



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 254 of 2007**

**1. INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION**  
**2. JOSHUA OMUKANDA (T/a Eshikhony Agency).....**  
.....**APPELLANTS**

**V E R S U S**

**1. HANNAH MORAA BORUMA**

**(suing as the legal representative of PATRICK BORUMA MARANGA)**

**2. RICHARD MIRIERI NYATWANGA .....**  
**RESPONDENTS**

**R U L I N G**

This is an application (by notice of motion dated 11<sup>th</sup> April, 2007) for stay of execution of decree of the lower court pending hearing and determination of the appeal herein. It is brought under Order 41, rule 4 of the Civil Procedure Rules (the Rules). The decree was passed on 15<sup>th</sup> of March, 2007 by the Chief Magistrate's Court at Kisii; ideally, the appeal should have been filed before the High Court at Kisii. But that is an issue that can be revisited at a later stage. It is necessary to dispose off the application now.

The 1<sup>st</sup> Appellant (1<sup>st</sup> defendant before the lower court) was a lender while the 2<sup>nd</sup> Appellant (3<sup>rd</sup> defendant) was an auctioneer. The 1<sup>st</sup> Respondent (plaintiff) was the borrower upon a charge over her land, **L.R. NO. CENTRAL KITUTU/NDARANJA MBILI/1916** (hereinafter called the "suit land"). The 1<sup>st</sup> Appellant, through the 2<sup>nd</sup> Appellant (an auctioneer), sold the charged land by public auction to the 2<sup>nd</sup> Respondent who was duly registered as the proprietor thereof. In its judgement the lower court ordered, first, that the register of the land be rectified to restore the 1<sup>st</sup> Respondent as proprietor of the property. Secondly, it ordered that the 2<sup>nd</sup> respondent be refunded by the Appellants the purchase price he had paid of KShs. 500,000/00 plus interest. Lastly, the 1<sup>st</sup> Appellant's counterclaim of KShs. 1,000,000/00 against the 1<sup>st</sup> Respondent was dismissed.

The Appellants have argued that they will suffer substantial loss unless stay of execution is granted, in that they may not recover the KShs. 500,000/00 from the 2<sup>nd</sup> Respondent if the appeal is successful. The 2<sup>nd</sup> Respondent has not filed a replying affidavit despite being duly served with the application. There was no appearance for him at the hearing. The suit property is currently in his name. The Appellants are ready to provide security by way of a deposit of the money in an interest-earning account. It is further

argued for the Appellants that it is convenient that the parties do await the outcome of the appeal before further changes to the register of the suit land are made.

For the 1<sup>st</sup> Respondent it was argued that the application does not satisfy the test in Order 41, rule 4(2). This being a money decree there is no likelihood of substantial loss; in any case, there is no evidence that the 2<sup>nd</sup> Respondent will be unable to refund the decretal sum in the event of the appeal succeeding. Regarding rectification of the register, it was argued for the 1<sup>st</sup> Respondent that the Appellants will not suffer substantial loss as the 1<sup>st</sup> Appellant's charge will still be in place. It was also argued that there was unreasonable delay of nearly a month in bringing the application.

I have considered the submissions of the learned counsels. Under rule 4(2) of Order 41, no stay of execution of decree shall be made unless the court is satisfied that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay. The applicant must also give such security as the court may order for the due performance by him of such decree or order as may ultimately be binding on him.

Part of the decree challenged in the appeal is a money decree. Although the Appellants have asserted that they may have difficulty recovering the money should the appeal succeed, they have not offered any evidence of the 2<sup>nd</sup> Respondent's inability to refund the money. But having said that, the 2<sup>nd</sup> Respondent himself has not opposed the application; he did not file any papers in response despite being served, and there was no appearance for him at the hearing. The 1<sup>st</sup> Respondent cannot oppose the application for him.

Regarding rectification of the register of the suit land, I agree with the Appellant's learned counsel that it is convenient that no further changes in the register of the land be permitted to occur, pending hearing and determination of the appeal. Any further changes in the meantime may ultimately occasion the parties substantial loss. I am also satisfied that the application has been made without unreasonable delay.

The Appellants have offered security by way of deposit of the decretal sum in an interest-earning account. That will be acceptable security. I will therefore allow the application and order that there be stay of execution of the decree of the lower court pending disposal of the appeal herein. The 1<sup>st</sup> Appellant shall, as a condition for the stay, within twenty-one (21) days of delivery of this ruling deposit the decretal sum of KShs. 500,000/00 in an interest-earning account in a reputable bank or financial institution in the joint names of the Appellants' advocates and the 2<sup>nd</sup> Respondent (or his advocates if he has any).

Costs of the application shall be in the appeal. Those shall be the orders of the court.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2007**