



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 35 of 2007**

- 1. MUNAI ISAACK OPONDO
- 2. PETER MWANGI WALTER ONYIMBO
- 3. WALTER ONYIMBO
- 4. THOMAS R. GETANGITA
- 5. SOPHIE MWIKALI MUSYOKI
- 6. DENNIS K. CHERUIYOT
- 7. JULIUS L. JAIKA
- 8. MAURICE OLAGO and MANY OTHERS.....**PLAINTIFFS**

**V E R S U S**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup>**  
**DEFENDANT**

**KENYA RAILWAYS STAFF**

**RETIREMENT BENEFITS SCHEME.....2<sup>ND</sup>**  
**DEFENDANT**

**R U L I N G**

By a ruling dated 5<sup>th</sup> and delivered on 6<sup>th</sup> July, 2007 this court (Waweru J.) refused the Plaintiffs’ various applications for temporary injunction. They have now come back to court by notice of motion dated 10<sup>th</sup> July, 2007 seeking one main order, that the court do issue

**“a temporary stay of execution pending the hearing and determination of the intended appeal”.**

The application is stated to be brought under Order 41, rule 4 of the Civil Procedure Rules (the Rules) and also under sections 3A and 63 (e) of the Civil Procedure Act, Cap. 21. There is a supporting affidavit sworn by the 1<sup>st</sup> Plaintiff.

The 1<sup>st</sup> Defendant has opposed the application as set out in the replying affidavit sworn by one VITALIS ADEMO ONG'ONG'O, the managing director of the 1<sup>st</sup> Defendant. The grounds of opposition emerging from that replying affidavit are:-

1. That the application does not meet the legal conditions for grant of stay.
2. That the Plaintiffs have no arguable appeal with any chances of success.
3. That any stay as sought would be unjust and prejudicial to the 1<sup>st</sup> Defendant.
4. That the balance of convenience is not in favour of granting the order of stay sought.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing, including the various authorities cited by them.

As already seen, the main order sought in this application is a temporary stay of execution pending hearing and determination of the intended appeal. Notice of appeal dated 9<sup>th</sup> July, 2007 was duly lodged on 10<sup>th</sup> July, 2007 against the order of the court dated 5<sup>th</sup> and delivered on 6<sup>th</sup> July, 2007 which refused the various applications by the Plaintiffs for temporary injunction. For the purposes of this application, therefore, there is an appeal duly lodged (see Order 41, rule 4(4) of the Rules. But the said order merely dismissed the Plaintiffs' various applications for temporary injunction. So, what is there to be stayed? The order of dismissal of those applications cannot be stayed as that would have the effect of keeping alive applications which have already been dismissed. The application is clearly misconceived. What the Plaintiffs should have sought is a temporary injunction pending appeal. The court has jurisdiction to grant a temporary injunction pending appeal even where it has dismissed an application for temporary injunction because it recognises that it may have been wrong in its dismissal of the application. This is the jurisdiction of the court that the Plaintiffs ought to have invoked. The court cannot properly stay an order of dismissal of an application; that would be perverse. I therefore hold that the application as presently drawn is misconceived and liable to be struck out.

But in the interests of justice, I will proceed on the basis that the application seeks temporary injunction pending appeal. However, I am inclined to refuse the application for the various reasons set out in the ruling dated 5<sup>th</sup> and delivered on 6<sup>th</sup> July, 2007. Nothing new has been placed before the court to dissuade me from the position that I took in the said ruling, that is, that it would be more injurious to the Defendants to grant any temporary injunction than it would be to the Plaintiffs to refuse the injunction. It is common ground that over 80% of the houses in question belong to the 2<sup>nd</sup> Defendant. As found in the said ruling, the Plaintiffs did not establish a *prima facie* case with a probability of success against the 2<sup>nd</sup> Defendant. Again, as found in the ruling, the houses were transferred to and rested in the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant for the main purpose of raising revenue by way of rents for the 1<sup>st</sup> Defendant's staff retirement benefits scheme of which the Plaintiffs are or will be beneficiaries. A temporary injunction would greatly prejudice the intended purpose of establishing the 2<sup>nd</sup> Defendant. This would in turn cause great hardship to the beneficiaries of the retirement benefits scheme (including the Plaintiffs) that far outweighs the inconvenience of the Plaintiffs having to pay the rents demanded by the Defendants or finding alternative accommodation. Further, there are thousands of Plaintiffs living in thousands of houses scattered all over Kenya. Should the Plaintiffs lose the suit, the logistics of recovery of arrears of rent would be daunting.

In the event this application must be refused. It is hereby dismissed with costs to the Defendants. It is so ordered.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF AUGUST, 2007**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED THIS 17<sup>th</sup> DAY OF AUGUST, 2007**