

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 3132 of 1995

**KEZIAH WANJIRU MBURU(as personal representative Of The Estate of
SIMON MBURU GIKERE (Deceased))PLAINTIFF/RESPONDENT**

V E R S U S

WHITE FARM KENYA LIMITEDDEFENDANT/APPLICANT

R U L I N G

The Defendant was aggrieved by the judgment of this court which was delivered on 18th January, 2010 declaring that it held Plot No. Limuru/Township/338 which had been allocated to it by the Commissioner of Lands on 7th February, 1991 in trust for the Plaintiff. The Defendant was directed to sign all papers to transfer the land to the Plaintiff, failing which the Registrar would execute them on its behalf. It filed a notice of appeal to the Court of Appeal and now seeks for stay of execution pending the hearing and determination of the appeal. The application was brought under **Order 41 rule 4** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act**.

The application was filed a month after the decision being appealed from and therefore was brought without delay.

In appealing, the Defendant is exercising its undoubted right of appeal. The competing interest is that the Plaintiff has a judgment which she is entitled to execute. The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the reliefs of the Appellant, who is exercising his undoubted right of appeal, are safeguarded and the appeal, if successful, is not rendered nugatory. (**See BUTT –VS- RENT RESTRICTION TRIBUNAL [1982] KLR 417**).

Under **Order 41 rule 4** the Defendant must show that substantial loss may result to it if stay is not granted. The application should be made without unreasonable delay. On this later condition, I have noted there was no delay. Lastly, the Defendant has to provide security for the due performance of the decree that may ultimately be binding on it. The Defendant did not offer any security in the supporting affidavit, but M/S Githaiga informed court that the Defendant would be willing to abide by any order of the court in this regard.

Regarding the loss that the Defendant may suffer it was deponed that it is feared the Plaintiff may dispose of the plot. The Defendant is the registered owner of the plot. It is clear that if the judgment is executed legal ownership will change and the Plaintiff may deal with in any manner allowed to such an owner. This will certainly be to the substantial detriment of the Defendant. The interest of justice, I find, shall be better served if the property is preserved. In any case, the Plaintiff is in actual possession.

In conclusion, I grant the application and order that the Defendant deposits into court KShs. 300,000/= within 14 days as a condition of stay. The Defendant shall also pay costs of the application.

DATED AND DELIVERED IN NAIROBI

THIS 29TH DAY OF APRIL 2010

A. O. MUCHELULE

JUDGE