



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 476 OF 1998**

PAUL KAMAU MWANIKI.....PLAINTIFF

**VERSUS**

TERESIAH WANGARI NDUNGU.....DEFENDANT

**RULING**

1. Before me is an application by way of a chamber summons dated the 2<sup>nd</sup> October, 2013 by the defendant Teresiah Wangari Ndungu seeking stay of execution of the judgment and decree of this court made on the 14<sup>th</sup> June 2013 pending hearing and determination of an appeal to the Court of Appeal. It is brought under the provisions of Order 42 rule 6(1) of the Civil Procedure Rules, 2010 and the application is supported by an affidavit sworn by the defendant. The Respondent Paul Kamau Mwaniki opposes the application by his grounds of objection filed on the 8<sup>th</sup> October, 2013.

2. A brief background of the case is that the plaintiff filed this suit against the defendant seeking three prayers, that -

(a) *Exhumation and removal of the remains of Antony Irungu Ndungu (the defendants son) who was burried on the suit plot No. Mau Summit/Molo Block 1/Mutirithia 1641 which belongs to the plaintiff, and that the defendant covers a pit latrine she dug on the said plot, and also remove the wire fence she erected to surround the plaintiff's plot.*

(b) *the defendant to pay for a registered surveyor to re-plant boundary marks of the said plot, and pay general damages for defiling and rendering the plot unclean, with the intention to annoy, scare and force the plaintiff to abandon the said plot for her own use.*

(c) *in the alternative the plaintiff prays that the defendant be ordered to pay compensation for the plot at the current open market value, and also pay damages for loss of income and user from the date of burying her son there, fencing the plot and digging the pit latrine.*

3. After a full hearing, the court directed that -

(1) *the defendant do exhume the remains of her son Antony Irungu Ndungu buried on the plot No. Mau Summit/Molo Block 1/Mutirithia/1641 which belongs to the plaintiff, and fill and remove the wiere fence erected as joining the boundary between her plot No. 46 and plot No. 1641 within 60 days thereafter.*

(2) *the land Registrar, Nakuru to rectify the register to reflect the correct acreage as shown in the reports filed by Mr. Nyantika and Mr. Kotut herein.*

(3) *the District Surveyor to re-plant boundary marks as shown in the above mentioned reports. The respondent will bear the costs of this activity.*

(4) *the defendant shall bear the costs of the suit.*

4. Being aggrieved by the above judgment, the defendant filed a Notice of Appeal to the Court of Appeal and a Memorandum of Appeal by her then Advocates, Chuma Mburu & Co. Advocates. It however transpired later that the said Advocates, at the time of July the said Notice of Appeal and Memorandum of Appeal had not taken out their practicing certificates for the year 2013 hence unqualified to prepare and or sign the court documents. Soon thereafter, the Applicant filed an application at the Court of Appeal being **Civil Application No. NAI 294 of 2013 (UR 214 of 2013)** and sought leave to appeal out of time on the premise that the then filed Notice of Appeal and Memorandum of Appeal as filed were defective, improper and ought to be struck off. Though opposed by the Respondent/Plaintiff, Justice P. Kihara Court of Appeal Judge, granted the prayers sought on the 9<sup>th</sup> May 2014. A fresh Notice of Appeal and Memorandum of Appeal were lodged in the court on the 19<sup>th</sup> May, 2014.

5. It is the above Judgment and Decree that the defendant seeks to stay execution pending the hearing and determination of the appeal.

6. The plaintiff filed his grounds of objection on the 8th October, 2013 citing incompetence of the then defendants advocates. This was however overtaken by events when the Court of Appeal granted leave to the applicant/plaintiff to withdraw the notice of appeal and Memorandum of Appeal filed by the incompetent Advocates, and leave granted to file a fresh appeal out of time, which was done. The respondent did not file fresh grounds of objection of a replying affidavit to the application leaving the application by the defendant unopposed.

7. In her supporting affidavit to the application and grounds, the court has been urged to allow and grant an order of stay of execution pending the hearing of the appeal which is alleged to have high chances of success, that if not granted, the respondent who has no possession or occupation of the suit premises may sell the same which would render the appeal nugatory, and that the applicant shall suffer irreparable loss and damage. It is further urged that an order of stay of execution shall not prejudice the plaintiff as he is not in occupation of the suit land.

8. For this court to be persuaded to grant the orders sought, it ought to be satisfied, pursuant to the provisions of Order 42 rule (1) (2) that -

(a) *... substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay, and*

(b) *such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

9. A perusal of the proceedings after the delivery of the judgment confirms that indeed the application has been brought without undue delay. In the ruling of Justice P. Kihara, Judge of Appeal referred to above, the court was satisfied that the application was brought to court without delay, and that there were arguable grounds as stated in the memorandum of appeal filed herewith. The court having so stated, this court is obligated to abide by the said holding.

10. As to whether the applicant may suffer irreparable loss should the application be disallowed, I am minded to refer to the Judgment under attack where the Judge, Hon. H. A. Omondi stated, *"I recognised that the defendnat has remains of her son in the grave that encroaches on plot No. 1641. She may not wish to disturb his rest. In that case I will give her an option of paying compensation to the plaintiff*

*for the encroached portion...*” and gave the parties a chance to agree on the compensation, and in the event the parties disagree, then, the defendant was directed to exhume the remains of her son from the suit premises.

11. From the foregoing, it is clear that this is a grave matter and in view of the gravity and consequences more so on the exhumation of the remains of the defendant's son, I am satisfied that the applicant shall suffer, not only financial loss but also emotional, psychological and irreparable loss if an order of stay of execution is not granted.

12. On the issue of security and conditions that that the court may impose, the applicant stated her readiness to abide by terms that the court may impose. The title deed to the suit property, Plot No. Mau Summit/Molo Block 1/Mutirithia 1641 is in the possession of the plaintiff. The plaintiff is not in occupation of the said land. The defendant/applicant has been in occupation thereon. Selling the property shall render the appeal nugatory.

To preserve the suit property pending the hearing of the appeal, the court directs that status quo as it was before the judgment be maintained, and that the plaintiff shall not interfere, alienate, sell or in any other manner interfere with the suit property.

Consequently I make the following orders:

1. That an order of stay of execution of this courts judgment and decree made on the 14<sup>th</sup> June 2013 is granted pending the hearing and determination of the appeal to the Court of Appeal.
2. That the defendant/applicant shall continue to occupy the suit premises but shall not sell, charge or in any other way dispose of the said plot.
3. That the plaintiff shall not interfere with the occupation of the suit premises by the plaintiff, shall not sell, charge or in any other manner dispose of the same pending the hearing and determination of the appeal.
4. Costs of the application shall be costs in the appeal.

**Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of January, 2015**

**JANET MULWA**

**JUDGE**

**Ruling read in open court in the presence of:**

Gichuhi holding brief Kinya Mwaniki for Plaintiff

Chege holding brief for Chuma for Defendant

Court clerk: Mwai