



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 129 OF 2005**

**AMON CHEGE MUTUA.....PLAINTIFF/APPLICANT**

**VERSUS**

**1. JULIUS GATAMBIA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**2. AMOS KAGUAI NJOROGE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a decree issued and dated 10<sup>th</sup> May 2011, the court ordered that the defendants be given 90 days from the date of delivery of judgment to vacate the plaintiffs **Land Parcel No. Nyandarua/Kirima/713** in default whereof they would be evicted therefrom.

On the 24<sup>th</sup> November 2011 upon application, the defendants were, by court order issued by Hon. Justice RP.V. Wendo, J granted a temporary order of stay of execution restraining the plaintiff from evicting the defendants on condition that they deposited a sum of Kshs.100,000/= in court as **security for costs** pending hearing of the application interpartes. That sum was duly deposited in court on the 25<sup>th</sup> August 2011 as security for costs.

By his Ruling dated 3<sup>rd</sup> May 2012, Hon. Justice W. Ouko ( as he then was) gave the defendants an order of stay of execution pending the hearing and determination of the Intended appeal on condition that the defendants who were the applicant deposit into court security in the sum of Kshs.40,000/= within 30 days from the date of the ruling.

2 By an application dated 21<sup>st</sup> July 2015 the plaintiff sought that orders of eviction against the Defendants be issued on the grounds that the condition upon which stay of execution pending lodging and hearing of the intended appeal was granted, the deposit of Kshs.40,000/= into court as security were not met.

While arguing the application before me, Ms. Fatma Advocate for the defendants told the court that she had not been able to get or trace the defendants since 2012 to facilitate deposit of the Kshs.40,000/= as ordered. The court after considering the rival arguments granted the plaintiff leave to execute the decree of the court.

On the 26<sup>th</sup> June 2015 the defendants approached the court under a certificate of urgency and sought variation or discharge of its orders issued on the 10<sup>th</sup> May 2011 allowing the plaintiff to execute the decree pending hearing and determination of the application. An order of *status quo* was issued and orders of execution issued on the 23<sup>rd</sup> July 2015 were suspended to await hearing

of the application interpartes on the 30<sup>th</sup> November 2015.

3. The application dated 26<sup>th</sup> June 2015 by the Defendants sought orders that:

(1) The court be pleased to stay the orders arising from the judgment delivered on the 10<sup>th</sup> May 2011 and any other subsequent order issued on the 26<sup>th</sup> June 2015 pending hearing and determination of the intended appeal.

(2) That the court be pleased to exercise its jurisdiction and vary discharge and set aside its orders delivered on the 26<sup>th</sup> June 2015 and any other towards evicting the defendants from the suit land and stay orders of 3<sup>rd</sup> May 2012 be reinstated.

The grounds upon which the application is based are that an order of stay was granted by the court on condition that a sum of Kshs.100,000/= be deposited in court which was done as security. That upon hearing and determination of the intended appeal condition, a further condition was given that the applicants deposit a sum of Kshs.40,000/= as security for costs. It was submitted that having deposited Kshs.100,000/= in court, they had complied with the court orders, a fact the defendants Advocates state was not within their knowledge at the time execution orders were granted. The supporting affidavit sworn by Kipkoech B. Ngetich, Advocate reiterates the above and adds that the delay in filing the Intended Appeal has been occasioned by failure to obtain typed proceedings to date. The application was brought under **Order 42 Rule 6, Order 51 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act.**

4. Mr. Karanja Mbugua Advocate opposed the application on behalf of the Plaintiff who swore a replying Affidavit on the 26<sup>th</sup> October 2015. It is deponed that the order of court issued on the 25<sup>th</sup> August 2011 was issued pending hearing and determination of the application interpartes, and that since 10<sup>th</sup> May 2011 the defendant have not filed the Intended Appeal. He further avers that the sum of Kshs.100,000/= was deposited in court in compliance with the order issued on the 25<sup>th</sup> August 2011 only as security for costs pending hearing and determination of the application dated 24<sup>th</sup> August 2011 interpartes, and not a deposit for security pending hearing and determination of the intended appeal, which todate is yet to be filed.

It is further deponed that the order to deposit Kshs.40,000/= was clear, that it was for security, pending hearing and determination of the Intended Appeal. It was conditional that if it is not deposited within 30 days, the stay orders would lapse automatically.

5. I have heard both counsel on the application. Ms. Fatma Advocate for the applicant reiterated the contents in the supporting affidavit that the defendants having deposited the Kshs.100,000/= as ordered, they ought not deposit a further Kshs,40,000/= and even sought release to the defendants a sum of Kshs.60,000/= out of the Kshs.100,000/= deposited in court. It was her submission that the orders granting leave to the plaintiff to execute the decree were on account of none payment of the Kshs.40,000/= and since the said sum is paid, it ought to be set aside.

On why the Intended Appeal has not been filed, she stated that todate, no typed proceedings have been availed to the defendants, and that the appeal has high chances of successes.

6. Mr. Karanja Mbugua for the plaintiff submitted that failure by the applicant/defendant to comply with the court order renders the application incompetent. It was his submission that no good grounds were advanced to persuade setting aside of the orders of Justice W. Ouko (as he then was) to deposit the Kshs.40,000/= into court, that at the time the order was issued, the said Judge was alive to the earlier orders issued for the deposit of Kshs.100,000/= as security for costs. It was his submission that the Kshs.40,000/= ordered to be deposited was for security for the due performance of the decree pending the hearing of the intended appeal, a different consideration from the earlier order, and that issue of refund of Kshs.60,000/= was misplaced.

He stated that the defendants have been indolent since their application for proceedings by their letter dated 6<sup>th</sup> May 2011 in that they have not followed typing of the proceedings over four years ago, and that the application was made to further shut the plaintiff from enjoyment of his judgment fruits and is made in bad faith.

7. The court has considered the rival arguments. It is in dispute that since May 2011, the defendants have not followed up the court registry for the typed proceedings. No demonstration by either payment for the proceedings, or follow up letters to the Deputy Registrar was done.

It is also not in dispute that the defendants have to date not deposited the Kshs.40,000/= into court as a condition for stay of execution as ordered on the 3<sup>rd</sup> May 2012.

Going by the defendants submissions it is their contention that having paid Kshs.100,000/= ordered paid on the 24<sup>th</sup> November 2011, there was no requirement to pay the said Ksh,40,000/=.

A close scrutiny of the two orders may shed light on the purpose and import, and intention of the Honourable Judges while granting the said orders.

8. The order of Justice Wendo dated 24<sup>th</sup> November 2011 states, as extracted:

*“(b) That pending the hearing and determination of the applicant's application interpartes order of stay of execution do issue restraining the respondent by himself, servants from evicting the applicants from Land Parcel No. Nyandarua/Kirima 713 on condition that the applicant deposit Ksh.100,000/- in court as security for costs.”*

The order issued on the 3<sup>rd</sup> May 2012 by Judge W. Ouko was issued after hearing interpartes of the application referred to above and dated 24<sup>th</sup> November 2011 for stay of execution pending hearing and determination of the intended appeal.

It stated:

*“---For those reasons, there will be stay of execution pending the hearing an determination of the intended appeal on condition that the applicants deposit into court security in the sum of Kshs.40,000/= within 30 days from the date of this order.”*

9. In my considered view, the two orders were made in different circumstances and for different considerations. The application that prompted the issuance of the two orders was made by the defendants and was dated 24<sup>th</sup> November 2011, and made under **Order 42 Rule 6 (2) of The Civil Procedure Rules**, and sought the following prayers:

*(2) “That pending the hearing and determination of the applicants application interpartes order of stay of execution do issue restraining the respondent by himself, servants or agents from evicting the applicants from land Parcel No Nyandarua/Kirima 73. (emphasis mine).*

*(3) That pending the lodging, hearing and determination of the applicants intended Appeal, there be a stay of all orders arising from the judgment delivered on 10<sup>th</sup> May 2011.”*

Justice V. Wendoh heard the applicants on the their application Prayer 2 only, in the interim pending interpartes hearing of the said application. The orders the Judge granted were limited to and in respect of the application **pending interpartes** hearing as stated in the **Prayer No. 2**. It was complied with by the deposit of Kshs.100,000/= leading to the court hearing prayer **No. 3**. at interpartes stage.

My take on this is that had the defendants not complied by depositing the Kshs.100,000/= as ordered, the temporary order of stay of execution would have lapsed.

10. When Justice W. Ouko(as he then was) heard the application interpartes, he was aware and alive to the conditions given by his sister judge as a condition for hearing **Prayer No. 3**. Upon hearing the same, the court proceeded to grant the said prayer, but upon the condition to deposit Kshs.40,000/= into court pending **the lodging, hearing and determination of the intended appeal(emphasis mine)**.

It is clear that the two orders are different, and were to serve different purposes. I see no ambiguity at all.

Justice W. Ouko's order was to provide **SECURITY** for due performance of the decree pending lodging hearing and determination of the intended appeal whereas Justice Wendo's order to deposit Kshs.100,000/= was for purposes of providing security for costs.

#### **Order 42 Rule 6(2) of the Civil Procedure Rules**

**States:**

*(2) “No order for stay of execution shall be made under Subrule (1) unless*

*(a) -*

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

11. The order of court issued on the 3<sup>rd</sup> May 2012 was pursuant to the above provision which is different from an order to provide security for costs.

On the matter of the Intended Appeal, I find no reasonable grounds put forth as to why the applicants/defendants have not been able to obtain the proceedings to facilitate filing of the same since May 2011. It cannot be a good reason that proceedings are not typed to date. It behoves the applicant to take active action to pursue its request. This was not done and even after filing of the application, nothing has been shown to have been done. The only conclusion that this court can make is that the defendants/applicants have lost interest in the Intended Appeal. The plaintiff cannot be kept out of the fruits of his judgment indefinitely. Litigation has to come to an end for ends of Justice and fairness to all the parties to be done.

Having so found, it is this court's considered view that the applicants application dated 26<sup>th</sup> June 2015 lacks merit.

No sufficient reasons have been given to persuade the court to invoke its jurisdiction and discretion to vary, discharge or set aside any of the orders issued by the court subsequent to the Judgment and decree of the court in this case.

Consequently, the said application is dismissed with costs. The Respondent is at liberty to proceed with execution of the decree of the court issued on the 10<sup>th</sup> May 2011.

It is so ordered.

**Dated, signed and delivered in open court this 3<sup>rd</sup> day of December 2015**

**JANET MULWA**

**JUDGE**