



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**HIGH COURT CIVIL APPEAL NO. 11 OF 2016**

**BETWEEN**

**PATRICK IMBANTU.....APPLICANT/APPELLANT**

**AND**

**ANTONY IDI INDAKO.....RESPONDENT**

**(Being an appeal from the Orders and Ruling of the Hon T.A Odera PM Mumias Law Courts  
Delivered on 05/02/2016)**

**RULING**

**The application**

1. What is before me for determination is the Notice of Motion dated 08/02/2016. The same is brought under section 42 Rule 6, (sic) order 51 Rule 1 of the Civil Procedure Act, Cap 21 laws of Kenya and all other enabling provisions of the law. The applicant prays for ORDERS of stay of execution and/or proceedings in Mumias PMCC NO. 156 of 2015 pending the hearing and determination of the appeal herein. There are 6 grounds in support of the application, inter alia, that the applicant risks eviction if the orders sought herein are not granted as the respondent is already in top gear towards the execution of the orders of the learned trial Magistrate. That in the event that execution takes place, then the stratum of appeal will have been reduced, thus reducing the entire appeal into a mere shell, the applicant also swore an affidavit dated 08/02/2016 in support of the application.

2. The application is opposed vide the replying affidavit sworn by the respondent on 06/04/2016. Deponent avers that the application is overtaken by events since he is already back in the disputed premises, secondly, the deponent contends that the application is fatally defective, frivolous vexatious bad in law and an abuse of the court process for reason that the supporting affidavit is marred by untruths and is also full of rhetoric. Which is unsupported by any form of evidence. He prays that the application be dismissed with costs.

**Background**

3. By the plaint dated 29/10/2015, the respondent sued the appellant as a result of the appellant having evicted the respondent from a yard hitherto used by the respondent on or about 28.10.2015. At paragraph 6 of the plaint the respondent averred thus- "6 that the defendant has locked the gates of the yard and stationed persons thereat to prevent the plaintiff from gaining entry." By reasons of the aforesaid relief's from the applicant.

- a. An order of permanent injunction restraining the defendant from interfering with the user and occupation of the yard by the plaintiff.
- b. Compensation for the financial loss incurred by the plaintiff for the time during which he has unlawfully been denied user of the yard
- c. Costs of the suit.

### **The Appeal**

4. Though the court has not been shown the application and the ruling in such an application, the appellant was aggrieved by the decision of the Principal Magistrate sitting at Mumias, hence this appeal, the appellant's Memorandum of Appeal comprised 4 grounds
5. The learned trial magistrate erred both in law and in fact by ordering a reinstatement of the respondent who thorough (sic) his pleadings alluded to the fact that he had been evicted from the suit premises.
6. The learned trial Magistrate erred in law and in fact in failing to note that the appellant is the Bonafide special owner of the suit premises having leased the premises from the owner.
7. The learned trial Magistrate grievously erred in law and fact in failing to consider that the respondent's application did not meet the legal threshold to grant the orders granted.
8. The learned trial magistrate erred both in law and fact in failing to note that the copies of the receipts availed to the court by the respondent were issued to the appellant herein.
9. It is to be noted at this point in time that the appeal is yet to be admitted and is thus pending admission and determination. Further, the lower court record is also yet to be availed to this Honourable court.

### **Hearing of the Application**

10. The application was canvassed orally before me on 20.7.2016. The parties relied on the filed affidavits and asked the court to give the ruling before me on 7.4.2016, counsel for the respondent told the court that the orders sought to be stopped had already been executed, but this allegation was denied by counsel for the applicant. As a result of that controversy, the applicant was granted leave to file a supplementary affidavit, but as at 20.7.2016 there was no such supplementary affidavit on the file.

### **Analysis and Determination**

11. I have now carefully considered the application as filed together with the affidavits in support and the replying affidavit. I have also carefully considered the provisions of order 42 Rule 6 of the Civil Procedure Rules which sets out the conditions to be met by an applicant seeking stay of execution. In all such cases, the applicant must satisfy the following 3 conditions.:-

- i. That the applicant will suffer substantial loss if the orders sought are not granted; and
- ii. That he has made the application timeously; and
- iii. That he has given security for the orders sought

12. The above rule requires an applicant to fulfil all the 3 conditions and not just one or two of them. In the instant case, I have reached the conclusion that the applicant has not satisfied all the 3 conditions for the granting of the orders sought. As regards timeliness, the orders complained of were made on 05.02.2016 and the application herein filed on 08/02/2016. Indeed the applicant acted with appropriate despatch. However, he has not demonstrated to this court that he will suffer any substantial damage and what the nature of such damage is the respondent has averred and that fact is not disputed, that the

respondent is already back in possession of the disputed premises and this being the case, there is no other loss that the applicant can suffer. So on that ground the application must fail.

13. Before I conclude this ruling, I must point out that whether or not this appeal is arguable is not one of the considerations to be taken into account by this court. What this court is concerned about are the provisions of order 42 Rule 6(2) of the Civil Procedure Rules 2010. Unless these conditions are satisfied, an application seeking stay of execution has no chances of success.

**Conclusion**

14. In light of what I have stated above, the applicant’s Notice of Motion dated 8/01/2016 is found to be lacking merit and is accordingly dismissed with costs to the respondent. The interim orders issued by this Honourable court on 11.2.2016 be and are hereby vacated.

Orders accordingly,

Ruling delivered, dated and signed in open Court at Kakamega this 18<sup>th</sup> day of August 2016

**RUTH N. SITATI**

**JUDGE**

In the presence of ;-

.....Mr. Ondieki(present).....for Applicant/Appellant

.....Mr. Khayumbi (absent).....for Respondent

.....Mr. Lagat.....Court Assistant