



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Civil Case 64 of 2003**

**JULIUS KIRUMA KARIUKI..... PLAINTIFF**

**VERSUS**

**KAMAU MWANG ..... 1<sup>ST</sup> DEFENDANT**

**NAHASHON MWANGI MBOGO..... 2<sup>ND</sup> DEFENDANT**

**PETER GITHINJI..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL..... 4<sup>TH</sup> DEFENDANT**

**RULING**

This ruling is the offshoot of two applications: The summons dated 2<sup>nd</sup> September 2009 and the motion dated 23<sup>rd</sup> September 2009 which were directed to be argued together. In the amended summons dated 2/9/2009, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are seeking for an order of stay of execution of the judgment of this court delivered on 18/6/2009 pending Appeal. The summons is taken out pursuant to the provisions of order XLI rule 4 of the Civil Procedure Rules. In the Notice of motion dated 23<sup>rd</sup> September 2009, taken out under sections 3A and 63(e) of the Civil Procedure Act, the plaintiff sought for an order of eviction against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in terms of the judgment delivered on 18/06/2009.

In my view, if the summons dated 2/9/2009 is successful, it means the motion will be deemed to have been dismissed because the execution process will have been halted. If the summons fails, it means the motion will have to be allowed automatically. It is only logical to start with the summons dated 2/9/2009. The aforesaid application is supported by the affidavit of Nahashon Mwangi Mbogo sworn on 13/08/2009. It is the submission of the applicants that unless the order for stay of execution is given they will suffer irreparable loss and damage which cannot be compensated in monetary terms. It is also argued that the intended appeal has high chances of success. The plaintiff on his part has urged this court to dismiss the motion on the ground that its jurisdiction has not been properly invoked. It is said that the same does not meet the requirements of order XLI rule 4 of the Civil Procedure Rules.

I have considered the grounds set out on the face of the summons and the facts deponed in the affidavit filed in support. I have also considered the grounds of opposition filed by the plaintiff plus the written submissions filed by both sides. There is no doubt that this court delivered its judgment on 18<sup>th</sup> June 2009 in which the court found the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to have acted fraudulently leading to the hiving off of 1 acre from the parcel of land known as **Loc. 8/Matharite/Kiaheho/181** giving rise to the parcel of land known as **Loc. 8/Matharite/Kiaheho/698**. In short this court ordered the cancellation of the subdivision and directed the land to revert back to its original

title. Being aggrieved, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have lodged a notice of appeal to express their intention to appeal. They are now before this court seeking for an order of stay of execution pending Appeal. The plaintiff has raised one preliminary issue as to the competency of the summons. It is said the applicants should have approached this court by way of a motion as opposed to a summons. The defendants conceded that they should have come by way of a motion instead of a summons. They however beseeched this court to ignore the defect for want of form since it did not go to the root of the case. I am inclined to overlook the defect for the broad interest of justice. I am fortified by the provisions of order VI rule 12 of the Civil Procedure Rules which outlaws dismissal of matters on technical objections for want of form.

It is argued that the application does not meet the principles required under Order XLI rule 4. The applicants have averred that they are likely to suffer irreparable damage if the order is not given. A careful perusal of Order XLI rule 4 will reveal that principles are:-

- (i) ***An applicant must show the substantial loss it would suffer if that order is denied.***
- (ii) ***The application must be made without an unreasonable delay.***
- (iii) ***Security for the due performance of the decree must be considered.***

I agree with the submission of the plaintiff that the applicants have not satisfied the first principle. They have not stated the substantial loss they would suffer if the order is denied. They have instead relied on the principle used in applications for injunctions. The applicants' averments are stated on the face of the summons and in paragraph 8 of the affidavit of Nahashon Mwangi Mbogo. On this account alone the summons is ordered dismissed with costs to the plaintiff. I have already stated that if the summons succeeds, it means the motion dated 23/9/2009 will be treated as having been dismissed. There is no doubt that the defendants did not file any grounds of opposition nor a replying affidavit to oppose the motion. The motion seeks to have the decree executed. Since there is no stay order I have no reason to deny the plaintiff the orders sought. The motion is allowed as prayed with costs.

***Dated and delivered this 7<sup>th</sup> day of May 2010.***

**J.K. SERGON**

**JUDGE**

In open court in the presence of Miss Wambua holding brief for Kuloba for the plaintiff, Miss Ngatunyi holding brief for Munyi for defendants.