



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Appeal 108 of 2011**

MIRIAM NJOKI GITO A.....NG1<sup>ST</sup> APPELLANT

JOSEPH MAINA GACHUIRI.....2<sup>ND</sup> APPELLANT

**VERSUS**

MUSA WAMBUGU JOHN.....RESPONDENT

**RULING**

By a Motion on Notice dated and filed on 16.10.2012, Musa Wambugu John (*the Applicant*), sought a stay of execution of the orders of court issued on 19.09.2011 but made on 2.06.2011. The said prayer was granted at the *ex parte* stage on 24.10.2012 pending the hearing *inter partes*.

Counsel for the parties subsequently agreed that the Motion be determined by way of written submissions. The Applicant's counsel's written submissions dated 3.12.2012, were filed on 10.12.2012. The submissions of the Respondent's Counsel dated 6.12.2012 were also filed on 10th December 2012.

The conditions for granting a stay pending appeal are well settled both statutorily and also by precedent.

Firstly SS 3A and 63(e) of the Civil Procedure Act reiterate the courts inherent power to make such orders in order to prevent the ends of justice from being defeated.

More so under the Civil Procedure rules, Order 42 rule 6(2) the conditions for grant of an order of stay of execution are laid down as -

- (a) ***that the applicant will suffer substantial loss unless the orders are granted,***
- (b) ***that the application for stay is made within reasonable time following the order for execution, and***
- (c) ***that the Applicant has offered or given such security as the court may order.***

As for precedent, the Court of Appeal has in the case of **BUTT VS. RENT RESTRICTION TRIBUNAL [1982] KLR 417** expressed itself thus -

- (1) ***the power of the court to grant or refuse an application for stay of execution is a***

**discretionary power. The discretion should be exercised in such a way as not to prevent an appeal;**

**The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.**

In **INDAR SINGH GILL LTD VS. NJOROGE**, (Nairobi HCCC No. 2411 of 1990) the court held *inter alia* that -

**“(i)**

**(ii) when an unsuccessful litigant who has appeared is in possession of immovable property and claiming a right to it, such possession should not be disturbed for he may establish his right in the appeal,**

**(iii) applicant would not be able to regain possession of the suit property if dispossessed.”**

In the instant case, the Applicant is said to be in possession of the suit property and has erected permanent developments thereon. He may well have to do legal battle to regain possession if he were successful on appeal. Possession is therefore a special circumstance for the applicant and inquiry is necessary under the appeal (*if filed*) to establish the legality of the applicant's acquisition of the suit premises.

For those reasons, I would allow the application for stay of execution pending the appeal on terms that the deposits by way of security, half the market value of the suit premises within 30 days of the date hereof, or a title of comparable value within the said period. In default these orders shall lapse and be of no avail to the Applicant.

It is so ordered.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of April, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**