



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Appeal 74 of 2007**

**PETER RUGU GIKANGA.....PLAINTIFF**

**VERSUS**

**HELLEN MURIGE KABUTHA.....DEFENDANT**

**RULING**

The appellants filed an application under the provisions of Order XLI Rule 4 and Order L Rule 1 & 2 of the Civil Procedure Rules seeking the orders of this court to stay the execution of the judgment and decree of the Nyahururu Principal Magistrate's Court in Nyahururu PMCC No.189 of 2004 passed on the 20<sup>th</sup> April 2007 pending the hearing and determination of the appeal filed herein. The application is based on the grounds on the face of the application which states, *inter-alia*, that the appeal filed by the appellants would be rendered nugatory if stay of their eviction from the suit land is not granted. The application is supported by the annexed affidavit of the 1<sup>st</sup> appellant, Peter Rugu Gikanga.

The application is opposed. The respondent Hellen Muringe Kabutha has sworn a replying affidavit in opposition to the application. The thrust of her replying affidavit is that there was nothing to stay since the respondent had instructed a court bailiff to execute the subordinate's court decree resulting in the eviction of the appellants from L.R Nyandarua/Ol'joro orok Salient/14570 and 14587 on the 14<sup>th</sup> June, 2007. The respondent deponed that she took possession of the suit parcels of land on the 15<sup>th</sup> June, 2007, in the circumstances making the application herein be overtaken by events. She urged the court to dismiss the application with costs.

Mr. Kahiga for the appellants reiterated the contents of the application and the supporting affidavit. He submitted that although the appellants had been evicted from the suit parcels of land, there were still orders of the subordinate court capable of being stayed. He submitted that the appellants would suffer substantial loss if stay of execution is not granted since the appellants did not have any other home. He submitted that the respondent had acted contrary to the rules in evicting the appellants and the court should therefore grant stay of execution of the decree pending the hearing and determination of the appeal which is now pending before this court.

Mr. Mwangi for the respondent opposed the application. He reiterated the contents of the replying affidavit of the respondent. He submitted that the respondent had already executed the decree which was issued in his favour by the subordinate court and therefore there was nothing capable of being stayed by this court. He submitted that the respondent is the registered owner of the suit parcels of land and was therefore entitled to possession. He argued that there were no grounds to justify this court to grant stay of execution. He urged the court not to grant the appellant's application for stay of execution which would amount to frustrating the respondent from enjoying the fruits of her judgment. He maintained that the appellants had not established that they would suffer substantial loss if stay of execution is not granted. He urged the court to dismiss the application with costs.

Both counsel relied on several authorities in support of their respective arguments. The issue for determination by this court is whether the appellants have established a case that would enable this court grants them the order sought stay of execution of the decree of the subordinate court. **Order XLI Rule 4(2)** of the **Civil Procedure Rules** requires that before stay of execution is granted, the applicant must satisfy the court that he would suffer substantial loss if stay is not granted. An applicant must also be prepared to provide security for the due performance of the order. In the present application, the appellants have argued that they would suffer substantial loss if stay of execution is not granted. In **Machira t/a Machira & Co. Advocates vs East Africa Standard (No.2) [2002] 2KLR 63** at page 67, Kuloba J, defined substantial loss as thus;

***“If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded, decree or order, before disposal of the applicant’s business (e.g. Appeal or intended appeal).”***

In the present application, the appellants concede that they have already been evicted from the suit land. They however argued that there exists parts of the decree of the subordinate court which is capable of being stayed. The appellants have specifically stated that paragraph 3 and 5 of the decree is capable of being stayed.

What do the said paragraphs states?

Paragraph 3:

***“THAT a permanent injunction do issue and is issued restraining the defendants (appellants) by themselves their agents or servants from entering remaining or erecting structures or in any other way interfering with the plaintiff’s quiet enjoyment and possession of the said plots.”***

Paragraph 5;

***“THAT the defendants will pay the costs of the suit plus interest at court rates.”***

It is evident from the foregoing that the paragraphs of the decree mentioned by the appellants are not capable of being delinked or separated from the earlier paragraphs which granted the respondent her prayer to evict the appellants from the suit land. In the circumstance therefore, I do agree with the submission by the respondent that the appellants have failed to establish that there is anything remaining, after the eviction of the appellants, capable of being stayed.

In any event, the appellants have failed to establish what substantial loss they would suffer if stay of execution is granted when they have conceded that they have already been evicted from the suit land. It appears that the appellants took issue with the manner in which their eviction was secured by the court bailiff. It is the opinion of this court that if the appellants have such complaint against the court bailiff, they would be at liberty to lodge an official complaint against the court bailiff for disciplinary action to be taken against him. The manner, in which execution is levied, in most cases, cannot invalidate an execution. The appellants also may opt to sue the concerned parties for damages.

The upshot of the above reasons is that the appellants have failed to establish that they are entitled to be granted an order staying the execution of the judgment and decree of the subordinate court pending the hearing and determination of the appeal now pending before this court. The application is dismissed with costs to the respondent.

**DATED at NAKURU this 24<sup>th</sup> day of OCTOBER 2007**

**L. KIMARU**

**JUDGE**