



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO. 2 OF 2000**

**PAUL NDIRITU GITURO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MUNYUKO GICHAGA.....DEFENDANT/APPLICANT**

**RULING**

On 23<sup>rd</sup> September 2011, this Court entered judgment in favour of Paul Ndiritu Gituro, the Plaintiff herein, as against Munyuko Gichaga, the defendant herein, in the following terms:

- (i) Ksh.10,000 damages fro trespass.**
- (ii) An eviction order against the defendant from L.R. No. Mahiga/Munyange/839.**
- (iii) An order directing the defendant to remove all his structures and crops standing on the suit land.**
- (iv) The Defendant to pay Ksh.7000/= being costs of labour by the Plaintiff in re-fixing his fence.**
- (v) Costs of the suit.**

The Defendant is unhappy with the aforesaid judgment and has filed a notice of appeal to challenge the same in the Court of Appeal. The Defendant has now taken out the Motion dated 7<sup>th</sup> October 2011, the subject matter of this ruling in which he basically applies for an order of stay of execution of the decree pending the hearing and determination of the intended appeal. The Motion is supported by the affidavit of the Defendant/Applicant. The Defendant opposed the Motion by relying on his replying affidavit.

I have considered the material placed before me plus the rival oral submissions made by learned counsels from both sides. It is the submission of the Defendant that unless the order of stay is given his appeal will be rendered useless in that he will have been evicted and compelled to remove his crops and structures from the land in dispute. In essence, the Defendant avers that he will suffer irreparable loss. The Plaintiff on his part is of the view that the Defendant has no arguable appeal hence the same is frivolous. The Plaintiff admitted that the Defendant's tea bushes, houses and trees are on the land in dispute. The principles to be considered in an application for stay of execution pending appeal in this court are well settled. First, an applicant must show the substantial loss he would suffer if the order is

denied. Secondly, the application must be made without unreasonable delay. Thirdly, an order for security for the due performance of the decree should normally be given.

Let me apply the above principles to this matter. Let me start with the second principle, that is as to whether the Motion was filed without unreasonable delay. Judgment was entered on 23<sup>rd</sup> September 2011 while the Motion was filed on 10<sup>th</sup> October 2011. It is evident that the Motion was timeously filed hence the Motion satisfied the second principle. The first principle is whether the Applicant has shown the substantial loss he would suffer if the order is denied. The Defendant has in his affidavit shown the damage he may suffer if the order for stay is denied. In the judgment he has been ordered to remove his crops and structures. There is also an order of eviction. With respect, I am convinced the Applicant has shown that he will suffer substantial loss if the order for stay is denied. The third principle to be considered is the provision for security for the due performance of the decree. The Applicant did not offer any form of security. This Court has a wide discretion to make the order based on the facts of each. I note that the Defendant was ordered to pay the Plaintiff Ksh.10,000/= as damages for trespass and Ksh.7000/= being a refund of the expenses incurred by the Plaintiff in re-fixing his fence. I direct the Defendant to deposit the aforesaid sum of Ksh.17,000/= in Court within 15 days. In the end the Motion is allowed with costs abiding the outcome of the intended appeal and on condition that the Defendant deposits with the Deputy registrar of this Court a sum of Ksh.17,000/= within 15 days from the date hereof. In default the Motion will be deemed to have been dismissed.

*Dated and delivered at Nyeri this 20<sup>th</sup> day of January 2012.*

**J. K. SERGON**

**JUDGE**

In open court in the presence of P. M. Muthoni holding brief K. Wachira for the Respondent and Mayeka holding brief Gichohi Mwangi for the Applicant.