



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 3955 of 1993**

**WOKI KAMONDE.....PLAINTIFF**

**VERSUS**

**LIVINGSTONE MUNYUI KINUTHIA & OTHERS.....DEFENDANT**

**R U L I N G**

By this Notice of Motion brought under Order XLI Rule 4(1) Order L Rule 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act the Applicant seeks orders that she be granted a stay of execution of the judgment and decree of this Honourable Court made on 8<sup>th</sup> April 2008 pending the hearing and determination of the intended appeal.

The application is based on the grounds as stated on the body of the notice of motion and supported by an affidavit sworn by the Applicant on 23<sup>rd</sup> April 2008 in which she avers that she has been in possession of the suit land since 1958 continuously and openly and that she acquired title through adverse possession and that she has an arguable appeal.

Mr Gachache appearing for the Applicant submitted that the dispute involves land which the Applicant has occupied since 1958 and she has lived there with her entire family to date. She had filed this suit for a declaration that she had acquired title by adverse possession but her suit was dismissed. The Applicant has filed notice of Appeal and contends that the intended appeal is arguable and that since the Respondents are holding title to the suit land stay is necessary to maintain status quo. The application is opposed by the Respondents who has filed a replying affidavits on which they rely entirely.

Mrs Ngala appearing for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in opposing the application submitted that there is no copy of the intended appeal attached to the application for stay and that the Applicant has not demonstrated that she has an arguable appeal. Mr. Gathaiya appearing for the 4<sup>th</sup> Respondent submitted that the 4<sup>th</sup> Respondent was a purchaser for value without notice in 1993 but since then he has not been allowed access to the suit premises for the last 15 years and that she should be allowed to enjoy her property.

This being application for stay there are two conditions which the Applicant must satisfy before she is granted stay of execution pending appeal.

First she must satisfy the court that the intended appeal is not frivolous, that it has arguable ground to canvass during the intended appeal; and

Secondly that the appeal if successful would be rendered nugatory if stay of the order is not granted.

It is the Applicant's case that she has been in possession of the suit land since 1958 openly continuously and without interruption. The 4<sup>th</sup> Respondent alleges to have purchased the suit land in 1993. This is over 35 years. By that time the Applicant had secured title by operation of the law by adverse possession so that there was no interest passed to the 4<sup>th</sup> Respondent. I am persuaded that the Applicant has an arguable appeal. Secondly if stay is not granted, the Respondent might dispose of the suit land and this would render the appeal nugatory in the event it succeeds.

Further this dispute involves land and land matters in Kenya are very emotive and the Applicant having expressed her intention to pursue the matter to the highest court of this land, she should not be denied the opportunity to do so. The Court of Appeal has so stated in the case of **SIMPSON NDERITU KARITU VS MARTHA WATETU KARITU AND ANOTHER CA NO. 136 OF 1996** (unreported) where TUNOI JA said:

**“I need not reiterate here that it is an established practice of the court that all land disputes wherever possible should finally be determined by this court; and that no party who desires to be heard should be driven out of the seat of justice by technical application of rules.”**

For the reason aforesaid I exercise my discretion in favour of the Applicant and allow the application in terms of prayer 2 of the Notice of Motion dated 23<sup>rd</sup> April 2008.

Dated and delivered at Nairobi this 13<sup>th</sup> day of June 2008.

**J. L. A. OSIEMO**

**JUDGE**