



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 600 OF 2003**

**SAMOW EDIN OSMAN.....2ND PLAINTIFF/APPLICANT**

**VERSUS**

**PETER MWANGI MBUTHIA )**

**NAFTALI RUTHI KINYUA ).....DEFENDANTS/RESPONDENTS**

**RULING**

Earlier on the Plaintiff had applied to this Court by Notice of Motion dated 30th September, 2003 and filed on 14th October, 2003. This application was heard, and the Ruling delivered on 19th December, 2003. The Ruling was the basis of a Decree extracted by the Deputy Registrar on 19th January, 2004, and which carries the following Orders:

1. That the Defendants do immediately deliver vacant possession of L.R. No. 36/111/218 Section III, Eastleigh, Nairobi to the Plaintiff,
2. That the Defendants do pay mesne profits for the period they have remained in occupation contrary to the demands of the plaintiff, from 25th March, 2003 until the date of delivery of vacant possession at the rate of Kshs.150,000/= per month with interest thereon at Court rate, unless they agree on different amounts with the Plaintiff or unless a proper application is made regarding these amounts and a different Order is given by the Court.

On 23rd December, 2003 the Defendants filed a Chamber Summons application seeking a stay of execution of the Ruling of the Court aforementioned. This Court granted a stay of execution for only 14 days. The Defendants have since then filed a Notice of Appeal and appeared in Court on 22nd January, 2004 with a Chamber Summons application praying:

“That this Honourable Court do order stay of execution pending the Hearing of (an) appeal to the Court of Appeal.” Mr. Wandaka for the first Defendant/Applicant stated as grounds for the application:

- (a) the fact that the Defendants intended to appeal to the Court of Appeal, and that the Notice of Appeal had been filed on the very day the Ruling had been given, on 19th December, 2003;
- (b) the claim that there was a risk of loss of the suit premises if the Defendants parted with possession;
- (c) other grounds contained in the affidavit of Peter Mwangi Mbutia sworn on 23rd December, 2003 and filed on the same date.

The deponent, Peter Mwangi Mbutia, states that he is a Defendant/Appellant in this matter; that he had been one of the registered proprietors of the suit premises, namely L.R. No. 36/111/218 located at Eastleigh in Nairobi; that he stands to be evicted and dispossessed of the suit premises unless the Plaintiff/Respondent and his agents are restrained by Order of the Court; that there is a likelihood of the Plaintiff/Respondent further transferring the suit premises to third parties; that the Plaintiff/Respondent had colluded with the Kenya Commercial Bank to facilitate the purchase of the suit premises by the Plaintiff/Respondent.

The foregoing are the pleaded grounds proffered by the Defendants/Applicants in their prayer for stay of execution of the Ruling of 19th December, 2003.

The grounds advanced by counsel call for scrutiny, and the outcome of the exercise should point clearly in what direction the Ruling should go.

The fact that the Defendants/Applicants promptly filed a Notice of Appeal and secured copies of the Ruling and Proceedings is put forward to sustain the submission that there is real seriousness in seeking the intervention of the Court of Appeal. What is not exactly clear is how this factor should weigh in the determination of the rights of the parties. In the Ruling of 19th December, 2003, all the relevant considerations were taken into account, and the matter was determined in favour of the Plaintiff/Respondent. Even though Mr. Wandaka for the first Defendant/Applicant attempted to highlight what he saw as weaknesses in that Ruling, I was not convinced that the Ruling was not as right as it could have been and that the Plaintiff/Respondent's well-earned rights should not be given prompt realisation by law. I thus indicated to counsel that there was but one correct path to questioning the Ruling, namely an appeal in the Court of Appeal.

At this moment, I have no evidence that, apart from filing the Notice of Appeal and securing the proceedings of the last hearing, the Defendants/Applicants have done anything to prosecute their appeal in the Court of Appeal with the greatest possible expedition; and it could very well be that an attempt will be made to bring about a dilatory status quo in which the judgement-creditor, in effect, shares his rights with the judgement-debtor, because the former is prevented from possessing and managing his property while the latter continues to reap benefits of ownership which are otherwise due only to the former. No impression was given, on behalf of the Defendants/Applicants, of the time-frame within which their appeal was likely to be heard and determined.

Counsel for the first Defendant/Applicant submits that if a stay against the Orders of 19th December, 2003 is not granted, then the Applicant stands to be evicted and dispossessed of the land in dispute. It has to be accepted that this prayer is diametrically opposed to the uncontested rights of ownership which the Plaintiff is claiming. Quite clearly, if the Plaintiff's legal rights are recognised by law – and this is precisely what was held in the Ruling of 19th December, 2003 – then they cannot be compromised just because the Defendants apprehend that they will be dispossessed; the right course for the Defendants would be to seek redress against someone other than the Plaintiff, and such redress must sound in damages and damages alone.

It follows that the Defendant's apprehension that the Plaintiff will transfer title to third parties is not a concern that, strictly, should be the preoccupation of the legal process; because ownership travels together with the power to alienate.

In their boundless concern for their own interests in the suit premises, the Defendants are still asserting that the Plaintiff, in becoming the legal owner of the suit premises, had colluded with the Kenya Commercial Bank over the exercise of the statutory power of sale by auction. This averment would have no relevance, given the clear wording of the Ruling of 19th December, 2003 and it is incomprehensible why counsel keeps returning to this allegation.

Mr. Wandaka caps his submission with an impassioned plea that "this application be granted unconditionally." This plea, clearly, has no legal basis. To grant the Applicant's prayer, and grant it unconditionally, would amount to a disrespect for the law which, as indicated in the Ruling of 19th

December, 2003, is unequivocal as to the sanctity of the Plaintiff/Respondent's title over the suit premises. Mr. Wena for the second Defendant/Applicant grounds his plea for stay of execution on the assertions that the second Defendant lives and does business on the suit premises, and that much personal and family suffering would follow if eviction Orders were issued. Mr. Wena claims that such suffering as the second Defendant stands to undergo cannot be compensated in damages.

Mr. Wena drew the Court's attention to the case of JOSEPH KINORU KAHONGE v. BARCLAYS BANK OF KENYA LTD. AND ANOTHER, Civil Application No. Nai 18 of 2001, in which the Court of Appeal thus said, in relation to land rights where stay of execution is sought:

“Regarding the second limb of the application, namely, whether unless we grant the injunction prayed for the Applicant's intended appeal if successful, will be rendered nugatory, we say this. The property due to be auctioned is land. In this country issues involving rights in land are sensitive. So if the applicant were to lose his aforesaid property and he eventually succeeds in his intended appeal his success in the appeal will be futile, as damages might not fully compensate him for the loss.”

Mr. Wena was, in effect, inviting the Court to take into account sentimental factors, in deciding on the question of stay of execution of Orders that stand in favour of the Plaintiff. As it is clearly stated in the Ruling of 19th December, 2003 that the Defendants' best possible remedy is damages, the principle encapsulated in the passage from the Court of Appeal's Judgement does not fall on all fours with the circumstances of the present application.

Counsel for the Plaintiff made the elemental point that the Plaintiff is the lawful owner of the suit premises, after acquiring ownership by public auction conducted in pursuance of the statutory power of sale of the Kenya Commercial Bank. He observed that the Defendants had appeared to have recognised this legal position, as the only time the Defendants came seeking restraints on the Plaintiff, is when the Plaintiff claimed possession of the suit premises. Counsel submitted that, should a stay of execution be granted, the Plaintiff who has made substantial investment in the suit premises, would suffer considerable loss. Counsel cited the case of MOMIN CORPORATION (U) LTD. v. SHAUKATALI H. JIWANI (1964) 244 to support the proposition that a party in a position such as that in which the Plaintiff/Respondent is, will be entitled to file suit for the recovery of the suit premises. Counsel submitted that no appeal can, in circumstances such as the present ones, operate as a stay of execution of Court Orders except for sufficient cause. He argued that no such sufficient cause had been shown, and that the rights of the Defendants lay elsewhere; and he cited the case of VISHRAM RAVJI HALAI & ANOTHER v. THORNTON & TURPIN LTD, Civil Application No. Nai. 15 of 1990, in support of the argument.

The Court of Appeal there said (P.2):

“Before the Superior Court can exercise its discretion in favour of an Applicant for a stay of execution, the Applicant must first establish a sufficient cause.”

Counsel argued that proof of “sufficient cause”, in this context, required a demonstration that the Ruling or Judgement in question stood good chances of changing on appeal; and that the Applicant was ready to give such security as may be specified by the Court; and that even when all this is fulfilled the Court had an open discretion to determine the question.

Counsel for the Plaintiff/Respondent called for the application to be disallowed, firstly as the Defendants could be compensated in damages; secondly as the Defendants had no rights to remain in occupation of the suit premises; thirdly as the statutory power of sale, which was the basis of the auction of suit premises, would be defeated if a stay of execution was granted; fourthly as there was no evidence before the Court that any business was carried out at the suit premises. This Ruling is to be seen in the light of the principles of law set out in the Ruling of 19th December, 2003. I have no doubts at all that the recognised owner of the suit premises is the Plaintiff, and consequently it follows that the Plaintiff/Respondent has the right to use his property as he deems fit. There is no basis in law for calling

upon the Plaintiff to limit his enjoyment of his own property, leaving some room for the Defendants to satisfy any particular sensitivity or practical need attached to real property as such.

In principle therefore, I would have been most reluctant to grant the Defendants a stay of execution of the Orders made in the Ruling of 19th December, 2003.

However, only for the purpose of allowing the Defendants a decent-time frame for easing themselves out of the suit premises, I will grant a limited stay, though on clear conditions that shall be complied with.

I do make the following Orders:

1. With regard to prayer No. 2 of the Defendants' Chamber Summons application of 23rd December, 2003, I grant a stay of execution of the Orders of 19th December, 2003 for 30 days.
2. As a condition for this grant of stay, the Defendants shall, within 15 days pay all the mesne profits accrued between 25th March, 2003 and the date of this Ruling, on the terms specified in the Order of 19th December, 2003 into an interest-bearing account with the Plaintiff, in the joint names of his Advocate and that of counsel for the first Applicant.
3. Failure to comply with the condition specified in Order No. 2 above shall render the Defendants' application null and void.
4. Subject to Orders No. 2 and 3 above, the costs of this application shall be in the intended appeal. Should there be no appeal, then the costs of this application shall be borne by the Defendants/Applicants.

**DATED and DELIVERED at Nairobi this 6th day of February, 2004.**

**J. B. OJWANG**

**Ag. JUDGE**

**Coram: Ojwang, Ag. J.**

**Court clerk: Mwangi**

**For the Defendants/Applicants: Mr. Wandaka, instructed by M/s**

**Kinuthia Wandaka & Co. Advocates; Mr. Njiru, instructed by M/s**

**Njiru Boniface & Co. Advocates; Mr. Wena, instructed by M/s P.W.**

**Wena & Co. Advocates**

**For the Plaintiff/Respondent: Mr. Hassan, instructed by M/s**

**Ahmednasir, Abdikadir & Co. Advocates.**