



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL CASE 21 OF 2008**

**PAUL NGOBIA NJOROGE**  
**JAMES MAINA WERU**  
**FRANCIS GITONGA KIMERIA**

*(on behalf of 88 others – tenants at Nanyuki Housing Scheme)*  
**..... PLAINTIFFS**

**VERSUS**

**KENYA NATIONAL ASSURANCE CO.(2001) LTD.....DEFENDANT**

**RULING**

This ruling is the outcome of three notices of motion: dated 7<sup>th</sup> May 2012, 8<sup>th</sup> May 2012 and one filed on 11<sup>th</sup> May 2012 but amended on 25<sup>th</sup> May 2012 respectively. In the motion dated 7<sup>th</sup> May 2012 the plaintiffs sought for the following orders:

0. *That this application be certified urgent and the same be heard ex parte in the first instance.*
1. *That there be a stay of execution of this court order dated 2<sup>nd</sup> May 2012 pending hearing interparte of this application.*
2. *That there be a stay of execution of this court's order dated 2<sup>nd</sup> May 2012 until this application is heard and determined.*
3. *That this honourable court be and is hereby pleased to review by setting aside its orders dated 2<sup>nd</sup> May 2012 and any other consequential order.*
4. *That the applicants be and are hereby granted extension of time to vacate voluntarily. Time of three months.*
5. *That the costs of this application be in the cause.*

In the motion dated 8<sup>th</sup> May 2012, the defendant applied to be given the following orders:

0. *That this application be certified as urgent and the same be heard ex-parte in the first instance.*
1. *That there be a stay of the court order granted on 7<sup>th</sup> May 2012.*
2. *That the honourable court be pleased to vary or set aside its order made on 7<sup>th</sup> May, 2012.*
3. *That the cost of this application be provided for.*

In the motion filed on 11<sup>th</sup> May 2012, and amended on 25<sup>th</sup> May 2012 the plaintiffs applied for the following orders:

0. *That this application be certified urgent and the same be heard exparte in the first instance.*
1. *That this honourable court be and is hereby pleased to stay its orders issued on 9<sup>th</sup> May 2012 and dated 10<sup>th</sup> May 2012 pending hearing interparte of this application and for avoidance of doubt the orders of this court of 7<sup>th</sup> May 2012 be and are hereby reinstated.*
2. *That this honourable court be and is hereby pleased to set aside and vary orders issued on 9<sup>th</sup> May 2012 and dated 10<sup>th</sup> May 2012 pending hearing and determination of this application.*

**4a. That an order be and is hereby made that the applicants herein be restored to actual possession of their respective houses that they occupied on L.R. Nanyuki block 8/898 otherwise known as Nanyuki Housing Scheme**

0. *That the costs of this application be in the cause.*

When the aforesaid applications came up for hearing interpartes, this court with the concurrence of learned counsels directed the motions to be argued together. Learned counsels further recorded a consent order to have those motions disposed of by written submissions.

I have considered the grounds set out on the face of those motions plus the facts deponed in the affidavits filed for and against the motions. I have further taken into account the written submissions filed herein.

It is the submission of M/S King'oo, the plaintiffs' learned counsel that the Deputy Registrar of this court, decided on a matter which he had no jurisdiction to do so. It is M/S King'oo's submission that the Deputy Registrar has no jurisdiction to make final and compelling orders. The plaintiffs' counsel further pointed out that there is an application for stay of execution pending before the Court of Appeal. This court was beseeched to issue the orders failure to which the plaintiffs will suffer irreparable loss. The plaintiffs further complained that on 9<sup>th</sup> May 2012, this court issued exparte orders which they think are irregular in the sense that they are final in nature hence they ought to be set aside to avoid the tenants being evicted.

The defendant on the other hand is of the view that the plaintiffs' applications should be dismissed because they lack merit. The defendant further argued that the plaintiffs' application dated 3<sup>rd</sup> February 2012 having been dismissed, there was nothing preventing the Respondent from having its application dated 9<sup>th</sup> February 2012 to be heard by the court, the same being exparte in nature. The plaintiffs further argued that the application of 9<sup>th</sup> February 2012 was an application in pursuit of execution which applications are usually heard by the Deputy Registrar of this court under **Order 22 of the Civil Procedure Rules and under the Provisions of the Auctioneers Act**. The Defendant also stated that the order issued on 2<sup>nd</sup> May 2012 was meant to assist the court bailiff execute the warrants to give vacant possession to the decree/holder. It is submitted that a similar application filed by the plaintiffs was heard and dismissed on 27<sup>th</sup> April 2012. Mr. Mahinda, the defendant's learned advocate also pointed out that the motion dated 7<sup>th</sup> May 2012 only addresses issues relating to want of form but does not challenge the decree that gave rise to the execution process. It is the defendant's submission that the plaintiffs have filed the current applications to further delay the defendant from enjoying the fruits of judgment. The defendant urged this court to protect the rights of innocent purchasers of its houses. The defendant further pointed out that the plaintiffs were finally evicted on 7<sup>th</sup> May 2012 hence the plaintiffs applications have been overtaken by events.

Let me start by stating that the plaintiffs were prompted to file the motions dated 7<sup>th</sup> May 2012 and the undated one filed on 11<sup>th</sup> May 2012 and amended on 25<sup>th</sup> May 2012 by the orders issued by the Deputy Registrar on 2<sup>nd</sup> May 2012. By an application dated 9<sup>th</sup> February 2012, the court bailiff M/S

Hippo General Merchants successfully applied for inter alia police assistance to break in and evict the tenants residing in the premises standing on plot No. Nanyuki Municipality Block 8/898. The application was heard and determined by Hon. Makori, learned Deputy Registrar of this court

It is confirmed that the court bailiff completed the exercise of eviction on 7<sup>th</sup> May 2012. The main complaint raised by the plaintiffs is to the effect that the Deputy Registrar had no power to hear and determine the application. After a careful consideration of the rival submissions I have come to the following conclusion in this saga:

First, that the Auctioneer (Court Bailiff) is mandated under Order 29 Rule 3 to break into premises to enforce a decree and put a decree holder into occupation and possession. A court bailiff is authorized under Rule 9(2) of the Auctioneers Rules (1997) to seek for police assistance if there is cause to believe that the judgment debtor will resist eviction and may in the circumstances cause a breach of peace. It would appear, the court bailiff anticipated stiff resistance to the eviction hence the need to file the application dated 9<sup>th</sup> February 2012. In my humble view, the application was properly presented before the court.

Secondly, the jurisdiction of the Deputy Registrar of this court has seriously been questioned. The plaintiffs are of the view that the Deputy Registrar had no jurisdiction to grant the orders he gave on 2<sup>nd</sup> May 2012. With respect, I do not subscribe to that view. Once a judgment has been rendered, it is the duty of the Deputy Registrar to cause the decree to be enforced pursuant to the provisions of order 22 rules 1 – 86 of the Civil procedure Rules. Under Order 49 rules 5 and 7 of the Civil Procedure Rules, the Deputy Registrar is mandated to oversee the execution process.

In the final analysis I see no merit in the plaintiffs two motions (i.e) the motion dated 7<sup>th</sup> May 2012 and the undated motion filed on 11<sup>th</sup> May 2012) and amended on 25<sup>th</sup> May 2012. Those motions are ordered dismissed with costs to the defendant. My decision to dismiss the plaintiffs' applications means that the defendant's motion dated 8<sup>th</sup> May 2012 succeeds with costs.

Dated and delivered at Nyeri this 19<sup>th</sup> day of July 2012.

J.K. SERGON

JUDGE

19/7/2012

Coram: before Justice J.K. Sergon - Judge

Court clerk - Ndungu

Kihara H/b for M/S King'oo for Plaintiffs

Mahinda for the Defendant

Ruling read in open court in the presence of learned counsels.

J.K. SERGON

JUDGE