



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO. 2115 OF 1999**

**JOSEPH MBURU KIMUKU ..... PLAINTIFF**

**VERSUS**

**GRACE WANJIRU NJIHIA ..... DEFENDANT**

**RULING**

This application by notice of motion, dated and filed in court on 19th November, 2001 seeks an order of stay of execution of the decree and all consequential orders and steps pending the hearing and determination of the intended appeal.

The grounds upon which it is based are that the applicant is dissatisfied with the ruling of this court delivered on 15th November, 2001, that on the same date or soon after the court ruling the plaintiff destroyed fences and said he would go back to demolish the applicants' house, that the applicant has a good appeal which has high chances of success; that if eviction is allowed to go on the applicant and her children and their families will be thrown out in the cold and the appeal will be rendered nugatory and that the court has unlimited discretion to give stay of execution and the application has been made without undue delay.

The supporting affidavit filed in court together with the application is in similar manner as the grounds save to add that at the time the court ruling was made the applicant was/is the registered proprietor of the suit land and that such title had not been cancelled.

In court on 29th November, 2001 counsel for both parties made their respective submissions with counsel for the applicant relying mainly on the grounds set out on the face of the application and the facts deponed to in the affidavit.

Counsel for the respondent submitted that submissions made on the application were similar to those made on the application to set aside judgement.

He argued that the applicants claim in the suit land was based on deceased Wamaitha's interest therein but that the latter had only a life interest, hence there was no sustainable appeal since the applicant cannot claim what Wamaitha did not have. He prayed for the dismissal of the appeal.

Though counsel for the applicant stated that he had initiated the appeal process, there is nothing on this file to confirm this. And in particular, there is no draft memo of appeal to demonstrate a good appeal with high chances of success.

My ruling dated 15th November, 2001 is clear and/or exhaustive and unless the applicant demonstrates to my satisfaction the probability of success of the intended appeal, which has not been done here, then there is no sufficient case made out for the issue of an order of stay of execution as sought herein.

That the applicants' title to the suit land remains intact is neither here nor there given the weight attached to the ruling of the late Gachuhi, J., as he was then, dated 19th January, 1984 and issued on 12th March, 1984 in High Court Civil Case No. 669 of 1978 over the interest of the deceased Wamaitha in the suit land.

It is not enough to talk about the decision of the appeal court being rendered nugatory in the event of

the success of the appeal without considering the other side of the coin particularly in a case like ours where the intended appellant fails to demonstrate the alleged high chances of success.

I dismiss this application with costs.

Delivered this 21st day of January, 2002.

D.K.S AGANYANYA

JUDGE