

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

Civil Case 276 of 1997

AFRICAN INLAND CHURCH.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF NAKURU.....1ST DEFENDANT

FRANCIS NGAMBI RUKOMIA.....2ND DEFENDANT

JAMES NJUGUNA WARUKIRA.....3RD DEFENDANT

RULING

On the 16th November 2006, this court entered judgment in favour of the plaintiff as prayed in its plaint. The effect of the said judgment was that the 2nd and 3rd defendants were ordered to give vacant possession of all that parcel of land known as *LR No. 15174, Subukia Trading Centre* to the plaintiff within sixty (60) days of the date of the said judgment or in default thereof the plaintiff be at liberty to evict them. The 2nd and 3rd defendants were further ordered to remove all the structures that they had erected on the said parcel of land. The counterclaim of the 2nd and 3rd defendants seeking to be declared as the owners of the suit land was dismissed with costs. The 2nd and 3rd defendants were aggrieved by the said decision of this court and have filed a notice of their intention to appeal to the Court of Appeal.

On the 20th December 2006, the 2nd and 3rd defendants made an application to this court under the provisions of Order XLI rule 4(2) of the Civil Procedure Rules seeking orders of stay of execution pending the hearing and determination of the intended appeal. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavits of the 2nd and 3rd defendants. In essence, the 2nd and 3rd defendants aver that they would suffer substantial loss if stay is not granted. They further pleaded with the court to grant them stay so that their intended appeal would not be rendered nugatory. Mr. Kagucia Jnr. for the 2nd and 3rd defendants amplified and reiterated these grounds when he made his submission before this court.

The application is opposed. Rev. Geoffrey Githinji on behalf of the plaintiff has sworn a replying affidavit in opposition to the application. Mr. Kahiga, Learned Counsel for the plaintiff made submission urging this court to disallow the application. The thrust of the argument presented by the plaintiff is that this court having decreed that the plaintiff was the owner of the suit land, and further having ordered that the 2nd and 3rd defendants to give vacant possession of the suit land, would defeat the said decree if stay is granted.

I have read the pleadings filed by the parties to this application in support of their respective positions. I have also carefully considered the submissions made before me by Mr. Kagucia Jnr. on behalf of the 2nd and 3rd defendants and by Mr. Kahiga on behalf of the plaintiff. The issue for determination by this court is whether the 2nd and 3rd defendants have established a case to enable this court grant them the order of stay of execution sought. The principles to be considered by this court in determining whether or not to grant an order of stay of execution are well settled. In Mukuma –vs- Abuoga [1988] KLR 645 at page 647, the Court of Appeal held that:

“It was laid down in M. M. Butt –vs- The Rent Restriction Tribunal Civ App No. Nai 6 of 1979, (following Wilson –vs- Church (No. 2) (1879) 12 Ch 454 at p. 488) that in the case of a party appealing, exercising

his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard. Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without undue delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo.”

In the present application, the dispute involved land. The 2nd and 3rd defendants have erected buildings on the suit land using substantial sum of money. The 2nd and 3rd defendants were aggrieved by the decision of this court decreeing that the suit land belongs to the plaintiff. They wish to have a second opinion from the highest court in the land. This is their constitutional right. A right of appeal, especially in matters involving land, should in most cases be allowed to be ventilated to the highest court if an aggrieved litigant so wishes.

The 2nd and 3rd defendants have submitted that the said appeal would be rendered nugatory and further that they would suffer substantial loss if stay of execution is not granted. Although the plaintiff has vehemently opposed the said application for stay of execution, I will exercise my discretion in favour of granting the 2nd and 3rd defendants stay of execution of the decree pending the hearing and determination of the said intended appeal. If the decree of this court is to be given effect to, it would mean that the buildings which the 2nd and 3rd defendants have erected on the suit land would be demolished and the said defendants be obligated to give vacant possession of the suit land to the plaintiff. The intended appeal to be filed by the 2nd and 3rd defendants would thus be rendered nugatory.

This court is not required to consider whether or not the appeal has merit. This court’s jurisdiction when granting stay of execution of its decree is to preserve the *status quo* pending the hearing and determination of the intended appeal to be filed at the Court of Appeal. The 2nd and 3rd defendants are in possession of the suit land. The said *status quo* should remain pending the determination of the said appeal. I do hold that the 2nd and 3rd defendants have established that they would suffer substantial loss.

Stay of execution of the decree of this court issued on the 16th November 2006 is hereby granted on condition that the 2nd and 3rd defendants deposit a sum of Kshs 100,000/= as security in a joint interest earning account in a reputable bank in the names of the counsel for the plaintiff and counsel for the 2nd and 3rd defendants within twenty one (21) days of today’s date or in default thereof the stay of execution granted herein shall automatically lapse. The costs of the application shall be paid by the 2nd and 3rd defendants.

DATED at NAKURU this 17th day of January 2007.

L. KIMARU

JUDGE