



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Civil Case 37 of 2007**

**JOHN KIBII KOSKEI (suing through power of attorney of behalf of  
FELIX CHERUIYOT KOSKEI ::: PLAINTIFF.**

**VERSUS**

**SHABAN SIFUNA ALIAS EKA MOJA ::: DEFENDANT.**

**R U L I N G.**

On 2nd August, 2012, judgment was entered by this court against the applicant/defendant to the extent that he vacates the suit property Trans Nzoia/Botwo/166 failing which he be evicted therefrom. A permanent injunction was also issued to prevent him from interfering with the suit property in any manner whatsoever.

A ten (10) days grace period was given to the applicant to voluntarily vacate the suit property and in default eviction to issue forthwith.

Being dissatisfied with the judgment, the applicant filed a notice of appeal on 14th August, 2012. this was followed by the present application vide the notice of motion dated 17th November, 2012 filed herein on 19th November, 2012.

Basically, the application seeks an order that there be a stay of execution of the judgment pending hearing and determination of the intended appeal.

The question is whether the applicant would be entitled to stay.

In his supporting affidavit, the applicant avers that he has been in occupation of the suit land since 1999 and has already been threatened with eviction. He contends that he will suffer substantial loss if stay is not granted. He is ready and willing to provide such security as the court may order.

In response to the foregoing, the respondent/plaintiff avers in his replying affidavit dated 25th January, 2013 avers that the applicant has not demonstrated that the intended appeal has triable issues and will be rendered nugatory if stay is refused.

The respondent contends that the applicant has come to court without clean hands as he was twice granted a stay but failed to file the indeed appeal. Further, the certificate of title is issued in his (respondent) name such that there is nothing to justify a stay of execution.

The respondent also contends that the applicant has not shown that he will suffer substantial loss and that he has delayed in bringing this application.

The application was argued on behalf of the applicant by learned counsel, **M/s. Wanyama**, while learned counsel, **Mr. Chebii**, opposed it on behalf of the respondent.

Having considered the arguments for and against the application, it must be noted that at this juncture the intended appeal has not been formally filed. Nonetheless, the merits and demerits of the appeal do not fall for determination herein. The guiding principles for an application of this nature are found in Rule 6 (2) of Order 42 of the Civil Procedure Rules. The applicant was therefore required to satisfy this court that the application has been made without unreasonable delay and that substantial loss may result to him if stay is not granted. The applicant must also be prepared to provide such security as may be ordered by the court.

With regard to delay, the notice of appeal was filed on 14th August, 2012 while this application was filed on 19th November, 2012.

There was no informal application for stay of execution when the judgment was delivered on 2nd August, 2012.

The applicant delayed by a period of about three (3) months to bring this application. Such delay was unreasonable and would militate against exercise of discretion in favour of the applicant.

Be that as it may, with regard to substantial loss, the applicant has merely stated that he will suffer substantial loss without demonstrating how that would occur. In any event, a person in illegal or unlawful possession of another's property would not suffer substantial loss if he is evicted from the property. Any loss that may occur as a result of an eviction would have been self inflicted and a consequence of an unlawful act of trespass.

With regard to security, the nature and circumstances of this case would render any monetary security ineffective for purposes of guaranting that a successful litigant will reap the fruits of his judgment in the shortest time possible and more so, where a matter involves immovable property.

In sum, the applicant has failed to fulfill conditions necessary for grant of stay pending appeal. His application is without merit and is hereby dismissed with costs to the respondent.

**[Read and signed this 26th day of February, 2013.]**

**[In the presence of M/s. Wanyama for Applicant and Mr. Nyakundi H/B for Chebii for respondent)**

**J.R. KARANJA.**

**JUDGE.**