

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 410 of 1999

FIDAN GATHUMBI NJUGUNA.....PLAINTIFF

VERSUS

MUNGAI NJUGUNA.....DEFENDANT

RULING

By a judgment delivered by this court on 7th March 2008 judgment was entered in favour of the plaintiff/respondent in respect of property known as **Bahati Wendo Block 5/47**. Immediately the applicant/defendant filed an appeal in the Court of Appeal challenging that decision. The applicant has also filed the notice of motion seeking for an order of stay of execution of the decree pending the hearing and determination of the appeal. The application is based on the grounds that the appellant has lodged an appeal in the Court of Appeal and pending the determination of the appeal the respondent may execute the decree which will render the appeal nugatory and defeat the ends of justice.

The suit premises are registered in the name of the appellant. The order of the court also restrained the appellant from alienating the suit premises. The respondent is busy extracting the decree and if the decree is executed, it will entail the cancellation of his title and the respondent could also transfer the property to third parties. The respondent filed a replying affidavit basically denying that the transfer of the suit premises would render the appeal nugatory.

This application for stay of execution was filed in court within a reasonable time after the judgment was delivered. The court record also shows that the proceedings have been typed and furnished to the appellant. The subject matter involves a parcel of land; execution would obviously entail a transfer of the suit premises to the plaintiff who in turn could transfer the property to a third party, thereby rendering the appeal nugatory. It is for those reasons that this court will exercise its discretion and grant the orders of stay to preserve the status quo until the appeal is heard and determined. See the case of **Butt -vs. - The Rent Restriction Tribunal [1982] KLR 417** where it was held:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.”

Bearing the above principles in mind, I find the applicant’s application has merit. There was no order for costs. The order was only in regard to the suit premises, thus I will not issue any conditions, but direct that the status quo in respect of the suit premises be maintained until the appeal is heard and determined.

Ruling read and signed on 24th November, 2008

M. KOOME

JUDGE