



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**LAND AND ENVIRONMENTAL LAW DIVISION**

**CIVIL SUIT (ELC) NO.1010 OF 2007**

**LUCY WANJIRU KUNGU.....PLAINTIFF**

**VERSUS**

**JOHN NJUGUNA NDARWA.....DEFENDANT**

**R U L I N G**

1. By a notice of motion dated 31<sup>st</sup> August, 2010, brought under certificate of urgency, and under the High Court Vacation Rules, Lucy Wanjiru Kungu who was the plaintiff in this suit, sought an order for stay of execution of the judgment delivered on 12<sup>th</sup> June, 2009 by Hon. Nambuye J. The applicant is dissatisfied with the judgment and has instructed her advocate to appeal. She contends that the respondent has taken steps to execute the judgment and is already harassing and intimidating the tenants on the suit property.
2. John Njuguna Ndarwa, who is the respondent to the application, has urged the court not to grant the orders sought. He argues that the court has already rejected an application for stay of execution. He maintains that he has already taken possession of his half share of the suit property as awarded in the judgment, and rented it out after extensive repairs. He maintains that he will suffer irreparable loss if an order of stay of execution is granted. Further he contends that the intended appeal is brought in bad faith, and only intended to prevent the respondent from benefiting from his share of the suit property.
3. On 6<sup>th</sup> April, 2011, it was agreed by the parties that written submissions be served and filed to enable the court determine the application. However the applicant did not file any submissions. The respondent filed submissions in which it was argued that the applicant having failed to file any submissions, no case had been presented to court. It was argued that the respondent had already executed the judgment of the court by taking possession of his half share of the suit property and therefore the court should not grant the orders sought.
4. I have considered the application before me. The applicant is seeking an order of stay of execution pending appeal. Such an order can only be issued if this court is satisfied that substantial loss may result to the applicant unless the order of stay is made. Further, the court should be satisfied that the application for stay of execution has been brought without undue delay. In this case, the judgment subject of the impending execution, was delivered on 12<sup>th</sup> June, 2009. The application for stay of execution was only brought on 31<sup>st</sup> August, 2010, which is more than a year later. In between, the applicant brought an application seeking to have the decree issued on 12<sup>th</sup> June, 2009 and execution proceedings stayed and the judgment delivered on 12<sup>th</sup> June, 2009 set aside and or vacated. That application was heard and a ruling delivered on 28<sup>th</sup> May, 2010.
5. In effect therefore, the issue of stay of execution has already been deliberated upon by this court. Be that as it may, the applicant now seeks to stay the execution as she pursues her appeal. Nonetheless, the applicant has not satisfied this court that she will suffer any irreparable loss. The only loss she stands to suffer stems from rent from half the suit property. This is a quantifiable loss. She

has not demonstrated that the respondent will not be able to compensate her for this loss should she be successful in her appeal. The court has the responsibility of balancing the interests of both parties. The respondent has obtained a judgment in his favour. There is no reason why he should not be allowed to enjoy the benefit of that judgment. I therefore reject and dismiss the application dated 31<sup>st</sup> August, 2010. The applicant shall pay costs of the application to the respondent.

**Dated and delivered this 2<sup>nd</sup> day of June, 2011**

**H. M. OKWENGU**  
**JUDGE**

In the presence of: -

Advocate for the plaintiff/applicant absent

Advocate for the defendant/respondent absent

Respondent present in person

B. Kosgei - Court clerk