



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 687 of 2002**

**GEORGE MWAI MBUR.....PLAINTIFF**

**VERSUS**

**1. MARY WAMAITHA KAITTANY**

**2. NAIROBI CITY COUNCIL.....DEFENDANTS**

**RULING**

1. Judgment herein was delivered on 9<sup>th</sup> October 2012. The Plaintiff's suit was dismissed with costs. The 1<sup>st</sup> Defendant's counterclaim against the Plaintiff was allowed with costs. The 1<sup>st</sup> Defendant was granted an order of eviction of the Plaintiff from the suit premises. She was also awarded *mesne* profits.
2. The Plaintiff then duly lodged notice of appeal. He also applied by **notice of motion dated 25<sup>TH</sup> October 2012** seeking stay of execution of the decree pending hearing and determination of the intended appeal. That application is the subject of this ruling.
3. The application is brought under **Order 42, rule 6** of the **Civil Procedure Rules (the Rules)**. **Sections 1A** and **3A** of the **Civil Procedure Act, Cap 21** are also cited. The grounds for the application appearing on the face thereof include –
  - (i) That unless stay is granted the Plaintiff will suffer substantial and irreversible loss.
  - (ii) That the application has been made without delay.
  - (iii) That unless stay is granted the Plaintiff's intended appeal may be rendered nugatory.
  - (iv) That the Plaintiff is willing to give such security as the court may order.
4. The application is supported by the annexed affidavit of the Plaintiff which gives a factual basis for the application.
5. The Defendants have opposed the application – the 1<sup>st</sup> Defendant by **replying affidavit filed on 6<sup>th</sup> November 2012** and the 2<sup>nd</sup> Defendant by **grounds of opposition filed on 10<sup>th</sup> December 2012**.
6. The points taken by the 1<sup>st</sup> Defendant include –
  - (i) That this is an old dispute where the Plaintiff has been in occupation for over 10 years without

paying rent to the prejudice of the 1<sup>st</sup> Defendant.

(ii) That the 1<sup>st</sup> Defendant should be allowed to enjoy the fruits of her litigation.

(iii) That the 1<sup>st</sup> Defendant is a woman of means and would refund any monies paid to her pursuant to the decree in the event that the Plaintiff succeeds in his intended appeal.

(iv) That the Plaintiff has not demonstrated what prejudice or irreparable loss he stands to suffer unless the stay sought is granted.

7. As for the 2<sup>nd</sup> Defendant, he contends that the application is fatally and incurably incompetent without saying how; that the Plaintiff has failed to demonstrate what substantial loss he stands to suffer unless stay is granted; and that no security has been furnished by him.

8. The application was canvassed by way of written submissions. Those of the Plaintiff were filed on 25<sup>th</sup> January 2013 while the Defendants' filed theirs on 11<sup>th</sup> February 2012. I have considered those submissions, including the cases cited.

9. Under Order 42, rule 6(2) of the Rules,

**“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.”**

10. Judgment was delivered on 9<sup>th</sup> October 2012 and the Plaintiff filed notice of appeal the following day. At the time of delivery of judgment interim stay was sought and granted for 14 days pending the filing of formal application. The formal application was filed on 26<sup>th</sup> October 2012. I am satisfied that the application was filed without unreasonable delay.

11. Does the Plaintiff stand to suffer substantial loss unless the stay sought is granted? I am satisfied that he does. Let it be remembered here that we are dealing with “substantial” loss, not “irreparable” loss.

12. The two suit properties are plots of land within Nairobi that are now probably very valuable. The Plaintiff has been in possession and occupation now for over 10 years. He says, and it is not controverted, that he has in the plots some 15 tenants, which means he derives a substantial income from the two plots.

13. But this must be balanced against the 1<sup>st</sup> Defendant's interest. It must be remembered that the Plaintiff entered the plots as the 1<sup>st</sup> Defendant's tenant under terms that were well set out. At the end of the tenancy the Plaintiff offered to buy one of the plots but was not able to. He subsequently claimed both plots as his.

14. The 1<sup>st</sup> Defendant has been kept out of her properties for over 10 years without deriving any benefit from them as the Plaintiff does not pay any rent.

15. After balancing the interests of both parties, I will direct that there be stay of execution of decree upon the condition that the Plaintiff pays to the 1<sup>st</sup> Defendant within sixty (60) days of today all the *mesne* profits decreed to her and so far accrued, and thereafter to pay such *mesne* profits by the 10<sup>th</sup> of each succeeding month pending hearing and disposal of the intended appeal. In default the stay shall lapse.

**16.** Costs of the application shall be in the cause. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MAY 2013**