



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 189 of 2009**

**NICHOLAS GACHUNGA MIHINGO.....APPELLANT**

**VERSUS**

**PILISIKA NJERU MWANGI.....**

**....RESPONDENT**

**R U L I N G**

1. On 20<sup>th</sup> March, 2009, the Chief Magistrate in Thika Court issued a decree declaring that the defendants, i.e Nicholas Gachunga Mihingo, (hereinafter referred to as the applicant) and Phyllis Wangechi Mwangi, were unlawfully occupying Land Parcel No.Ithanga/Phase III/312,(hereinafter referred to as the suit land). The magistrate issued an order for the eviction of the defendants from the suit land. Being aggrieved by that order, the applicant filed a memorandum of appeal in this court on 16<sup>th</sup> April, 2009, against the judgment of the magistrate subject of the decree.
2. On 29<sup>th</sup> May, 2009, the applicant moved this court by way of a notice of motion brought under Order XLI Rule 4 and Order L Rule 1 of the Civil Procedure Rules for orders that the judgment of the trial magistrate delivered on 20<sup>th</sup> March, 2009 and all subsequent decrees be stayed pending the determination of his appeal. The application was anchored on the grounds that the applicant has filed an appeal against the said judgment which appeal is arguable and raises questions of law and facts.
3. The application was supported by an affidavit sworn by the applicant wherein the applicant contended that he has been in the suit land since the year 1993 when the respondent allowed him to cultivate the suit land. The applicant maintained that he has extensively developed the suit land. The applicant expressed apprehension that unless the order sought is granted, the respondent may execute the decree and he will suffer loss as his appeal will be rendered nugatory and he will also be rendered homeless.
4. The application was opposed through a replying affidavit sworn by the respondent in which the respondent explains that the applicant was allowed to use the suit land on the understanding that he was to buy the suit land. It was maintained that the applicant having failed to buy the suit land, he has no claim against it. It was therefore submitted that the application was incompetent and only intended to delay the execution of the orders given at Thika Court. It was further submitted by counsel that the application was brought after an undue delay and that no security had been offered.
5. I have carefully considered this application. I have also had the benefit of the judgment and proceedings of the lower court which were availed by the applicant as well as the memorandum of appeal.
6. First, it is noteworthy that the applicant did not bring his application expeditiously. The judgment subject of the decree was delivered on 20<sup>th</sup> March, 2009. The application for stay of proceedings was brought more than two months later on 29<sup>th</sup> May, 2009. No explanation has been given for that inordinate delay.
7. It is further evident that the suit land belongs to the respondent. Although the applicant claims rights of ownership he has not demonstrated how those rights of ownership arise. Thus *prima facie* the applicant's appeal cannot be said to be arguable. It is true that if the decree is executed the applicant is likely to be evicted from the suit land. Nevertheless, the applicant has to demonstrate that he has a

sufficient cause to justify the staying of the proceedings in the lower court. This the applicant has failed to do, and I find no justification for staying the proceedings in the Thika Court. Accordingly the application fails and is dismissed.

Dated and delivered this 29<sup>th</sup> day of June, 2009

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Applicant present in person

Otieno H/B for Mwangi for the respondent