



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CIVIL SUIT NO. 696 OF 1996**

**ROSE WANGUI KIMANI .....PLAINTIFF/RESPONDENT**

**VERSUS**

**MICHAEL NDUNGU NGINYA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH IRUNGU GICHIRI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

Before me is a Notice of Motion dated the 25/2/11. It is brought under Order (3) (4) of the Civil Procedure Act. The applicant/2<sup>nd</sup> defendant seeks the following orders;

- a. That the monies so far deposited by the plaintiff be released to the 2<sup>nd</sup> defendant pursuant to an order dated 5<sup>th</sup> December 2003.
- b. That the title deed of the land parcel Thika Municipality Block 13/42 registered in the 2<sup>nd</sup> defendant's name be released to the 2<sup>nd</sup> defendant.
- c. The application is supported by the affidavit of Mr. Joseph Irungu Gichiri

The application is grounded on 4 grounds stated on the face of the application stated as follows:

That the Hon. Court do issue an order directing that all rents of the contested property deposited by the applicant with the court to the tune of Kshs. 10,000/- be released to the 2<sup>nd</sup> defendant, the Court be pleased to order the plaintiff to clear the outstanding balance of Kshs. 450,000/- that the title deed of the subject property be released to the 2<sup>nd</sup> defendant and that costs of the application be provided for.

In the applicant's affidavit he depones that on the 5<sup>th</sup> December 2003 the Hon. Justice G. B Kariuki ordered the plaintiff herein to deposit Kshs. 58,000/- and a further Kshs.1,000/- per month in favour of the 2<sup>nd</sup> defendant until the plaintiff vacates the suit premises, that he now prays that the court releases all the monies so far paid to him.

The application was served on the plaintiff/respondent. The plaintiff did not respond to the application nor did her counsel appear in court.

I have perused the court filed and these are my findings. On the 1<sup>st</sup> October, 2004 Hon Justice Ojwang as he was gave the following application for stay of execution of the judgment/ decree pending the hearing and determination of appeal lodged by the plaintiff to the Court of Appeal that;

- i. ***“There shall be a stay of execution of the court’s judgment/decree pending the hearing and determination of an appeal lodged by the plaintiff.***
- ii. ***The plaintiff shall within 30 days of the date hereof deposit in court the sum of Kshs 58,000/- to secure the 2<sup>nd</sup> defendants interests and shall thereafter continue to pay into Court the sum of Kshs. 1,000/- every month subject to such orders as may be issued by the Court of Appeal upon hearing the intended appeal”***

By a letter dated 20/5/08 the plaintiff’s lawyer M/s Karago S. N & Company Advocates were informed that the proceedings, rulings and judgments are ready for collection and the plaintiff paid Kshs, 3,120/- for the said proceedings. There are some receipts for deposits in the Court file for deposits of 1,000/- and 2,000/-. On the 6/1/11 the firm of Dola Magani sought to come on record for the 2<sup>nd</sup> defendant in place of the firm of Karago & Company Advocates.

On coming on record M/s Dola Magani filed this application.

I must comment that the application cites Order (3) and (4) of the Civil Procedure Act. These orders as cited do not exist. The applicant should have cited the proper Order he is moving the court under. However this situation can be cured by the provisions of Article 159 (2) (d) of the Constitution which states that; ***“Justice shall be administered without undue delay regard to procedural technicalities”***.

The applicant in his application refers to the orders of 5<sup>th</sup> December 2003. The judgment the subject of appeal was made on the 5/12/03 by Justice GBM Kariuki. In the said judgment the plaintiff was ordered to vacate the suit premises. Subsequent to the said order she filed the application for stay of execution and was granted the orders on 1<sup>st</sup> October, 2004. I note that there is an appeal pending in the Court of Appeal from the order of this Court. I therefore find that it would not be proper for this Court to grant the orders sought in this application. If the applicant seeks to have the monies and title released to him let him move to Court of Appeal for the said order, thus the applicant’s application is dismissed. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **4<sup>th</sup>** day of **April** 2014.

**R. E. OUGO**

**JUDGE**

In the presence of:

.....PLAINTIFF/RESPONDENT

.....1<sup>ST</sup>DEFENDANT

.....2<sup>ND</sup> DEFENDANT/APPLICANT

.....COURT CLERK

