



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 584 OF 2014**

JUSTUS MATHUMBI.....1<sup>ST</sup> PETITIONER  
TIMOTHY WANYANGA.....2<sup>ND</sup> PETITIONER  
MARY EMURIA.....3<sup>RD</sup> PETITIONER  
DAVID M. MUTISYA.....4<sup>TH</sup> PETITIONER  
GILBERT MEME.....5<sup>TH</sup> PETITIONER  
ROSEMARY A. ABAYO.....6<sup>TH</sup> PETITIONER  
DAVID ODHIAMBO.....7<sup>TH</sup> PETITIONER  
JUDITH A. BICKO.....8<sup>TH</sup> PETITIONER  
MICHAEL K. MWANGI.....9<sup>TH</sup> PETITIONER  
GERTRUDE ANGOTE.....10<sup>TH</sup> PETITIONER

( Suing on their own behalf and on behalf of 327 occupiers/tenants of Starehe and Shauri Moyo Government Estates, Nairobi and their 200 school going children)

-AND -

THE CABINET SECRETARY, MINISTRY OF LAND

HOUSING AND URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT

THE INSPECTOR GENERAL,

THE NATIONAL POLICE SERVICE.....2<sup>ND</sup> RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

AND

KATIBA INSTITUTE.....AMICUS CURIAE

**RULING**

**BACKGROUND**

1. The applicants herein filed this constitutional petition in which they sought inter alia; orders quashing the vacation notices issued to them

by the 1<sup>st</sup> respondent, a declaration that the demolition of the 1<sup>st</sup> petitioner's house is a violation of his right to inherent dignity and accessible and adequate housing, an order restraining the 2<sup>nd</sup> respondent from overseeing the demolition, eviction termination of allocated houses, transfers or in any other way interfering with the suit premises, general and exemplary damages. In a judgment delivered on 28<sup>th</sup> May 2018, this court (differently constituted) dismissed the petitioners' petition thereby precipitating the filing of a Notice of Appeal (annexure "JM-2") and the instant application.

### Application

2. This ruling is in respect to the application dated 30<sup>th</sup> May 2018 brought under Order 42 Rule 6 of the Civil Procedure Rules. In the said application, the applicants' main prayer is for orders of stay of execution of the judgment and orders issued in this petition delivered on the 28<sup>th</sup> May 2018 by Justice Mativo pending the hearing and determination of the intended Appeal.

3. The applicants' case is that they intend to appeal against the said judgment of Justice Mativo but are apprehensive that the respondent will proceed to evict them to their detriment thereby causing them irreparable loss and further rendering the intended appeal nugatory.

4. The application is supported by the affidavit of 7<sup>th</sup> applicant **David Odhiambo** who avers that the impugned judgment did not contain any supervisory orders providing the framework or timelines within which the applicants should vacate the suit premises thereby exposing the applicants to violent evictions.

5. He further states that even before the judgment was delivered, the 1<sup>st</sup> respondent issued notices to the applicants to vacate the suit premises as seen in a notice marked "JM5" attached to his affidavit. He also states that an eviction will render more than 327 families from Starehe and Shauri Moyo Estates homeless.

6. It is the applicants' case that an eviction will adversely affect the school going children, the elderly and the disabled who live in the affected premises thereby causing them substantial loss.

7. At the hearing of the application, **Mr Mwariri**, learned counsel for the applicants submitted that the applicants are low cadre civil servants who have 200 school going children and that the likely eviction, following the impugned judgment, will affect them adversely. Counsel relied on the decision in the case of **Bakari Shaban & 39 Others vs Said Bin Rashid Khamis Elmandri [2016] eKLR** wherein the court stated that an eviction may cause substantial loss. He added that the applicants have a constitutional right of appeal which they should not be denied. He relied on the case of **Bhutt vs Rent Restriction Tribunal [1982] KLR 417** where the court held that exercise of discretion should be in such a way that the constitutional right of appeal is not prevented.

### Respondents' case

8. The respondents opposed the application through the Grounds of Opposition dated 14<sup>th</sup> June 2018 in which they listed the following grounds:

*1. That the application does not conform to the requirements of Order 42 Rule 6 under which it is brought.*

*2. That the respondent is entitled to the fruits of the judgment.*

*3. That the petition is speculative and full of fear and only raises hypothetical questions.*

9. At the hearing of the application, **Mr. Sekwe**, learned counsel for the respondents submitted that the relationship between the applicants and the respondents is that of a landlord and tenants and that notices had been issued to the respondents to vacate the suit premises the last notice being the one dated 31<sup>st</sup> May 2018. He argued that the applicants had not proved that the law imposes an obligation on the respondents to provide housing to the applicants as all public servants are paid house allowance which they can use to secure alternative housing,

10. He further submitted that the respondents had, since the year 2014, embarked on projects geared towards providing affordable housing to its citizens with full involvements of the applicants in line with Article 42 and 43 of the Constitution and that the applicants' fears of violent evictions were unfounded. Counsel submitted that the allegations that school going children, the elderly and the disabled would be affected by the evictions were not proved. It was the respondents' case that allowing the instant application would cause substantial loss to the respondents as the housing project comprising 10,000 units that the government had initiated in 2014 had stalled yet the project was intended to benefit even the respondents. The respondents maintained that the wider public interest would be served if the application for stay of execution was rejected.

### Determination

11. I have considered the instant application, the grounds of opposition and the rival arguments made by the parties together with the authorities that they cited.

12. The main issue for determination is whether the applicants have made out a case to warrant the granting of orders of stay of execution pending appeal. The instant application invokes the discretionary powers of the court and is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by Order 42 Rule 6(1) as follows:

“No order for stay of execution shall be made under sub rule (1) unless–

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

13. In the case of **Butt v Rent Restriction Tribunal (supra)** the Court of Appeal gave guidance on how a court should exercise discretion and held that:

*1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.*

*3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*

*4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

*5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

14. The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal. Applying the above principles to the instant case, I will now turn to consider if the present application fulfills the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules.

#### **Delay**

15. The first condition to consider is whether the application was filed without unreasonable delay, I note that the impugned judgment was delivered on 28<sup>th</sup> May 2018 and the instant application filed on 30<sup>th</sup> May 2018 barely 2 days after the said judgment. It is my finding that the application was filed timeously and therefore meets the threshold of having been filed without unreasonable delay.

#### **Substantial loss**

16. In determining whether or not the applicant will suffer substantial loss unless the stay of execution sought is granted, the court must at the same time bear in mind the fact that the respondent in whose favour the impugned judgment was made, is equally entitled to the fruits of his judgment. In this regard therefore, the court is under an obligation to balance the interests of the applicant to his right of appeal and the right of the respondent, to enjoy the fruits of his judgment. The burden of proving that substantial loss may occur if the stay is not granted rests on the applicant.

17. In the case of *Machira t/a Machira & co. Advocates East Africa Standard (No.2) (2002) KLR 63* that;

*“...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.*

18. In the instant case, it was not disputed that the applicants are tenants in the respondents’ premises situate at Starehe and Shauri Moyo Government Estates. The applicants had been served with notices to vacate the said premises thereby precipitating the instant petition. As I have already stated in this ruling, this court found the applicants’ petition to be unmerited and dismissed it thereby precipitating the Notice of Appeal and the instant application for stay pending appeal. The applicants’ claim is that they stand to suffer loss if the evictions are allowed to continue because they have school going children and disabled persons living in the suit premises who would be affected by the evictions. I note that apart from merely claiming that there was such category of people in the suit premises, no material was placed before this court to show that the school going children and disabled persons actually resided in the said premises. Moreover, even assuming that the said group actually existed, that would still not form sufficient ground for issuance of the orders of stay because the applicants had already been served with notices to vacate the suit premises which means that they have adequate notice and opportunity to secure alternative accommodation for themselves and their families. In the case of **Andrew Kuria Njuguna vs. Rose Kuria (Nairobi Civil Case 224 of 2001**, (unreported) as follows;

***“Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay”.***

19. The respondents’ case, which was not disputed, was that they require the applicants to vacate the suit premises, albeit on a temporary basis, so as to enable them put up a government housing project comprising 10,000 housing units which project would benefit the applicants and the wider public. According to the respondents, it is the general public that stands to suffer irreparably if the project is not completed as it has stalled since its launch in 2014 following the applicants’ refusal to vacate the premises so as to give room for the construction work.

20. My finding is that the applicants did not prove that they stand to suffer substantial loss if the stay is not granted. The applicants did not demonstrate that they are not able to secure alternative accommodation for themselves. It was not enough for the applicants to merely state that they had school going children and disabled persons in the suit premises and that substantial loss will result. They needed to prove specific details and particulars regarding the same. In the **Machira t/a Machira & Company Advocates** case (supra), the court observed that ***“...where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”***

21. I further find that the relationship between the applicants and the respondents is akin to the relationship between a landlord and a tenant which means that a tenant cannot stop a landlord from taking over his building and carrying out construction work thereon as long as the tenant is given adequate notice to vacate the premises.

22. For the above reasons, I am not persuaded that the applicants have satisfied the condition on substantial loss to be suffered if the stay pending appeal is not granted and I find no reason to venture into discussing the last condition for granting stay orders which is the order for security for costs.

23. The upshot is that applying the above principles and findings, I hereby disallow the application before me and dismiss it with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 8<sup>th</sup> day of November 2018.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr Sekwe for the respondents

Mr Ndolo holding brief for Mwariri for the applicant

Court Assistant - Kombo