



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

Civil Appeal 65 of 2010

MAJOR (RTD) CHARLES NAULLE DIFFU.....APPELLANT

VERSUS

**LINDA BROWN.....1ST RESPONDENT
FLORENCE GATHONI MUNGAL.....2ND RESPONDENT
JOAN NJOKI NDUNGU.....3RD RESPONDENT**

R U L I N G

1. Major (Rtd) Charles Naulle Diffu, (hereinafter referred to as the applicant), has moved this court under Order XLI Rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The substantive order sought by the applicant is an order of stay of the orders made in CMCC No.558 of 2008 on 3rd March, 2010 by the Chief Magistrate, pending the hearing and determination of his appeal which he has filed in this court. The application is supported by an affidavit sworn by Daniel Ngala who is the applicant's advocate. It is also indicated in the body of the application that the orders sought to be stayed are mandatory in nature, and that if executed the applicant's appeal which is meritorious is likely to be rendered nugatory.

2. A copy of the order which is sought to be stayed has been exhibited and it is apparent that the order is for the eviction of the applicant, his servants, agents or employees from property known as LR.No.3734/213 Muthangari Road, Lavington. From the annexures to the supporting affidavit sworn by E.M. Ngala, it is evident that the orders issued on 3rd March, 2010 in Milimani CMCC No.5588 of 2008, were issued pursuant to a notice of motion filed by the respondents in which it was contended that the applicant had failed to comply with the terms of the consent order recorded on 20th November, 2008 and that the applicant has not been making monthly payments towards the rent arrears nor has he been paying rent in respect to the suit premises.

3. The respondent has exhibited a copy of the consent order which shows that the applicant was required to pay a sum of Kshs.50,000/= monthly and in default of any one installment the defendant would be at liberty to evict the plaintiff. From the correspondences, exchanged between the parties, which have been exhibited, it appears *prima facie* that the applicant has been irregular in making the monthly payments. That seems to be the basis of the respondent's attempt to levy distress for rent against the appellant and also the basis of the orders for eviction issued by the lower court.

4. However, being mindful of the fact that the applicant has filed an appeal in this court, and that if the order of stay of execution is not issued the substratum of the appeal will be lost. I will issue a conditional order for stay of the orders of eviction issued on 3rd March, 2010 subject to the following:

- (i) That the applicant shall deposit a sum of Kshs.400,000/= into this court within 7 days from the date hereof.
- (ii) That the applicant shall continue paying the sum of Kshs.50,000/= monthly to the respondents.
- (iii) That the applicant shall file and serve a record of appeal within 90 days from the date hereof.
- (iv) That in default of the applicant complying with condition No.(i), (ii), or (iii) above, the respondent will be at liberty to apply for discharge of the order for stay of execution of the eviction order.
- (v) That the applicant shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed of within one year, the order for stay of execution of the eviction order shall be discharged unless otherwise extended by this court.

Dated and delivered this 12th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ngala for the appellant

Ngugi H/B for Thuku for the respondent

Eric - Court clerk