



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**ELC CIVIL APPEAL NO.184 OF 2014**

**KITHEKA NDUVYA.....1ST APPELLANT**

**MUTIA MWAVA.....2ND APPELLANT**

**MUTINGA MWAVA.....3RD APPELLANT**

**KINGOLA MWAVA.....4TH APPELLANT**

**MWASI NDUVYA.....5TH APPELLANT**

**NDUVYA MUTIA.....6TH APPELLANT**

**MUSILI NDUVYA.....7TH APPELLANT**

**VERSUS**

**STEPHEN MULI**

(Being the legal representative of the Estate of Ngeta Ngeta)....**RESPONDENT**

**RULING**

1. The matter herein is for application dated 27.8.2014 seeking stay of execution of the decree in Mwingi SPMCC No.45/2004 pending hearing and the determination of the appeal herein. The application is anchored on the provisions of Section 13 A Civil Procedure Act order 42 Rule 6, Order 51 Rules 1 and 3 Civil Procedure Rules (2010) and the omnibus provisions of all the enabling provisions of the law.

2. The application is supported by the grounds on the face of the motion and the affidavit of Kitheka Nduvya sworn on the 27th August, 2014. The applicant has also filed a further affidavit sworn on 2.10.2014. The application is opposed by the Affidavit of Stephen Mutui Ngeta sworn on the 29.9.2014.

**APPLICANTS' CASE**

3. By a plaint dated 27.4.2014 the Respondent lodged suit in Mwingi SRM court claiming possession of the suit properties from the Applicants. The Applicants filed defence thereof dated 7.6.2014. The trial magistrate heard the matter and ordered the Applicants to vacate the suit properties. It is the aforesaid decision which aggrieved the Applicants and thus filed appeal hereof and at the same time lodged the motion subject of this ruling.

4. The Applicants claim that they have utilized and developed the suit properties and are in actual occupation since 1940s. They claim to own the same land. They claim to have a strong case vide the content of memorandum of Appeal and that if orders are not granted, they will suffer substantial loss and they will be evicted from the subject matter.

5. The Applicants submit that the condition for stay under the conditions for stay under order 42 Rule 6 have been demonstrated in their case in that the first rubric which is that Applicants has demonstrated that if stay is not granted, they will suffer substantial loss in that they will be evicted before the appeal is heard and determined. They rely on the case of **JAMES WAGALWA AND ANOTHER VS. AGNES NALIKA CHESETO (2012) eKLR** which held that:

*“The Applicant must establish other factors which the execution create a state of affairs that will irreparably affect or negate the*

*very essential case of the Applicant as a successful party in the appeal”.*

Also in SILVERSTEIN VS. CHESONI (2002) 1KLR 867 which held that:

*“... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what is to be prevented by preserving the status quo because such a loss would render the appeal nugatory”.*

They also relied on the case of WAIGWA & ANOTHER VS. JOSEPH KIRAGU KIBARUA (2009) eKLR which held that:

*“Substantial loss does not represent any mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss with a value or a loss, that is merely nominal ....”*

6. As for the second rubric of conditions under order 42 Rules 6, the Applicant relied on authority of JAMES WAGALWA & ANOTHER (SUPRA) which in essence stated that:

*“it is the court that orders the kind of security the Applicant should give as may ultimately be binding on the Applicant ....”*

7. On the elements of whether the application was filed without delay the Applicants aver that after the judgment on 31.7.2014, they expeditiously filed motion herein together with appeal on 27.8.2014. They seek the stay be granted as prayed.

### **RESPONDENT'S CASE**

8. In opposition to the application herein, the respondent avers that the Applicant has failed in all foras to win their claim for the subject matter herein. The Respondent avers that the determination of Applicants claim was done via adjudication process and the record cannot be re-opened at this stage. The Applicants could have only challenged the process via the Land Adjudication Act, otherwise their failure to impugn the decision via judicial review closed their avenue of questioning the process long closed.

9. The Respondent avers that a **Nairobi MISC.1262/04** had been lodged by the Applicants as judicial review cause, but same was withdrawn. The Respondent thus submits that the appeal herein is frivolous and devoid of merit and an affront to the maxim that there must be an end to litigation. The subjects herein were awarded to the Ngeta Ngeta since 1987 but the Applicants have refused to give vacant possession.

10. The Respondent alleges that the appellants do not reside on the land subject matter but cultivate and graze their animals on the subject matter. The Respondent submit that the Applicant have not demonstrated conditions for stay to merit grant of orders for stay. The Respondent conclude by urging the court that if the applicants are to be granted stay, then they should be ordered to deposit KShs.1 million in court as *mesne* profit and security herein.

### **ANALYSIS**

11. In the Plaintiff paragraph 7, the Respondent pleaded that the Applicant were since 5.3.1998 remained in occupation of suit Lands. The decree issued on 21.8.2014 by the trial court ordered Applicants to vacate and give vacant possession. In fact that Respondent seeks to evict the Applicants pending appeal by opposing the stay orders herein. The provisions of order 42 Rule 6 stipulates the conditions for stay namely:

- 1. The Applicants must show that failure to get stay they are bound to suffer substantial loss.**
- 2. That they have to offer security.**
- 3. The application has been filed without delay.**

12. On the first limb, the eviction would be the result in event of failure to grant orders sought. The court finds that the first condition is met. On security on authority of JAMES WAGALWA & ANOTHER (SUPRA), it is the court which determines security at its discretion. On the issue of delay in lodging the application, same was filed expeditiously. The court therefore makes the following orders:

- 1. The stay of execution is granted on condition that the Applicants pay the Respondents KShs.70,000/- as security for costs within a period of 3 months, in default, the application will stand dismissed.**
- 2. Costs in the main appeal.**

Signed and delivered at Machakos this 28<sup>th</sup> day of November, 2014.

**CHARLES KARIUKI**

**JUDGE**