



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 175 of 2011

**SERAH WAMBUI KINYANJUI.....APPELLANT/APPLICANT
VERSUS**

PETER MWANGI MBARIRE.....1ST RESPONDENT

CHRISTOPHER WAWERU NDERITU.....2ND RESPONDENT

RULING

The background to this application is scanty. But from what I am able to glean from the record, the applicant's land is poised to be sold in a public auction as a result of certain orders made by the court below on 20th March, 2012. She seeks to stay those orders.

The applicant has deposed that she is the registered proprietor of the property set to be auctioned; that she lives on the property and has developed it; that if no stay of execution is granted she stands to be rendered homeless. She has undertaken to provide security.

The respondents filed both a replying affidavit and grounds of opposition, the combined effect of which, is that the application does not satisfy the provisions of the relevant orders; that the application is *res judicata* and therefore amounts to an abuse of the court process and finally that the application is intended to delay the execution of a decree issued five years ago.

I reiterate that, from the pleadings, it is difficult to understand what preceded this application. While it would appear that the orders of 20th March, 2012 related to an order dismissing the applicant's application for stay in the court below, there is no indication what was sought to be stayed by that dismissed application.

If the application related to a dismissal of an application, then orders of stay cannot issue as no positive order capable of being executed was issued. Again from the pleadings and annexures, it would appear that the applicant's property is due for sale. If that be so, then the applicant has complied with **Order 42 rule 2** of the **Civil Procedure Act** by demonstrating that if the sale proceeds, she stands to lose the property. She has brought this application timeously and also offered to provide security.

It is emphasized that this court has the power to entertain an application for stay even where the court below has declined or granted the relief. Pending the hearing and determination of this appeal, there will be a temporary order of stay in terms of paragraph (c) of the motion dated 5th April, 2012, subject to the applicant depositing in a bank account in the names of the two advocates representing the parties, Kshs.50,000/= within fourteen (14) days from the date of this order failing which the orders of stay shall be spent without further orders.

Costs to be costs in the appeal.

Dated and Signed at Nakuru this 31st day of December, 2012.

**W. OUKO
JUDGE**

**Dated, Signed and Delivered at Nakuru this 21st day January, 2013 by Hon. Justice M. J. Anyara
Emukule.**

JUDGE