



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL 222 OF 2007**

**RODAH K. CHEBON.....APPELLANT/APPLICANT**

**VERSUS**

**SUSAN NYABOKE ONSOMU.....DEFNDANT**

**RULING**

The applicant's suit in the court below, being CMCC No.986 of 2003 in which she sought eviction of the respondent and a permanent injunction to restrain her was dismissed in a judgment delivered on 26<sup>th</sup> November, 2007 by T. Matheka, Senior Resident Magistrate. In that judgment, the respondent's counter-claim was allowed and the court declared the respondent the lawful owner of the land in dispute, PLOT NO.NAKURU/MUNICIPALITY BLOCK 17/213. The applicant was also restrained by an order of perpetual injunction. Being aggrieved, the applicant has preferred this appeal and in the meantime, sought in the instant application orders of stay of execution of the judgment and decree of 26<sup>th</sup> November, 2007 pending the hearing and determination of this appeal. The application further seeks an order of:

“mandatory injunction to restrain the respondent from evicting the appellant or interfering in any other way with the appellant's quiet and peaceful occupation of plot No.BLOCK 17/232.....”

The respondent has filed a replying affidavit in opposition to this application. The motion which is expressed to be brought under Order 41 rule 4 and Order 39 of the Civil Procedure Rules is supported by five grounds on the face of it and eighteen paragraphs affidavit. The replying affidavit on the other hand contains fifty one (51) paragraphs with twelve (12) annexures.

Both the applicant and the respondent in these length averments lost sight of this court's jurisdiction under **Order 41 rule 4** aforesaid. The arguments are more on the merit of the appeal and not the three cardinal conditions precedent in an application for stay namely, substantial loss to the applicant, application for stay to be made without unreasonable delay and an offer of security by the applicant.

To begin with, the applicant's suit having been dismissed, there can be no decree arising from that dismissal, except perhaps for the costs awarded to the respondent, capable of being executed or stayed. Of course the respondent's counter-claim was granted confirming the respondent as the registered proprietor of the suit property. Secondly there is an order of eviction. This is what the applicant wishes to be stayed. The order confirming the respondent as the proprietor of the suit property has been executed and the suit property (17/232) which he is sought to be restrained on does not exist the title having been cancelled.

The decree having been executed, there is nothing left capable of being stayed. Similarly, there cannot be a mandatory injunction in the terms prayed. Indeed a mandatory injunction does not restrain but directs or compels the doing of an act.

Finally, the application has been brought after an inordinate delay of nearly one (1) year without any explanation. For these reasons, the application must fail and is hereby dismissed with costs.

**Dated, Signed and Delivered at Nakuru this 26<sup>th</sup> February, 2010.**

**W. OUKO**

**JUDGE**