



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. 425 OF 2012**

**SAMMY KANGAU KARUNGO.....1<sup>ST</sup> PLAINTIFF**

**LAWRENCE MACHARIA.....2<sup>ND</sup> PLAINTIFF**

**MARGARET AKUMU.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**JOSEPH GIKURUMI NDOTONO.....DEFENDANT**

**RULING**

Judgment in this matter was entered on **8<sup>th</sup> April 2014**, wherein the Court issued a permanent injunction restraining the Defendant from occupying or in any other way interfering with the parcel of land known as **L.R.[particulars withheld]** . The Court also ordered that the Defendant be evicted from the property within **30 days**. Following this judgment, the Defendant filed an application dated **7<sup>th</sup> May 2014** and sought stay of the orders therein. In granting the application for Stay of execution, the Court ordered that the Defendant does deposit security of the sum of **Kshs. 500,000/-** within **45 days** failing which the stay automatically lapses.

The Defendant has since defaulted in paying the security. Thus the Plaintiffs have filed an application dated **16<sup>th</sup> October 2014**, seeking an order that the Defendant be forcefully evicted from the property and that the **OCS Rwai/Kamulu Police Station**, be directed to supervise the eviction. The Plaintiffs aver that they risk losing their vested property rights as the Defendant continues to reside and privately use the same without complying with the Court Orders.

The Defendant filed a Replying Affidavit on **17<sup>th</sup> November 2014** wherein he deposed that he has been unable to fulfill the condition that he deposits **Kshs. 500,000/-** as he is jobless and cannot afford such an amount of money. The Defendant stated that he has filed an application for review of the said order which he urged the court to consider.

It appears as if this application prompted the Defendant to file an application for review of the conditional stay. I say so because this application was served upon the Defendant on **29<sup>th</sup> October 2014** when after the Defendant filed his response together with the application on **17<sup>th</sup> November 2014**. In the said application, the Defendant reiterates that he is unable to raise the amount being a Jua Kali worker and as a result, his chance of justice in the Court of Appeal has been hindered by the said order.

I have considered the response made by the Defendant to this application and I have no doubt that this Court has discretion to review an order such as the subject matter herein. Order 45 of the Civil Procedure Rules allows any person considering himself aggrieved by a decree or order to apply for review upon:

- i. *Discovery of new and important matter or evidence which was not within the Applicant's knowledge or could not be produced by him at the time when the decree was made;*
- ii. *On account of mistake or error apparent on the face of the record; or*
- iii. *Any other sufficient reason.*

Evidently, there is no new evidence or error on the face of the record which leaves the Defendant's request to be considered in terms of sufficient reason. It is to be remembered that the power of the Court to adjudicate over an application for review is discretionary which therefore calls for the Court to weigh the circumstances that are before it in determining such an application. Further, and more particularly in this application, the Court must balance the Plaintiffs' right to enjoy their Judgment with that of the Defendant's right to appeal.

The reason advanced by the Defendant is that he is a mere Jua Kali worker and has thus far been unable to raise the amount. However, the Defendant has portrayed a slack attitude towards the matter. I say so because the Defendant did not apply for review of the order either immediately after it was made or before the lapse of the **45 days**. It is quite evident that he was jolted into action upon being served of this application. Notably, **Order 45** requires that applications for review ought to be made without unreasonable delay. In that regard, I see no candidness in the Defendant's claim that he is unable to raise the security amount. There being no sufficient reason to review the terms of the security, the Plaintiffs' application dated **16<sup>th</sup> October 2014** is hereby allowed entirely with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered this 12<sup>th</sup> day of June 2015

**L.GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff's

.....For the Defendant

..... Court Clerk

**L.GACHERU**

**JUDGE**