



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

**Civil Appeal 144 of 2005**

**FRANCIS NGIGE NYOIKE ..... APPELLANT**

**VERSUS**

**MATHEW NGIGE MACHARIA ..... 1ST RESPONDENT**

**MONICAH NJERI KIMEMIA ..... 2ND RESPONDENT**

**CHARLES N. MWAURA**

**T/A MELODY TRADERS ..... 3RD RESPONDENT**

**RULING**

This is an application for stay of execution pending appeal, under Order 41 Rule 4 of the Civil Procedure Rules.

At the centre of the dispute is a property known as Block 9/510/Thika Municipality which is presently owned by the Respondent, who acquired the same in a public auction. The Appellant is its previous owner. He claims that the Respondent acquired it fraudulently. The Respondent obtained orders of possession and eviction in the lower court, which are the subject of this appeal. The Appellant wants a stay of execution of those orders pending appeal.

For the Applicant to succeed in this application he must demonstrate to the satisfaction of this Court that substantial loss will ensue if the Order is not granted; that he has filed this application without delay; and that he is willing and able to give such security as is ordered by the Court for the due performance of the decree. That is the plain reading of Order 41 Rule 4, and the onus is on the applicant to satisfy all the conditions through his deposition, and not through bold statements from the bar.

Ordinarily, if I had to base my decision on the affidavit in support of the application dated 30th March, 2005, sworn by the Applicant, I would not grant the orders sought, as there is no evidence of substantial loss, and no offer of security. These are mandatory pre-conditions before such orders are granted. However, the further affidavit sworn by the applicant on 29th April, 2005 makes sufficient averments as to substantial loss, and offer of security. The security that I believe is just in the circumstances of this case is a reasonable sum representing the market rent in respect of the premises, that eventually the successful party would be entitled to. Both parties have filed written submissions regarding the market rent. The Appellant's valuers say it is Kshs.16,000/= per month while the Respondent's valuers assess it at Kshs.24,000/=. I will take the median rate of Kshs.20,000/= per month commencing 1st December, 2004.

Accordingly, I grant stay of execution pending appeal on condition that the Appellant shall deposit in this Court the sum of Kshs.160,000/= being the rent for the period 1st December, 2004 to 30th July, 2005, within the next 21 days. Thereafter, the Appellant shall pay into Court the sum of Kshs.20,000/= each month commencing 1st August, 2005 until this matter is finally determined. In default, this Order shall lapse. Those shall be the Orders of this Court.

Dated and delivered at Nairobi this 13th day of July,  
2005.

**ALNASHIR VISRAM**

**JUDGE**