

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 79 of 1999

SIMON MAINAPLAINTIFF

VERSUS

NJERI KARIRADEFENDANT

RULING

By a judgment pronounced on 24th November, 2006, judgment was entered in favour of the plaintiff in the following terms:

- (a) That a permanent injunction do issue restraining the Defendant either by herself, her sons, daughters, agents, servants or otherwise howsoever from entering, ploughing or erecting any structure on the parcel of land known as **Bahati/Bahati/Block 1/1459**.
- (b) The defendant was also declared to be a trespasser on the suit premises.
- (c) Costs were awarded to the plaintiff.

The defendant being dissatisfied by the said orders, promptly filed a notice of appeal on 27th November, 2006 and on 4th December, 2006 the defendant who is also the applicant filed this Notice of Motion in which she is seeking for an order of stay of execution of the judgment and decree delivered on 24th November, 2006 pending the hearing and determination of the appeal.

This application is premised on the grounds that the applicant has preferred an appeal to the Court of Appeal. That the applicant has been in occupation of the suit land **Bahati/Bahati Block 1/1459** and now she is likely to be evicted by the plaintiff from the said land. The applicant has been threatened with demolition of the houses that stand on the suit premises and the applicant will suffer substantial loss unless the order of stay is granted.

Lastly, counsel for the applicant argued that the applicant's appeal which has good chances of success would be rendered nugatory if the threatened demolition of the applicant's house and subsequent eviction is carried out by the respondent.

Counsel for the applicant put forward the authority in the case of **Mukuma vs Abuoga 1988 KLR 645** to buttress the argument that the applicant should be granted the order of stay so that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard.

The application was opposed by the respondent. Counsel for the respondent contended that the applicant has not complied with the provisions of **Order 41 rule 5** of the **Civil procedure Rules** and has failed to show sufficient cause and or to provide security for due performance should the appeal be unsuccessful.

It was argued that the applicant has not shown that she will suffer substantial loss if the applicant has never resided on the suit premises. Moreover, since the judgment herein was delivered, the sons of the applicant demolished parts of the structures on the suit premises and transported the materials to another

site which facts have not been controverted by the applicants.

The principles governing the circumstances under which this court can exercise its discretion and grant an order of stay of execution are set out under Order 41 of the Civil Procedure Rules.

The applicant must show sufficient cause, why an order of declaring the applicant a trespasser. It is contended by the respondent which fact is not denied by the applicant, that she has never resided on the suit premises. It is also clear that the applicant's brothers have demolished part of the structures on the suit premises. This clearly in my view shows that the applicant has not shown the substantial loss that she is likely to suffer if she has never resided on the premises.

Moreover the respondent has deponed in his replying affidavit that he has not threatened to evict the applicant. It is also significant to note that there is no order of eviction arising from the said decree and thus I am not satisfied that the applicant has been able to prove that he will suffer substantial loss.

The implementation of the order being appealed from cannot lead to an eviction as no order of eviction was issued.

The applicant has also not provided any undertaking in her affidavit to provide for security in the event that the appeal should fail. The court cannot assume that the applicant is willing to provide such security, the commitment must come from the applicant who is seeking the discretion of the court.

In the circumstances, I find that this application lacks merit and I hereby dismiss the same with costs to the respondent.

Ruling read and signed on 4th May, 2007.

M. KOOME

JUDGE