



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO 1678 OF 2002**

**PETER NDIRANGU KINUTHIA.....PLAINTIFF**

**VERSUS**

**JEDIDAH WAMBUI KARANJA**

**MARTIN THIRIMBU KARANJA**

**(Both substituted for.....1<sup>ST</sup> DEFENDANT**

**(ORIGINAL 1<sup>ST</sup> DEFENDANT: MARY NJOKI KARANJA, now deceased)**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

**1.** On 18<sup>th</sup> December 2013 judgment was passed herein in favour of the Plaintiff against the Substituted 1<sup>st</sup> Defendants as follows -

(i) It was declared that the 1<sup>st</sup> Defendant wrongfully evicted the Plaintiff from his own land parcel L.R. No. Muguga/Gitaru/1705, and the 1<sup>st</sup> Defendant (and now the Substituted 1<sup>st</sup> Defendants) became a trespasser therein.

(ii) The Substituted 1<sup>st</sup> Defendants were ordered to vacate the Plaintiff's said parcel of land within fourteen (14) days from the date of delivery of the judgement and give the Plaintiff vacant possession thereof. In default they shall be forcibly evicted therefrom and the Plaintiff put in possession.

(iii) There shall be a permanent injunction to restrain the Substituted 1<sup>st</sup> Defendants from interfering with the Plaintiff's quiet possession of his said parcel of land.

(iii) The Plaintiff was awarded against the 1<sup>st</sup> Defendants general damages of KShs 800,000/00.

(v) The 1<sup>st</sup> Defendant's counterclaim was dismissed with costs.

(vi) The Plaintiff was awarded costs of his suit against the 1<sup>st</sup> Defendant.

A decree was subsequently issued.

2. The Substituted 1<sup>st</sup> Defendants have applied by an **application dated 16<sup>th</sup> January 2014** for stay of execution of the decree pending disposal of an intended appeal to the ***Court of Appeal***. Notice of Appeal was filed on 13<sup>th</sup> January 2014. The Substituted 1<sup>st</sup> Defendants are acting in person.

3. The only stated ground for the application is that the intended appeal will be rendered nugatory if execution is allowed to proceed before the appeal is heard and determined. There is a supporting affidavit sworn by Jedidah Wambui Karanja.

4. The Plaintiff has opposed the application by his **replying affidavit sworn and file don 27<sup>th</sup> January 2014**. The grounds of opposition emerging therefrom include –

(i) That the application is misconceived, untenable and amounts to an abuse of the process of the court.

(ii) That the application does not meet the threshold set by the law.

(iii) That the application does not state why the Plaintiff should be stopped from executing his decree.

(iv) That the application lacks merit and is intended only to delay justice in this case.

5. Learned counsel for the Plaintiff did not demonstrate how the application is “misconceived” or an “abuse” of the process of the court. And he could not: the application lawfully seeks stay of execution of decree pending appeal as provided for in the Rules. It is not misconceived nor an abuse of the process of the court. It must be determined upon its merits.

6. The First Substituted Defendant presented the application in person. I have considered her submissions. I have also considered the submissions of the learned counsel for the Plaintiff.

7. This court has jurisdiction to order stay of execution “for sufficient cause”. **See Order 42, rule 6(1) of the Civil Procedure Rules, 2010 (the Rules)**. But under **sub-rule (2)** of that rule, no order for stay of execution may be made unless –

(i) the application therefor has been made without unreasonable delay;

(ii) the court is satisfied that substantial loss may result to the applicant unless the order is made; and

(iii) the applicant gives such security as the court may order for the due performance of such decree or order as may ultimately be binding on him.

8. As for delay in applying, none has been pleaded, and I find none.

9. Regarding substantial loss, all that is stated in the supporting affidavit is that no prejudice will be occasioned if the application is allowed. In her submission the First Substituted Defendant stated that unless stay is granted the 1<sup>st</sup> Defendants would suffer irreparable loss as the appeal would be rendered nugatory. She did not demonstrate how the appeal would be rendered nugatory. She did not attach to her application any draft memorandum of appeal, but she explained this by the fact that they have not been supplied with copies of the proceedings, though she has a copy of the judgment.

10. Learned counsel for the Plaintiff submitted that neither sufficient cause nor substantial loss has been demonstrated to warrant the stay sought. She pointed out that the plea that the decretal property belongs to the 1<sup>st</sup> Defendants is not such demonstration as the court in its judgment has held otherwise. She further submitted that the Plaintiff had been unlawfully evicted from his own land and the court found that a terrible injustice had been committed against him by the eviction. She pleaded that the injustice should not be allowed to continue any longer by granting a stay of execution.

11. Learned counsel also pointed out that no security had been offered at all for the stay of execution sought.

12. Regarding that issue of security the First Substituted Defendant replied that she found no reason at all why she should furnish security “when it is us who are going to be evicted from our land”.

13. The court stated in its judgment, *inter alia* –

**“I am satisfied on a balance of probability that the Plaintiff was wrongly evicted from his own parcel of land....In the process his houses were demolished....(I)t cannot be gainsaid that he suffered a terrible injustice....His other worldly possessions were apparently strewn about in the compound....He has been kept out of his property all those years in which the 1<sup>st</sup> Defendant has been in trespass thereof....”**

14. Substantial loss is a matter of fact. The Substituted 1<sup>st</sup> Defendants have not even attempted to demonstrate how they will suffer substantial loss. The judgment in favour of the Plaintiff will enable him to recover his own little parcel of land. The Substituted 1<sup>st</sup> Defendants will be left with their own larger parcel; it is not as if they will be rendered homeless.

15. I find that the Substituted 1<sup>st</sup> Defendants have not demonstrated that they stand to suffer substantial loss unless the stay sought is granted. They are also not prepared to provide any security for any such stay anyway, were it to be granted.

16. In the circumstances the application for stay of execution is refused; it is dismissed with costs. The interim stay of execution is hereby vacated. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 11<sup>th</sup> DAY OF FEBRUARY 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 14<sup>TH</sup> DAY OF FEBRUARY 2014**