



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

**AT NAKURU**

**CIVIL SUIT NO.56 OF 2006**

SALOME NAIVANUI KEEN .....1ST PLAINTIFF/APPLICANT  
HUDSON MWANGI THUKU .....2<sup>ND</sup> PLAINTIFF/APPLICANT  
KEVIN THUKU ..... 3<sup>RD</sup> PLAINTIFF/APPLICANT  
LUCY WANJIRU KIGOME .....4<sup>TH</sup> PLAINTIFF/APPLICANT  
JOSEPH THUKU ..... 5<sup>TH</sup> PLAINTIFF/APPLICANT  
SUSAN NYARUAI ..... 6<sup>TH</sup> PLAINTIFF/APPLICANT  
KAHURO THUKU .....7<sup>TH</sup> PLAINTIFF/APPLICANT  
GITHINJI THUKU .....8<sup>TH</sup> PLAINTIFF/APPLICANT

**VERSUS**

**ALICE WANJIRU WANJOHI (sued as the administratrix of the  
estate of the late FRANCIS WANJOHI NDIRANGU ..... DEFENDANT/RESPONDENT**

**RULING**

The application dated 8<sup>th</sup> March 2013 seeks orders of stay of execution pending appeal, in respect of a judgment dated 15/02/2013. The applicants have filed a notice of appeal and appeal for copies of proceedings for purposes of pursuing the intended appeal. It is their contention that unless the orders sought are granted, the decree holder may proceed with execution and render the intended appeal nugatory. The applicants will be evicted thus suffer irreparable injury and will be rendered homeless. The applicants are ready to abide with any condition the court may impose.

The applicants' apprehension is that once eviction is effected, the respondent will interfere with the developments and improvements on the land. It is pointed out that the application has been brought without any delay.

The respondent filed grounds of opposition in which she contends that the application is bad in law, inept, muddled up, and the orders sought are *in vacuo*. Further, that the applicants have not demonstrated any substantial loss which they will incur. In any event, she maintains that the applicants are in blatant disobedience of the court orders and cannot be assisted by the court. The applicants are also accused of failing to demonstrate any willingness to deposit sufficient and commensurate security.

The application was disposed by way of written submissions. The applicants argue that, they have been in occupation of the suit property for over 30 years and on that account, have acquired a right to the property by virtue of adverse possession. Following their occupation, they have undertaken immense developments, including building permanent houses in which they dwell. The applicants claim to have no other land to settle on as the suit properties have been their only place of abode throughout their lives.

Regarding the law applicable, based on **Order 42 Rule 6** of the **Civil Procedure Rules**, and the decisions in **Butt V Rent Restriction Tribunal (1982) KLR 417** and **Erinford Properties Ltd V Cheshire County Council (1974) 2 All ER 448**, it is submitted that, in the instant application, there are special circumstances which warrant issuance of stay pending hearing and determination of the appeal.

In **Butt V Rent Restriction Tribunal** (supra), the Court of Appeal held that:-

1. **“The power of the court to grant or refuse an application for stay is a discretionary power . . . should be exercised in such a way as not to prevent an appeal.**
2. **The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**
4. **The court in exercising its discretion . . . will consider the special circumstances of the case, and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**
5. **The court . . . can order security upon application by either party, or on its own motion. . . .”**

It is submitted on behalf of the respondent that the properties have been the subject of litigation since 1988 in **Nakuru HCCC No.405 of 1988 NAIVUNAI WANJIRU NGORIS V NGORIS OLE KURARU & 3 OTHERS**, where the court held that:-

**“..... Mrs. Wanjohi, as the legal representative of the estate of the 3<sup>rd</sup> defendant, is entitled to ownership and exclusive possession of the suit properties as against the plaintiff and any other person in occupation thereof (emphasis mine). The plaintiff is ordered to vacate the suit properties within the next thirty (30) days from the date hereof, failing which she may be forcefully evicted. The plaintiff is not entitled to any compensation for any developments she may have made on the suit properties because if at all she erected any structures . . . it was not shown that she did so with the consent and approval of any of the defendants.”**

It is also pointed out that Musinga J (as he then was) noted that the 3<sup>rd</sup> defendant (respondent in this case) had been kept out of the suit properties for over 20 years as at 20<sup>th</sup> February 2007. The court’s view was that respondent was entitled to some compensation by way of mesne profits because the plaintiff had unduly benefitted from her wrongful possession of the suit property.

Attempts to stay the judgment of Musinga J failed and the plaintiff and other occupants (including the present applicants), were evicted therefrom. It is argued that in the present case (i.e. HCCC No.56 of 2008), Ouko J (as he then was) found the suit to be *res judicata* and that in any event there was no evidence of adverse possession.

Owing to the fact that a court of equal and competent jurisdiction in Nakuru HCCC No.405 of 1988 had

the opportunity to determine the issue regarding the applicant's right to own or occupy the suit properties (which decision affected the applicants and which judgment has not been appealed from), applicants cannot be heard to say that they will suffer substantial loss, if the decree herein is executed.

Moreover the applicants have not demonstrated that they have the ability to furnish security. Under Order 42 Rule 2, the court has discretion to order stay for sufficient cause, this must be considered in the light of the issues addressed by the **Butt** case.

Musinga J, already made a decision regarding ownership and exclusive possession, which affected the applicants as “**any other person in occupation**” – the applicant cannot now come to claim they acquired legal rights over the suit property by operation of the law. That issue had already been adjudicated upon and a decision made. Any attempt to revisit it offends Section 7 of the Civil Procedure Act.

I find that there are no good grounds to warrant issuing orders of stay, and the application is dismissed with costs to the respondent.

**Delivered and dated this 8th day of November, 2013 at Nakuru.**

**H.A. OMONDI**

**JUDGE**