



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Civil Case 176 of 2000**

**JOHN IBRAHIM & 8 OTHERS.....PLAINTIFF**

**VERSUS**

**TAL HOLDINGS LIMITED.....DEFENDANT**

**RULING**

The plaintiffs filed this case challenging the first defendant's title to Block No. IV on the piece of land IX/124. That suit was dismissed with costs and instead judgment was entered for the first defendant in the counter decreeing vacant possession of the property to the first defendant. The plaintiffs were also ordered to pay mesne profits at the rate of Sh. 5000/= per month with effect from 2<sup>nd</sup> June 2000 until they vacate within 60 days. Aggrieved with that judgment they have filed a Notice of Appeal and have now applied for stay of execution and an injunction to restrain the first defendant from evicting them until their appeal is heard and determined.

Arguing the application on behalf of the plaintiffs Mr. Kenzi Advocate submitted that although the plaintiffs were given 60 days from 15<sup>th</sup> November 2005 to vacate the first defendant has sought to evict them prematurely. According to him since, by virtue of Order 49 Rule 3A, time does not run between 21<sup>st</sup> December and 6<sup>th</sup> January the plaintiffs had upto.... To vacate but the first defendant purported to evict them earlier.

Mr. Kenzi also argued that the purported eviction is illegal as the decree has not been drawn nor have the costs been taxed. He said the plaintiffs have deposited a substantial sum of Sh. 580,000/= as arrears of rent and are ready to continue paying the undisputed rent of Sh. 2,900/= per month. He said the plaintiffs will suffer irreparable loss if stay is not granted. He strongly contested the allegation that execution is complete and said that the plaintiffs are in the premises.

In response Mr. Kibara for the first defendant submitted that there is nothing to be stayed as the plaintiffs have all been evicted from the premises. He said the plaintiffs had upto 16<sup>th</sup> January to vacate and when they did not the second defendant evicted them on 25<sup>th</sup> January 2006. He further submitted that Order 49 Rule 3A applies to the filing of pleadings and not to things like the deadline that was given in this case.

Mr. Kibara further submitted that as at the end of January 2006 the plaintiff owe the first defendant a sum of Sh. 3,107,700/=. They have also not offered any security for the due performance of the decree. The amount the plaintiffs have deposited related to previous arrears. If stay is granted, he said, his client will suffer irreparably.

I have considered the averments in the supporting and replying affidavits as well as these rival submissions. I agree with Mr. Kenzi that as was stated by the Court of Appeal in **Rhoda Mukuma – Vs – John Abwoga, Civil Application No. NAI 95 of 1987** when a party is exercising his undoubted right of appeal the court ought to see that the appeal is not rendered nugatory. What would render the appeal nugatory is substantial loss which is the cornerstone in both the High Court and the Court of Appeal in applications for stay. If the applicant is likely to suffer substantial loss then the court should preserve the status quo.

While bearing in mind the fact that the applicants appeal should not be rendered nugatory the court should never lose sight of the fact that the respondent in an application for stay has also rights to be secured.

That is the purpose of Order 41 Rule 4 (2) (b) requiring the applicant to furnish security for the due performance of the decree in event the appeal is dismissed.

On the basis of these principles and without going into the other issues raised in this application the order that I find fair to both parties is that the execution of the decree herein be and is hereby stayed until the plaintiffs intended appeal to the Court of Appeal is heard and determined on the following terms:-

- 1. That the plaintiffs shall each deposit within 30 days the outstanding mesne profits of Sh. 5,000/= with effect from 2<sup>nd</sup> June 2000 to 30<sup>th</sup> January 2006 in an interest bearing account in the name of the Advocates for the parties.**
- 2. That the plaintiffs shall each thereafter deposit into the same account a sum of Sh. 5,000/= per month from 28<sup>th</sup> February 2006 until their appeals are heard and determined.**
- 3. That in default of payment of either of these amounts this application shall stand dismissed with costs to the first defendant.**

Order accordingly.

DATED and delivered this 3<sup>rd</sup> day of February 2006.

**D. K. MARAGA**

**JUDGE**