

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 189 OF 2003

FARIDA MOHAMMED.....1ST APPELLANT

PURITY MUHORIA.....2ND APPELLANT

VERSUS

EUNICE NJERI KANYARATI.....RESPONDENT

RULING

This is an application made by the Appellants Farida Mohammed and Purity Muhoria under the provisions of **Order XLI Rule 4 of the Civil Procedure Rules** for orders that there be a stay of execution of the judgment and decree in **Nakuru Rent Restriction Tribunal Case No. 35 of 2002** pending the hearing and determination of the Appellant's Appeal filed herein against the ruling and order of the said Tribunal dated the 12th November 2003. The grounds upon which the said application is based are that the Appellants would likely be evicted from **Plot No. 3-523 Nakuru Municipality** (*being the suit premises*) were the orders of stay refused. Further, the Appellants contend that the Appeal that they have filed has a high chance of success and further that they would be prepared to abide by such reasonable terms and conditions as to security for the due performance of the decree.

The Applicants have further contended that they would suffer substantial and irredeemable loss should stay not be granted. They have further stated that they have brought the Application before Court without undue delay. The Application was supported by the annexed affidavit of Purity Muhoria. The Application is opposed. The Respondent has filed a replying affidavit and a further affidavit in opposition to the Appellants application.

At the hearing of the application, Mr Gai Learned Counsel for the Appellants submitted that the reason why the Respondent had obtained orders to seek the eviction of the Appellants from the said premises is because, the Respondent wanted to reside in the said premises herself. The Appellants, through Counsel, have further argued that they have resided in the said premises for over twenty years. The Appellants were of the view that the Respondent had not been candid to them. It was their submission they were apprehensive that the Respondent wanted to transfer the said premises to a third party. The Appellants submitted that they were ready to abide by any reasonable terms that this Court may impose. The Appellants further submitted that they were upto date with the payment of rent although of late the Respondent had refused to accept rent from them. The Appellants submitted that they have been negotiating with the Respondent to be given adequate time to look for alternative premises, otherwise, the Appellants pray that the Application be granted.

Miss Njoroge, Learned Counsel for the Respondent opposed the Application. She denied that there were any out of Court negotiations concerning the matters in controversy. She further denied the Appellants submission that the rent had been paid upto date. The Respondent argued that the Appellants had been given six months notice by the Tribunal to look for alternative premises and vacate the said premises. The Application did not abide by this notice period. When the six months notice expired the Appellants went before the Tribunal and sought to review the order giving the Appellants six months to vacate the said premises. The order for review was rejected hence the Appeal which the Appellants had filed herein. The Respondent submitted that the Appellants had always indicated that they were willing to give vacant possession of the said premises, if only they could be given time. The Respondent submitted that the Appellants had not established a case as to entitle them to the orders of stay of execution sought. The Respondent submitted that the Appeal filed by the Appellants was filed in bad faith. The Respondent

further submitted that the Application was meant to delay the Respondent from moving into the premises which she intends to reside in. The Respondent further submitted that the fact that the Appellants had stayed in the premises for over twenty years is no reason why they should not vacate the premises if the owner of the premises required the same for her occupation. The Respondent submitted that the Application for stay should be dismissed with costs.

In response, Mr Gai for the Appellants submitted that the Appellants had every right to Appeal against a decision that they felt aggrieved or dissatisfied. Mr Gai reiterated that the Appellants should be granted stay of execution so that they may be able to canvass their Appeal.

I have read the pleadings filed in Court in respect of this Application. I have also considered the rival arguments made by Counsel for the Appellants and Counsel for the Respondent. The issue for determination by this Court is whether the Appellants have established a case as to entitle them to the orders of stay of execution prayed. I have read the proceedings of the Tribunal which have been annexed to the further affidavit sworn by the Respondent and marked ENK(a). The Appellants herein filed a complaint with the Tribunal when the Respondent served them with a notice to vacate the said leased premises. When the complaint came up for hearing the 1st Appellant submitted on the 4th of March 2003 that they would be ready to give vacant possession of the said premises if they would be given between eight months and one year to vacate the said residential houses. They were given six months to vacate the said premises by the Tribunal. On the expiry of the six months, the Appellants made an application for the Tribunal to review its orders granting them six months to vacate the said premises. The said Application was dismissed by the Tribunal. The tribunal noted that the said Application was brought in bad faith, scandalous, mischievous, and an abuse of the due process of the Court. It is from the said decision that the Appellants filed the Appeal herein. Contemporaneous with file the said Appeal, the Appellants filed an application for stay of execution. They obtained temporary stay of execution. For one reason or the other the Application was not heard until the 20th of September 2004.

I have anxiously considered the matters in issue in this application. I could not help but observe that the Appellants conduct in the entire proceedings is oppressive to the Respondent. The Appellants have sought to use every tactic in the book to frustrate the Respondent from taking possession of her residential premises which she has indicated that she intends to occupy. While the Appellants were within their rights to utilise all possible avenues availed to them by the law, it was not open to them to abuse the due process of the Court to achieve what they set out to do in the first place i.e. to remain indefinitely in the Respondent's premises. The Appellants indicated on the 4th of March 2003 that they were prepared to vacate the said premises if they would be given between eight and twelve months to seek alternative premises. If the Tribunal were to accede to their request, the Appellants would, by their own admission, have vacated the said premises on or before 4th of March 2004. The Tribunal gave the Appellants six months to vacate the said premises.

The Appellants did not Appeal against the said decision of the Tribunal giving them six months notice to vacate the said premises. It is only after the six months had expired that the Appellants purported to move the said Tribunal to review its orders of the 4th of March 2003. The said Application for review, was in my view, rightly rejected. The Appellants cannot approbate and reprobate. They cannot on the one hand say that they needed time to vacate the said premises and on the other hand seek to remain indefinitely in the said premises. The Appellants have clearly shown that they have no regard whatsoever to fair play when it comes to litigation. They would now like this Court to endorse their flagrant abuse of the process of the Court by granting them stay of execution to stay indefinitely in the said premises. I will not grant them their wish. The Appellants, by their own admission, ought to have vacated the said premises by the 4th of March 2004. They are still dilly-dallying at the said premises, gambling that this Court would disregard their conduct and grant them stay of execution. Unfortunately for them, this Court will not grant them their application for stay of execution. The Appellants have postponed the day of reckoning six months too far. They ought to have vacated the said premises, from their own admission, at least six months ago.

I do find that the Appellants application for stay of execution lacks merit and the Application is therefore dismissed with costs. The Appellants should give vacant possession to the Respondent

immediately as ordered by the Tribunal.

DATED at NAKURU this 28th day of September, 2004.

L. KIMARU

AG. JUDGE