



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 238 OF 2010

ALICE WANJA GUTHUA.....1ST APPELLANT
DORCAS WANGUI MBUTHIA.....2ND APPELLANT
JOHNSTONE KIMEMIA.....3RD APPELLANT
KEZIAH W. GITHUA.....4TH APPELLANT
JOYCE NJOKI MAINA.....5TH APPELLANT

VERSUS

JOHN NDUNGU CHEGE.....RESPONDENT

RULING

The Notice of Motion dated 1/9/2010 is brought pursuant to Order 41 **Rule 4(1) and (2)** of the **Civil Procedure Rules** in which the applicants seek an order of stay of execution of the decree issued in Nakuru CMCC No. 656/07 on 19/8/2010 pending the hearing and determination of an appeal lodged by the applicants. The lower court entered judgment against the applicant on 19/8/2010, to the effect that the appellants/applicants be evicted from the licensed stalls along East Road, Nakuru Municipality. The applicants claim to be small scale traders who run kiosks along the said road and they have been licensed by the Municipal Council to trade there and if evicted, they stand to lose their source of livelihood and will be rendered destitute. The applicants contend that the respondent is unlikely to suffer any prejudice if the order of stay is granted. The application is predicated on grounds found on the face of the application and an affidavit sworn by the applicants on 1/9/2011.

The application was opposed and John Ndungu Chege, the respondent has sworn an affidavit dated 19/10/2010. Although he purported to reply to an application dated 18/9/2010, I believe he was replying to the one dated 1/9/2010 since no other application for stay exists. He deponed that the applicants have not offered any security for due performance of the decree and have not demonstrated what kind of loss they are likely to suffer.

For an order of stay to be granted under **Order 41** of the **Civil Procedure Rules**, the applicants have to demonstrate that the application for stay has been brought without delay; that the applicants are likely to suffer irreparably and lastly there has to be provision for security for costs.

The decree against the applicants is for eviction from the respondent's place of business which is causing him to lose business as the front door to the shop has been closed as a result of the applicants' encroachment. Since the order was for eviction with the court granting an order of stay it means that the respondent continues to suffer monetary loss from his business. The applicants should therefore have offered security for costs which they did not bother to do.

The judgment was delivered on 19/8/2010. The applicants moved this court under certificate of urgency on 1/9/2010 about 10 days later. I find that the applicants acted timeously.

The applicants claim to have been duly licensed by the Municipal Council of Nakuru. They have been trading in that area for a while and it is their source of livelihood. In doing my best to balance the rights of both parties, I will order that an order of stay be and is hereby granted on condition that the applicants do provide security of Kshs.100,000/- for due performance of the decree, to be deposited in court within 10 days hereof. In default execution to proceed. Costs to abide the appeal.

DATED and DELIVERED this 18th day of March, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

N/A for the appellants.

Mr. Kipkoech for the respondent.

Kennedy – Court Clerk.