



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO. 1328 OF 2014**

**JOSEPHINE WANJIRU MWANGI.....APPELLANT**

**VERSUS**

**CHARLES NATHAN KIIRU.....1<sup>ST</sup> RESPONDENT**

**EMBAKASI RANCHING COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction and Appellant's Case**

1. The Appellant filed an application dated 16/10/2013 seeking an order that there be a temporary stay of execution of the decree judgment and order entered on the 3/8/2007, 27/8/2007 and 4/10/2007 pending the hearing and determination of the appeal, subject to any condition as to security as the court may deem just and reasonable in the circumstances to grant. The application is premised on grounds that the Appellant is dissatisfied with judgment and decree made in RMCC No. 3032 of 2002 on 3th August, 2007 and has filed an appeal that is pending determination. Further that the appeal has overwhelming chances of success which will be rendered nugatory and substantial loss suffered by the Appellant if the Respondent is allowed to execute the orders.

2. The Appellant avers that the delay in filling this application was because of her Advocates inaction also significantly contributed to by the indolence of the Respondents who never executed the decree and allowed the Appellant to stay on the property for a period of over 5 years after the decree. Moreover that even if the Court was to find that the delay is unreasonable, it would be in the interest of justice that the matter be heard on its merits. It is averred that no prejudice shall be occasioned balance tilts in favour of granting the stay. The Appellant reiterates that she is prepared to comply with any such fair and reasonable condition(s) that the Court may deem just to issue.

3. In a lengthy supporting affidavit sworn by the Appellant, she gave a history of how she acquired the property and the developments made thereon which she avers were destroyed by the 1<sup>st</sup> Respondent. It is her disposition that she and the 1<sup>st</sup> Respondent instituted suits against each other, which suits were consolidated. However, that the consolidated suit was heard in her absence and judgment delivered without an opportunity afforded to her to present her documents to prove ownership. It is the Appellant's disposition that she has been on the suit property since 1992 and thus she will be greatly prejudiced if stay will not be granted. Further that it would only be just and fair that both parties are subjected to a fair legal

process to determine the true owner of the property.

### **1<sup>st</sup> Respondent's Response**

4. Salome Wambui Kiiru on behalf of the 1<sup>st</sup> Respondent filed a Replying Affidavit on 5/11/2013 wherein she deposed that the lower court did issue an eviction order on 4/10/2007 which was executed under the supervision of the OCS Embakasi Division when the Appellant was lawfully evicted from the suit property. The deponent stated that the appeal has never been prosecuted and that this application was prompted by a criminal case Makadara CMCC No. 4199 of 2013 initiated against the Appellant whereby she was charged with malicious damage to property. It is deposed that throughout the lower court proceedings, the Appellant was ably represented by advocates. Consequently, that the application for stay is not merited as there been inordinate delay in bringing the application and further that there is nothing to be stayed since the decree was executed in 2007 hence the application has been overtaken by events.

### **Appellant's Response**

5. The Appellant filed a Supplementary Affidavit on 26/11/2014 wherein she reiterated that it would only be just and fair that there be a stay of the decree. The Appellant maintained that she is in physical possession of the suit property and that she has never been evicted as alleged. The Appellant admitted that she did not participate in the hearing at the lower court as a result of the mistakes of her advocates which should not be visited upon her.

### **Determination**

6. Order 41 Rule 6(2) of the Civil Procedure rules provides for conditions that must be met in granting an order for stay of execution. The Rule states as follows:

**No order for stay of execution shall be made under sub-rule (1) unless—**

- a. **The court is satisfied that 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.**

7. In urging the court to allow the application, the Appellant reiterated that she was willing to abide by any conditions as to security made by the Court. Other than security, the rules of procedure outlines two conditions that must be met namely, that the Applicant stands to suffer substantial loss unless the order is made and secondly that the application has been made without unreasonable delay. What amounts to substantial loss was well explained by Musinga J. (as he then was) in **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** as follows:

**“...substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”**

8. The Appellant contends that she has been in possession of the property since 1992 where she has undertaken developments thereon and planted food crops. Further that despite her commercial and residential buildings having been demolished by the 1<sup>st</sup> Respondent. She continued to stay in occupation even after the Judgment was entered in 2007 until 8<sup>th</sup> September, 2013 when the 1<sup>st</sup> Respondent moved into the property, demolished the structures thereon, destroyed the crops and trees. These allegations are denied by Salome Wambui Kiiru on behalf of the 1<sup>st</sup> Respondent who avers that execution of the eviction order granted by the lower court was effected on 4/10/2007 and therefore there would be nothing to stay. The court record shows that the 1<sup>st</sup> Respondent made an application to enforce the Judgment of the court that the Appellant be ordered to give vacant possession. This application was heard and the court on 3/10/2007 ordered that the enforcement of the court orders be effected under the supervision of the OCS

Embakasi Police Division. On the foregoing, it is my finding that the Appellant has failed to show that she is possession and therefore cannot claim to suffer substantial loss.

9. This application has been brought over 6 years after Judgment was entered by the lower court. The reasons advanced by the Appellant are, to say the least, flimsy. First, the Appellant states that she had been let to stay on the property by the 1<sup>st</sup> Respondent, which is denied and secondly that it's basically the fault of her advocate that she finds herself in the situation she in. It has since been established that cases are owned by litigants and not their advocates, which therefore calls for their vigilance in the pursuit of their cases to conclusion. See the case of **Samwel Kipsang Kitur & another v Eunice Kitur & 2 others Civil Case No. 32 of 1999 [2005] eKLR** where Kimaru J. aptly put it that:

**The 2nd plaintiff would like this court to believe that it was his then counsel on record who caused him to be in the situation he now finds himself in. I do not accept that proposition. Cases are owned by litigants and not their advocates. It behooves a litigant to closely follow the progress of his case. A litigant should always be vigilant in the pursuit of his case to its conclusion. He cannot leave such responsibility to his advocate. It will not do for a litigant whose case has been dismissed due to his failure to attend court to bring up the excuse that he was not informed of the date that the case was fixed for hearing by his advocate.**

10. The Appellant also averred that the suit at the lower court proceeded in the absence of herself and her Advocate. However, the court record reveals that the Appellant's advocate was present at the hearing sessions during which times he cross-examined the 1<sup>st</sup> Respondent's witnesses.

11. On the foregoing, it is my finding that the Appellant has failed to meet the threshold to warrant the grant of an order for Stay. Firstly, this application has been brought 6 years after Judgment was pronounced with no cogent reasons as to the inordinate delay. It was not filed timeously as anticipated by the rules. The delay is simply inexplicable. Secondly, the Appellant did not on a balance of probabilities prove that she is still in possession of the disputed property.

12. This court has a duty to exercise its discretion to grant or refuse stay depending on the circumstances of each case. The court must balance the Appellants undoubted right to appeal with the Respondent's right to enjoy the fruits of the judgment issued in its favour. It is evident that the Appellant's indolence in filing the application would not find favour with the court. In this instance, I consequently decline to exercise my discretion in favour of granting the stay and thereby dismiss the Appellant's application with costs to the Respondents.

13. Orders accordingly.

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of April, 2015.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff/Applicant

..... for the Defendants/Respondents