



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO.155 OF 2002**

**(CONSOLIDATED WITH NAKURU HCCC NO.94 OF 2005)**

**MWENJA NGURE ..... APPLICANT/PLAINTIFF**

**VERSUS**

**SAMMY KIPKORIR SERONEY..... 1<sup>ST</sup> RESPONDENT/ DEFENDANT**

**COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT/DEFENDANT**

**UNICAB HOUSING**

**COOPERATIVE SOCIETY LTD.....4<sup>TH</sup> RESPONDENT/DEFENDANT**

**JOHN MUTUA MWANGI.....5<sup>TH</sup> RESPONDENT/DEFENDANT**

**EVANS R. THUKU, JOSEPH MUGENDI (As trustees**

**of Beta Venture Enterprises).....6<sup>TH</sup> RESPONDENT/DEFENDANT**

**LUCY KINYA MUNGATIA.....7<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**SAMWEL NYAMOSI BICHANG'A.....8<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**CHARLES KYALE MWANIA.....9<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**PATRICK MBUGUA KINYANJUI.....10<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**PETER OKENYO OMANGA.....11<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**DAVID C. KOSKE.....12<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**ESTHER WAIRIMU GATHONGO.....13<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**JOHN GAITUNGU NDORO.....14<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**GLADYS MORAA MOSOMI.....15<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**RUTH WANGARI GITAU.....16<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**PENINAH MUTHONI NJOROGE.....17<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**MARY CHERONO MATUMBI.....18<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

**THOMAS BARONGO OERI.....19<sup>TH</sup>**

**RESPONDENT/DEFENDANT**

<b>LOSMAS MOMANYI GICHANA.....</b>	<b>20<sup>TH</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>ROSEMARY NYAMBURA.....</b>	<b>21<sup>ST</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>GIDEON GITAU GACHIGUA.....</b>	<b>22<sup>ND</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>DOUGLAS MUNYINGE MUNYAE.....</b>	<b>23<sup>RD</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>LOISE NJERI NGUGI.....</b>	<b>24<sup>TH</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>ANDREW CHERUIYOT YEGON.....</b>	<b>25<sup>TH</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>JACOB M. MBABU.....</b>	<b>26<sup>TH</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>BENJAMIN NGANGA MUIRURI.....</b>	<b>27<sup>TH</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>DOUGLAS SENGERA NYAMOKO.....</b>	<b>28<sup>TH</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>JOSIAH DISHONI NJERU.....</b>	<b>29<sup>TH</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>PAUL K.A. CHERUIYOT.....</b>	<b>30<sup>TH</sup></b>
<b>RESPONDENT/DEFENDANT</b>	
<b>FREDRICK MOSOMI OYUGI.....</b>	<b>31<sup>ST</sup></b>
<b>RESPONDENT/DEFENDANT</b>	

### **RULING**

On 22<sup>nd</sup> September, 2010, I delivered a judgment in this consolidated suit in which I dismissed the applicant's action against the 1<sup>st</sup> to the 4<sup>th</sup> respondents but entered judgment in favour of the 5<sup>th</sup> – 31<sup>st</sup> respondents against the applicant declaring that all the respondents are the lawful proprietors of the suit land.

That decision aggrieved the applicant who has filed a notice of appeal to challenge the judgment. In the meantime, he has brought the present application praying that there be an order of stay of execution of the judgment pending the hearing and determination of the appeal.

The applicant has averred that having filed a notice of appeal, the same will be rendered nugatory if the orders sought in this application are not granted; that already the respondents have invaded the land pursuant to the judgment in the company of hired guards and policemen, mowed down the applicant's crops and dumped building materials on the suit land; that if the respondents are not stopped, the applicant shall suffer substantial loss and damages; that the applicant is ready to provide security.

The 1<sup>st</sup> respondent in his affidavit in reply has denied that guards or police officer have been hired to assist in the taking over of the suit land; that having been declared in the judgment as the lawful owner of the land he visited the land to inspect it when the applicant shot at him in total disregard to the restraining orders; that this application has no merit and is only an attempt to delay expeditious determination of this matter.

Apart from the grounds of opposition, the 5<sup>th</sup> – 31<sup>st</sup> respondents have also filed a replying affidavit through the 26<sup>th</sup> respondent, Jacob M. Mbabu. It is contended for them that the notice of appeal is fatally defective and incompetent; that the application is based on a non-existent title; that the 5<sup>th</sup> – 31<sup>st</sup> respondents are not parties to the application; that the application is an attempt to derail execution of the judgment; that upon delivery of the judgment, the 5<sup>th</sup> -31<sup>st</sup> respondents took possession of their respective

portions and commenced construction; that the applicant has hired goons who have interfered with the construction.

These grounds were canvassed before me on 28<sup>th</sup> February, 2011 and I hold the following view of the matter. The application is brought pursuant to **sections 1A, 1B and 3A of the Civil Procedure Act and Orders 41 rule 4(1)** of the revoked **Civil Procedure Rules** as the 2010 rules had not come into force. Under that rule, the court before granting an order of stay of execution, must be satisfied that:

- i) there is sufficient cause to order stay of execution;
- ii) substantial loss may result to the applicant unless the order is made;
- iii) the application for stay has been made without unreasonable delay and;
- iv) the applicant has given security as ordered by the court.

The applicant has averred that he is ready to give security and that is all he is required to confirm with regard to (iv) above. There is also no doubt that this application was brought timeously on 4<sup>th</sup> October, 2010 while the judgment was on 22<sup>nd</sup> September, 2010. The more critical question is whether the applicant stands to suffer substantial loss if the relief of stay is not granted. It is common ground that the applicant has been in occupation of the suit property for a period of over 40 years. He has averred that he has been cultivating it and growing crops. It is also not in dispute that the 5<sup>th</sup> – 31<sup>st</sup> respondents are in the process of putting up buildings on their respective portions. This has the effect of displacing the applicant from the suit property, even though no eviction order was issued. The court's finding that the suit property belongs to the 1<sup>st</sup>, 4<sup>th</sup> – 31<sup>st</sup> respondents is the basis of this application and not the dismissal of the applicant's claim, as an order of dismissal is incapable of being stayed.

In applications for stay of execution, the court's primary concern is to obviate loss to the parties and balance their respective interests. The respondents have been denied the use of their land for many years and now have a judgment in their favour. The applicant on the other hand has challenged that judgment as he is entitled to. If the relief sought in this application is not granted, the applicant will be evicted and the respondents will embark on their construction. The applicant being in possession and indeed having been in possession for several years, stands to suffer most if the stay sought herein is not granted.

Two issues have been raised by counsel for the 5<sup>th</sup>-31<sup>st</sup> respondents which I turn to consider. It is averred first that the 5<sup>th</sup> – 31<sup>st</sup> respondents are not parties to this application and the intended appeal. The second issue is that the application for stay is based on a non-existent title. Starting with the last point, it was submitted that title No.26398/3 after subdivision ceased to exist and in its place are Block 32/1-41, yet in the application the applicant has sought to restrain the respondents from interfering with the original parcel that does not exist.

It must be made clear that the application sought two substantive prayers. The first prayer (2) although for stay of execution, asked the court to restrain the respondents from interfering with applicant's quiet possession, pending *inter partes* hearing of the application. It is in that prayer that the suit property is mentioned. That prayer was granted and with the hearing *inter partes* of the application, that prayer has been spent, leaving the second (3) prayer for stay orders pending appeal. The property is not mentioned as there is no need to do so since what is sought to be stayed is the judgment/decree .

Regarding the first issues, there are two answers. The first one relates to the restraining orders which was sought in the application, which I have stated has been spent. It is sought to restrain only the 1<sup>st</sup> – 4<sup>th</sup> respondents. The second explanation is that the two suits were consolidated as explained in the judgment. So that the applicant who was the defendant in HCCC No.94 of 2005 remained the plaintiff while the plaintiffs in HCCC No.94 of 2005 joined the 4 defendants in this suit (HCCC No.155 of 2002) and became the 5<sup>th</sup> – 31<sup>st</sup> respondents. When the judgment was typed, the heading did not depict that position hence the confusion. That is, really, a small matter. The heading will be amended as properly shown in the grounds of opposition filed by the firm of Gordon Ogola and Associates on 13<sup>th</sup> October, 2010.

In a nutshell, there will be an order of stay of execution pending hearing and determination of appeal subject to the applicant depositing into court Kshs.100,000/= within 30 days from the date of this order.

**Dated, Delivered and Signed at Nakuru this 7<sup>th</sup> day of June, 2011.**

**W. OUKO  
JUDGE**