



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.379 OF 2009**

LILIAN NKIROTE MARETE.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

**RULING**

1. On 20/1/2012, Majanja J. dismissed the Petition herein and on 25/1/2012, the Petitioner invoked the provisions of **Rule 33** of Legal Notice No.6 of 2006 - **Constitution** of Kenya (Supervisory Jurisdiction & Protection of Fundamental Rights and Freedoms of the Individual) High Court Procedure and Practice Rules as well as **Articles 22**, and **23** of the **Constitution, 2010** and now seeks the following orders;

***“i) That the Application be certified as urgent and heard ex- parte at the first instance.***

***ii) That the Court be pleased to issue an order of injunction restraining the Respondent by himself, through [the] Permanent Secretary, Ministry of Housing, their servants, agents and/or assigns from evicting the Applicant herein from House No.HG. 740, Rubia Estate, Nairobi pending hearing and determination of this Application.***

***iii) That the Court be pleased to issue an order of injunction restraining the Respondent by himself, through [the] Permanent Secretary, Ministry of Housing, their servants, agents and/or assigns from evicting the Applicant herein from House No.HG. 740, Rubia Estate, Nairobi pending filing, hearing and determination of an intended appeal in the Court of Appeal against the judgment dated and delivered on 20/1/2012***

***iv) That the cost of this Application be borne by the Respondent.”***

2. In the Supporting Affidavit sworn on 24/1/2012 by the Petitioner/Applicant and in Submissions by learned Counsel acting for the Applicant, her case is as follows;

That since she intends to appeal against the decision of Majanja J. she seeks protective orders to stop her eviction from House No.H.G. 740, Rubia Estate so as not to render her appeal nugatory. Further, that her said appeal has high chances of success as *“the High Court partly based its decision on a mistaken premise that [the] orders of stay granted in JR Case No.433 of 2005 merely restrained the Respondent from evicting [her] yet in fact the said order prohibited the Respondent from selling the subject property”*

3. That upon sale of the disputed house to another person, the Respondent has attempted to evict the Applicant and so there is a real danger of actual eviction unless the orders sought are granted.

4. In a Replying Affidavit sworn by Tirop Koskey on 25/5/2012 and filed on 31/5/2012, it is the Respondent's case that the Application is an abuse of Court process because after the delivery of judgment in J.R. No.433 of 2005, the Applicant filed a Notice of Appeal which she never pursued. That the said matter was based on the same complaints as the present Petition and in any event, that her case is weak and based on falsehoods and the orders sought should not be granted.

5. I have read the Submissions on record and the first issue to address in the law relating to interlocutory reliefs to be granted where a party wishes to appeal against a decision of this Court. It must be remembered that the matter before Majanja J. was a Constitutional Petition and once he dismissed it, this Court should ordinarily have had nothing more to say or do. But the Applicant has sought orders in the nature of an injunction pending the intended appeal. She has invoked **Articles 22 and 23 of the Constitution** which relate to enforcement of the Bill of Rights and the authority of Courts to uphold and enforce the Bill of Rights. It is unclear to what avail those provisions were cited especially where the Court has firmly held that no fundamental freedoms or rights were violated and that none could be enforced or upheld in this case.

6. Reliance has also been placed on **Rule 33** of the **Rules** cited in the Petition i.e. Legal Notice No.6 of 2006. The Rules were made pursuant to **Section 84(6)** of the **Repealed Constitution** and are still applicable because no Rules have been enacted under **Article 22(3)** of the Constitution and that may partly explain why the said Article was cited. **Rule 33** provides as follows;

*“The High Court may upon an informal Application immediately following the delivery of judgment or ruling **grant a stay for fourteen days pending appeal**” (Emphasis added).*

A “stay” is defined as “1. The postponement or halting of a proceeding, judgment or the like. 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from a proceeding – Also termed stay of execution; suspension of judgment”.

An “injunction” on the other hand is defined as “a Court order commanding or preventing an action”. (All definitions above from Black's Law Dictionary, Eighth Edition).

7. It is obvious that **Rule 33** above cannot be properly invoked in the instant case as there is nothing to stay when this Court has dismissed a Petition where a Party had sought declaration of alleged breaches of Constitutional rights.

Further, in their Submissions, learned advocates for the Parties invoked different principles of law in support of their respective cases. The advocate for the Applicant stated that for his client's Application to succeed, she had to show that;

- i) she has an arguable appeal.
- ii) if the orders sought are not granted, the intended appeal will be rendered nugatory.
- iii) there was no inordinate delay in filing the Application.

8. The learned State Counsel on his part, relied on (i) and (ii) above but added a third principle; that damages will be inadequate compensation. His argument was however premised on the understanding that the Applicant was seeking “*stay orders pending appeal*” Of course that is not what the Applicant is seeking. She is seeking injunctive reliefs pending appeal and in that case, the authority of Barnabas Wachira vs Industrial Development Bank, HCCC No.1436/2000 is relevant. In that case Ransley J. stated as follows;

*“The purpose of this Application is to preserve the suit premises pending the hearing of the Appeal. An Application for stay is not relevant as there is nothing to stay. However, if the Plaintiff succeeds in the Appeal, it would be rendered nugatory if the suit premises had been sold. A Court has discretion to grant an injunction on such terms as it thinks fit.”*

In stating above Ransley J.'s mind was swayed by the decision of Megarry J. in Erinford Properties Ltd vs Cheshire County Council [1974] 2 All F.R. 448 where the learned judge in addressing the issue of stay execution as opposed to an injunction pending appeal stated as follows;

*“Although the type of injunction that I have granted is not a stay of execution, it achieves for the Application or action which fails the same sort of result as a stay of execution achieves for the Application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal”*

9. As to the principles to be applied to be applied in granting or denying an injunction pending appeal, Megarry J. quoted Wilson vs Church [1962] & All L.R. 466 where Cotton LJ held as follows;

*“... when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful is not nugatory.”*

10. Megarry also added one more principle; that where damages are an alternative remedy, then the injunction should not be granted.

11. The Applicant in this case appeared before Wendoh J. in J.R. No.433 of 2005 and failed to quash the decision of the Respondent in refusing to allocate her house No.HC/740 Rubia Estate under the Civil Service House Purchase Scheme. She also failed to convince Majanja J. in the the present case, that any of her rights under the Constitution had been violated.

12. The house has since been sold to one, Johnson Muriuki Ruthuthi who has been denied possession since April 2005 when he paid the initial deposit for the house. In Erinford Properties (supra), Megarry J. stated *inter-alia* that *“there may of course, be many cases where it would be wrong to grant an injunction pending appeal, as where an appeal would be frivolous, or to grant an injunction would inflict greater hardship than it would, and so on”*

I have come to the conclusion, that the continued hardship to the said Ruthuthi. is inequitable. He has been denied access to a house he lawfully bought more than eight years ago by a litigant who has twice been told by the High Court that she has no genuine claim to the disputed house. To my mind, that is a good sign that her claim may be frivolous and I say so well knowing that I am not hearing her appeal but only answering the question whether she has an arguable appeal.

13. In any event, even if she has an arguable appeal, I am convinced that damages are an adequate remedy. What is in issues is the ownership of a house. Its value is known now and in the future. If she succeeds in her appeal, the quantum of damages to be awarded is easily ascertainable.

14. In the end therefore, I am satisfied that applying the law to the facts of this case, an injunction pending appeal should not issue. The Application dated 24/1/2012 is without merit and is dismissed with costs.

15. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 6TH DAY OF JUNE, 2013**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

*Florence – court clerk*

*Mr. Munjla holding brief for Mr. Wanyaga for Petitioner*

*Mr. Wamotsa for Respondent*

**Order**

*Ruling duly read.*

**ISAAC LENAOLA**

**JUDGE**