



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 543 OF 2007**

**HOUSING COMPANY OF E. AFRICA LIMITED:.....PLAINTIFF**

**VERSUS**

**THE BOARD OF TRUSTEES:.....1ST DEFENDANT**

**NATIONAL SOCIAL SECURITY FUND:.....2ND DEFENDANT**

**KISIMA MANAGEMENT CO. LIMITED:.....3RD DEFENDANT**

**RULING**

1. The **Notice of Motion** application before the court is dated **7th October 2014** by the Plaintiff/Applicant. The application is filed under Order 40 Rule 1 (a), 10 (1) (a), Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, and Section 1A, 1B and 3A of the Civil Procedure Act. The application seeks the following orders:-

**1. Spent**

**2. Spent**

**3. That this Honourable Court be pleased to extend the conservatory orders granted on 9th September 2014 for a period of thirty (30) days or such other period as may be necessary for the Court of Appeal to hear and determine Civil Application number 249 of 2014 (UR 192 of 2014), Housing Company of East Africa Limited – Vs – The Board of Trustees, NSSF and Kisima Management Limited.**

**4. That the Plaintiff/Applicant be at liberty to apply for such further orders and/or directions as the court may deem fit and just to grant.**

**5. That the court make such further and/or alternative orders as necessary to not only meet the ends of justice but to safeguard the subject matter of the application and also of the intended appeal.**

**6. That the costs of this application be provided for.**

2. The application is premised on the grounds stated therein and is supported by an affidavit of **Joseph**

**Macharia Muthama** dated 7th October 2014.

3. The Plaintiff's/Applicant's case as per the pleadings filed in court and the submissions by the Plaintiff's counsel Mr. Muihuri is that:

*1. On 9th September 2014, the High Court of Kenya at Nairobi (Hon. Justice Havelock) through the Judgement dated 14th August 2014 and delivered on 9th September 2014, inter-alia dismissed the Plaintiff's suits with costs.*

*2. On the said date of 9th September 2014, having regard to the nature of the dispute in the High Court, which dispute involves Land Reference Number 209/11408, the High Court granted a stay of execution of the orders of the learned Justice Havelock for a period of their (30) days.*

*3. The said orders of stay of execution lapses on 8th October 2014.*

*4. Being dissatisfied with the decision of the High Court, the Plaintiff/Applicant filed an application in the Court of Appeal seeking stay of execution of the said Judgement pending the hearing and determination of its intended appeal.*

*5. The Application in the Court of Appeal, to wit, Civil application number 249 of 2014 (UR 192 of 2014), Housing Company of East Africa Limited – Vs – The Board of Trustees, NSSF and Kisima Management Limited, was certified urgent by the Court of Appeal and is schedule for hearing on 9th December 2014.*

*6. The President of the Court of Appeal is yet to constitute a three Judge Bench to hear and determine Civil Application number 249 of 2014 (UR 192 of 2014), Housing Company of East Africa Limited – Vs – The Board of Trustees, NSSF and Kisima Management Limited, and the constitution of the said Bench is unlikely to happen by the 8th October 2014 when the stay orders in force lapse.*

*7. Unless the stay orders are extended:-*

*a. The Certificate of Civil Application number 249 of 2014 (UR 192 of 2014), Housing Company of East Africa Limited – Vs – The Board of Trustees, NSSF and Kisima Management Limited, as urgent will be rendered nugatory;*

*b. The President of the Court of Appeal will be acting in vain if the subject matter of the suit property will have been disposed off and transferred by the time Civil Application Number 249 of 2014 (UR 192 of 2014), is heard and determined.*

*8. Unless the application filed herewith is certified urgent and heard on priority basis, and the stay orders in force are extended before 8th October 2014 before they expire, the Applicant will suffer irreparable loss and its highly meritorious appeal will be rendered nugatory in that:-*

*a. The 2nd Defendant would have had the suit property, land Reference Number 209/11408, transferred to its name, as it holds all the requisite documents for such transfer including the original title documents to the suit property and the Instrument of Transfer duly executed by the 1st Defendant. In addition, the 2nd Defendant had already paid stamp duty in respect of the said Transfer.*

*b. With all the requisite documents in its possession, and stamp duty having been duly paid, it would be a matter of hours, at most one day, for the 2nd Defendant to transfer the suit property into its name immediately the present stay Order expires on 8th October 2014.*

*c. Upon transfer of the suit property to its name, the 2nd Defendant, in the absence of any*

*stay orders, will deal with the property in any such manner as it may please, including selling, transferring or charging the same.*

*d. If the 2nd Defendant were to deal with the suit property in any such manner, the property would be taken out of the reach of this Honourable Court and any such orders as may subsequent thereto be made in favour of the Applicant would be merely academic and incapable of enforcement. In such event, the outcome of any successful appeal would be rendered nugatory and of no effect.*

*e. In the absence of any stay orders, the 1st and 2nd Defendants would be at liberty to proceed to enforce the other awards made in their favour in the said Judgement including:-*

*i. The costs of the suit – the same are likely to be substantial having regard to the subject matter of the suit before the Superior Court.*

*ii. The ‘consequential loss’ awarded to them against the Applicant result from the Judgement of the Court over the suit property. This award is extremely prejudicial to the Applicant as the same was neither pleaded nor proved in the High Court, meaning that it is now open to the Defendant to determine, unilaterally and without the Applicant being heard, what constitutes ‘consequential loss’ and to proceed to resource the same summarily against the Applicant.*

**9. The Defendants/Respondents have began the process of extracting the decree with a view towards execution.**

**10. It is only just and fair to extend the conservatory orders granted on 9th September 2014 to allow the Court of Appeal a reasonable amount of time to constitute at three Judge Bench to deal with the Civil Application number 249 of 2014 (UR 192 of 2014), Housing Company of East Africa Limited – Vs – The Board of Trustees, NSSF and Kisima Management Limited.**

4. The application is opposed by both the Defendants/Respondents. The 1st Defendant/Respondent filed a replying affidavit by M/s Hellen Koech while the 2nd Defendant/Respondent filed a replying affidavit by Humprey Kariuki Ndegwa on 15th October 2014. The Respondents case, from the pleadings and submissions of their counsel Messers Kajwang, Orenge and Kinyanjui, is that it is not true that the stay of execution orders for a period of thirty (30) days granted on the 9<sup>th</sup> of September 2014 were based on the nature of the suit as pleaded in the Applicant’s Notice of Motion, but such stay was granted to the Applicant herein to give it time to consider whether or not it would appeal against the Judgement rendered then as is evident by representations by counsel in the court record and by order of the court then. The Respondents stated that indeed the Applicant herein has filed a notice of appeal against the decision of Havelock J. and has further filed an application for stay of execution of the orders therein under Rule 5 (2) of the Court of Appeal Rules 2010, which application is pending before the Court of Appeal. It is the Respondent’s case that the Applicant’s current application is a total abuse of the court process as it is trite law that a litigant cannot have two similar applications pending: one at the Court of Appeal and one at the High Court. It is submitted for the Respondents that the two extant applications of similar nature before two different courts is tantamount to playing lottery and/or Russian roulette with the court and is an abuse of the court process which, in the interest of fairness and justice, should not be countenanced by this court. It is submitted for the Respondents that the said application at the Court of Appeal was made under Certificate of Urgency and after considering all the circumstances, facts and orders sought in the application, the Court of Appeal judged that the application shall be heard on the 9<sup>th</sup> of December 2014. That being so, if the Applicant is dissatisfied with the decision of the Court of Appeal that the application be heard on the 9<sup>th</sup> of December 2014, it can only make an application before the Court of Appeal for it to rescind its decision but it cannot bring an application in order to hoodwink the High Court.

It was further submitted for the Respondents that the Applicant admits that the suit property is already

transferred to the 3rd Defendant herein, and therefore it is already out of the reach of the Applicant herein and the 1<sup>st</sup> Respondent. As such, the Applicant will suffer no loss and/or damage if the orders sought are declined.

It was further submitted for the Respondents that this application is an abuse of the court process, vexatious and ill conceived, and that the Applicant herein is obviously forum shopping having sought similar orders as in the present application in the Court of Appeal and the same having not been granted, the Applicant now seeks to get para material orders from this court. The Respondent urged the court to dismiss the application with costs.

5. I have carefully considered the application and the opposing submissions of the parties. It is true that this court did on 9th September 2014 grant the Plaintiff/Applicant a stay of execution for 30 days to enable the Applicant file an application for stay of execution in the Court of Appeal. Indeed the Plaintiff/Applicant filed an application in the Court of Appeal seeking stay of execution of the said Judgement pending the hearing and determination of its intended appeal. The application in the Court of Appeal is **Civil Application Number 249 of 2014 (UR 192 OF 2014), Housing Company of East Africa Limited – Vs – The Board of Trustees, NSSF and Kisima Management Limited**. The said application was certified urgent by the Court of Appeal and is scheduled for hearing on 9th December 2014. Prayer number 2 of the application in the Court of Appeal seeks stay of execution of the said Judgement. The same order is being sought herein under prayer number 3. The natural question which this court must ask itself is whether the Applicant drew the attention of the Court of Appeal to the urgency of the need for the stay order, and if the Court of Appeal considered the same. The answer to the above question must be a resounding yes, as is indicated by the Certificate of Urgency filed in the Court of Appeal. The Certificate of Urgency is signed by Mr. Njoroge Regeru and is dated 24th day of September 2014. In the said Certificate Mr. Regeru makes the following requests to the court:-

*a) The application filed herewith be certified urgent and be admitted for hearing on priority basis.*

*b) An interim order of stay of execution of the said Judgement be issued forthwith, pending the hearing of the application inter-partes so as to preserve the subject matter of the application and of the intended appeal.*

6. It must be assumed, and correctly so, that when the Court of Appeal certified the said application as urgent and set it for hearing on 9th December 2014, the Court also had considered the prayer for an order of stay of execution, since the issue was before the court. If the court did not grant that prayer, the jurisdiction to do the same was with the Court of Appeal and can now not be transferred to this court. Since the prayer for stay of execution was before the Court of Appeal in that application, and the Court of Appeal in its wisdom either rejected the request or ignored it, it cannot now be within the jurisdiction of this court to entertain in any way the said issue of stay. Two courts being the High court and the Court of Appeal cannot have concurrent jurisdiction over the same issue. This application is a blatant abuse of process of this court. I need not say more.

7. The application is dismissed with costs to the Respondents.

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Komo holding brief for Muihuri for Plaintiff

Omwana & Ngatia for Defendants

Teresia – Court Clerk