



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE NO. 148 OF 2010**

PETER RUGU GIKANGA.....1<sup>ST</sup> PLAINTIFF  
ELIZABETH WAKONYO MWANGI.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

WESTON GITONGA.....1<sup>ST</sup> DEFENDANT  
DAVID MWANGI.....2<sup>ND</sup> DEFENDANT  
NJOROGE NDUNGI.....3<sup>RD</sup> DEFENDANT  
WAINAINA KARIUKI.....4<sup>TH</sup> DEFENDANT  
DAVID NJIHIA.....5<sup>TH</sup> DEFENDANT  
JOHN WATAKI.....6<sup>TH</sup> DEFENDANT  
SIMON GICHUHI NJOGU.....7<sup>TH</sup> DEFENDANT  
DUNCAN NJENGA.....8<sup>TH</sup> DEFENDANT  
MARY NYAMBURA MUTHAKA.....9<sup>TH</sup> DEFENDANT  
MWANGI KARUME.....10<sup>TH</sup> DEFENDANT  
NELIUS NYARUAI KANYANGA.....11<sup>TH</sup> DEFENDANT

**RULING**

In a Judgment I delivered on 29th November 2012, I granted the Plaintiffs (*now Respondents*) the following orders -

- (a) a declaration that the Plaintiffs are the legal owners of Land Title Number NYANDARUA/OL JORO OROK SALIENT/2114 (the suitland) as administrators of the Estate of GIKANGA RUGU (the Deceased) and the Defendants have no right or interest therein;***
- (b) an order of eviction and ejectment of the Defendants, members of their families, their***

***proxies, servants, employees or agents from the suit land;***

***(c) an order for demolition and removal of the Defendants' houses and/or structures from the suit land;***

***(d) a permanent injunction restraining the Defendants by themselves, members of their families, their proxies, servants, employees or agents from entering, remaining on, cultivating, erecting structures or in any other manner interfering with the plaintiffs' quiet enjoyment and possession of the suitland;***

***(e) costs of the suit and interest thereon;***

***(f) any other and or better relief that this court may deem just to grant.***

2. In addition to those orders and consequent upon thereto, I also gave an order to the Director of Survey and the District Land Registrar together to carry out within 120 days a survey to establish the exact area and extent of Plot No. 2114, *vis-a-vis* plots No. 1337 and 1341 at Ol Joro Orok Salient in Nyandarua District, and setting out the proper boundaries of Plot 2114, formerly plot 2722 and the extent (if any) of the encroachment by the Defendants (*now Applicants*) and one Hellen Muringe Kabutha.

3. By a Notice of Motion dated and filed on 29th October 2013, under a Certificate of Urgency, the Applicants sought a stay of execution of that judgment and all consequential orders. The Application was supported by the Affidavit of Mwangi Karume, the 10th Applicant and the grounds *inter alia* -

***(a) that the Applicants had appealed to the Court of Appeal and had even lodged a Record of Appeal,***

***(b) that the Applicants have no alternative land and that unless the impending eviction is stopped the Appellants stand to suffer substantial loss,***

***(c) that the Appellants are willing to offer and abide by such security as the court may deem reasonable and necessary,***

***(d) that the application has been made without unreasonable or inexcusable delay,***

***(e) that the application should be granted in the interest of equity and justice.***

4. The Application was however opposed by the Plaintiff/Respondents. In a Replying Affidavit sworn and filed on 5.11.2013 by Peter Rugu Gikanga (*the 1st Plaintiff/Respondent*), avers *inter alia* that in light of the court's finding in the judgment that the Defendants/Applicants are trespassers, an order for stay of execution of the judgment would amount to perpetuating the said trespass, I agree with this submission.

5. The Respondents also say that the 6th and 7th Defendants/Applicants have already vacated the suit land. The 5th Applicant has removed his structures from the suit land except a perimeter fence. The 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 9th and 11th Defendant/Applicants do not live in the suit land, and that only the 3rd and 10th Defendants live on the suit land.

6. In addition to the grounds, Affidavit in Support and the Respondents Replying Affidavit, counsel for the respective parties also filed written submissions for and against the Application.

7. I have considered these submissions, and render my opinion in the passages following.

8. The Application is premised upon the provisions of Order 42, rule 6 (2) of the Civil Procedure Rules 2010, (*which was formerly Order XLI, rule 4(2)*) of the revoked Civil Procedure Rules. The rules are identical. An applicant for stay of execution must establish-

1. *that he will suffer substantial loss unless a stay is granted,*
2. *that the application for stay has been made without undue/unreasonable delay,*
3. *that the applicant has given security.*

9. I will consider these conditions in turn. For an order for a stay, what is to be preserved is the status quo as loss of it would render the projected appeal nugatory, “**KENYA SHELL LIMITED VS. KIBIRU & ANOTHER [1986] KLR 410** cited with approval in **MOKUA VS. ABUOGA [1988] KLR 644** where the three issues of loss, timeous application, and security were discussed and determined.

10. It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. In **CHARLES WAHOME GETHI VS. ANGELA WAIRIMU GETHI** (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007), the Court of Appeal held -

***“... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them.”***

11. Indeed as it was held in the said case (**Charles Wahome Gethi vs. Angela Wairimu Gethi**) the Applicant have not shown or suggested that they would suffer substantial loss rendering the appeal nugatory if the land were sold before the appeal were determined. On the balance there is no evidence that the Applicants would suffer substantial loss if a stay was not granted.

12. In my opinion, the Application herein was not brought without unreasonable/excusable delay. Judgment in this suit was delivered on 29th November 2012. The Applicants' application for stay was filed on 29th October 2013, that is, eleven (11) months from the date of delivery of Judgment.

13. Although the Applicants' claim that they were waiting for a report by the Director of Surveys and the District Land Registrar, which was ordered by the court in the judgment herein, the said Report was ready by 28th March 2013 and was filed on 8th April 2013. The Applicants have offered no explanation of why it took them seven (7) months from April to October 2013 to file the application for stay, the subject of this Ruling. It is therefore clear to me that the application was not filed without unreasonable/inexcusable delay. The Applicants also fail on this ground.

14. In the judgment, I found that the Applicants were trespassers on the suit land, and should be evicted from the land if they do not vacate the suit land voluntarily. They have offered no security for the performance of the decree, and taking into account the unreasonable and inexcusable delay in filing the application, they would have figured out what security to provide in the event a stay was granted. In any event a stay of 120 days had already been given. They refused to take advantage of that period to approach court for extension of that period. The Applicants also fail on the question of security.

15. Having failed on all three grounds set out in Order 42 rule 6(2) of the Civil Procedure Rules, 2010, there is no basis for allowing the application.

16. The Defendants/Applicants' Notice of Motion dated and filed on 29th October 2013 is dismissed with costs to the Plaintiffs/Respondents.

17. It is so ordered.

**Dated, signed and delivered at Nakuru this 27<sup>th</sup> day of May, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**