

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 71 OF 2002

NAKURU PACKERS LIMITED.....PLAINTIFF

VERSUS

MONICA NYAMBURA WATITU.....DEFENDANT

RULING

The applicant filed an application by way of a Notice of Motion dated 15th September, 2004 brought under Section 3A of the Civil Procedure Act asking the court to order that the status quo prior to the issue of the eviction order be maintained and that she be restored to the suit property and the properties seized from her be returned. She also prayed that the eviction order which was issued herein be set aside.

The applicant deponed in her affidavit in support of the application that on 14th September, 2004 while she was at her home some people entered her house violently and they showed her a copy of an eviction order. Her counsel, Mr. Kahiga, told the court that the applicant was evicted from the suit premises and some of her things were damaged. He told the court that there was an order of stay which was granted on 1/12/2003 and an application for approval of security that was ordered by the court was coming up for hearing on 25/10/2004. Counsel lamented that the eviction order was obtained contrary to the provisions of Order 20 Rule 7 of the Civil Procedure Rules.

The application was argued ex parte as the respondent's advocate did not attend court nor file any replying affidavit despite the fact that they had been served with the application and a hearing notice.

According to this court's ruling of 1/12/2003 the applicant was granted stay of execution of the order dated 29th September, 2003 on condition that she will ***“provide within thirty (30) days from the date hereof security in the sum of Kshs.3,500,000/- . Such security shall be by way of a bank guarantee or such o ther form as shall be acceptable to the respondent.”***

The applicant chose to provide the security by way of two title deeds for two properties known as ***Nyandarua/Melangine/2310 and Nyandarua/Melangine 2311*** but that form of security was not acceptable to the respondent's advocate. As a result, on 16th March, 2004 the applicant filed an application seeking enlargement of the time within which she was required to furnish the security and also seeking to have the court approve her proposed security as aforesaid. It is this application that is listed down for hearing on 25/10/2004. The applicant's advocates took that hearing date on 8/7/2004 despite the fact that they had filed the application much earlier.

They were well aware that the time granted by the court for providing the required security had lapsed and should therefore have moved to file the application much earlier and taken an early hearing date for the same. At the time when the applicant was being evicted out of the suit premises, there was no valid order of stay of execution due to the applicant's non compliance with the conditions of the ruling delivered on 1/12/2003.

Mr. Kahiga submitted that the eviction order was not issued procedurally since no decree had been obtained. According to the plaint filed on 13th March, 2002, there were two main prayers. One was for vacant possession of the suit premises and the other for damages for trespass at the rate of Kshs.3,200/- per month with effect from January 1996 until possession was delivered. Then 25th October, 2002 the respondent filed an application by way of Notice of Motion seeking vacant possession of the suit premises within 14 days of the court's decision and in default an eviction order to issue against the defendant. That application was heard by my brother Justice Visram and he granted the prayers therein. It

is against those orders that stay of execution was sought and as earlier stated, conditional stay was granted but the applicant failed to comply with the terms thereof.

In my view therefore, the eviction order was lawfully issued. A decree could only issue after the finalisation of the suit. The eviction order having been executed, this court is functus officio. I therefore dismiss the applicant's application dated 15th September, 2004. As the respondent's advocate neither attended court nor filed any documents to oppose the said application, there will be no order as to costs.

DATED at Nakuru this 30th day of September, 2004.

DANIEL MUSINGA

AG. JUDGE

30/9/2004