



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELC CASE NO. 2320 OF 2007**

**LYDIA WANJIRU KAGIRI .....PLAINTIFF**  
**V E R S U S**

**FRANCIS WAITHAKA KIRIU .....1<sup>ST</sup> DEFENDANT**  
**TERESIA WAITHIRA KIRIU .....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

This is the Defendants' application under **Order 41 rule 4** of the **Civil Procedure Rules** and **section 3** of the **Civil Procedure Act** for stay of execution of the Ruling delivered on 1<sup>st</sup> July 2008, in which the Plaintiff's application for summary judgment was allowed, pending hearing and determination of appeal to the Court of Appeal. It is further sought that the Plaintiff be restrained from evicting the Defendants from L.R. No. Komothai/Kibichoi/702 (hereinafter referred to as "the suit land") and/or transferring and/or disposing of the same until the appeal is heard and determined.

The following facts of this case are not in dispute. The Plaintiff is the registered proprietor of the suit land. On 26<sup>th</sup> March, 2003 she entered into a sale agreement in which she was selling it to the Defendants for KShs. 1,800,000/=. The Defendants owned plot No. 514 measuring 0.25 acres at Nyakinyua Investments Ltd. It was worth KShs. 450,000/=. It was agreed that they surrender it to the Plaintiff. They paid KShs. 401,000/= on the signing of the agreement towards the purchase price and took possession of the suit property as they waited to pay the balance. The Plaintiff was to obtain the consent of the Land Control Board.

On 29<sup>th</sup> November, 2007 the Plaintiff filed this suit complaining that the Defendants had failed to honour their part of the bargain. She sought an order of specific performance and, in the alternative, that the Defendants be evicted from the suit land. With the suit was filed a chamber application for a temporary injunction. When that application came for hearing on 29<sup>th</sup> November, 2007 the parties agreed that the Defendants be allowed to pay the balance of the purchase price within 6 months following which the suit land would be transferred to them. That balance was KShs. 856,500/=.

The balance was not paid, and on 24<sup>th</sup> June, 2008 the Plaintiff filed a motion under **Order 35 rule 1(1)** of the **Civil Procedure Rules** for summary judgment. She sought the eviction of the Defendants from the suit land. The application was heard by Justice Ang'awa who allowed it on 1<sup>st</sup> July, 2008. She directed that the Defendants give vacant possession of the suit land and that the deposit paid be forfeited. This is the judgment whose execution the Defendants seek to stay. In the supporting affidavit sworn by the 1<sup>st</sup> Defendant he deponed that it was the post-election violence that made it impossible for them to secure funds to pay the balance of the purchase price. The Plaintiff has threatened to evict them and that is why they have made the application. He swore that the appeal would have arguable grounds and that if they are evicted such appeal would be rendered nugatory. Further that, the Plaintiff would dispose of the land which would expose them to irreparable loss and prejudice.

The response by the Plaintiff was that the record appeal had so far not been filed despite the fact that proceedings have been typed. Further the application had been brought late in the day and that all the time the Defendants had breached the agreement entered into.

The Defendants seek to exercise their undoubted right of appeal and that has to be respected. The court should guard against a situation where such an appeal, if successful, is rendered nugatory. The Plaintiff has a competing interest. She has a judgment whose fruits she is entitled to enjoy. It is material that in dealing with an application for stay the court should exercise its discretion bearing in mind these interests (**Butt –Vs- Rent Restriction Tribunal [1982] KLR 417**).

Under **Order 41 rule 4(2)** the Defendants must show that they may suffer substantial loss unless

stay is granted and that the application has been brought without unreasonable delay. Further, they have to provide security for the due performance of such decree or order as may ultimately be binding on them if the appeal is not successful (**Halai & Another –Vs- Thornton & Turpin (1963) Ltd [1990] KLR 365**). The Plaintiff swore that the application had been brought late and that no security had been offered. There is no dispute that the Defendants offered no security. The application was brought about 2 months after the decision complained of. There was no explanation why it could not be made earlier.

Have the Defendants shown they will suffer substantial loss? Do they deserve the exercise of the court's discretion in their favour? It should be noted that the Defendants entered into an agreement in 2003 which they did not honour which forced the Plaintiff to sue in 2007. They were all that time occupying and utilizing the Plaintiff's land. Following the suit, they entered into yet another agreement to pay the balance of the purchase price in 6 months. They were still in occupation. They did not honour that arrangement. They certainly do not deserve any discretion. Once they did not honour their part of the bargain the most that they could claim would be the refund of the money they had paid under the agreement. It would not be the land as there is no indication that the consent of the Land Control Board was sought or obtained. There was no demonstration that the Plaintiff would not be able to make good the sums paid by the Defendants under the agreement.

In conclusion, the application has no merits and is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI  
THIS 8<sup>TH</sup> DAY OF NOVEMBER 2010**

**A. O. MUCHELULE  
J U D G E**