



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL 198 OF 2010

CECILIA NJOKI MAINA.....APPELLANT/APPLICANT

VERSUS

JANE WAMBUI WAHOME..... RESPONDENT

RULING

This ruling is in respect of the Notice of Motion application dated 13.4.2012 brought under **Order 22 rule 22** of the **Civil Procedure Rule Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law.

The applicant in this application, Cecilia Njoki Maina, hereinafter called the applicant instituted the instant application seeking stay of execution of the judgment of the lower court.

The applicant's application is premised on the following grounds-

- (1) That her application for stay of execution in the lower court was dismissed
- (2) That she has already filed an appeal against the decision of the lower court.

The application is supported by the applicant's own affidavit sworn on 13th April, 2012. In her affidavit, the applicant has averred that she filed an application dated 23rd November, 2011, at the lower court seeking an order of stay of execution of the judgment of the lower court pending the hearing and determination of the appeal herein; that the lower court, in a ruling, delivered in her absence and without notice to her, dismissed her application for stay; that she is apprehensive that an eviction order may be issued against her anytime and that she stands to suffer irreparable loss and damage as she is living in the suit property. She has also averred that unless the orders sought are granted the appeal herein may be rendered nugatory.

In reply to the application the Respondent filed a replying affidavit sworn by her advocate. The

respondent opposes the applicant's application on the following grounds:

- (a) that it is bad in law and an abuse of the process of the court;
- (b) that the applicant has no colour of right on the land where she has built the premises sought to be demolished.;
- (c) that the applicant completed the construction works when there was a court order in force against such works and that the respondent only abandoned an application for contempt against the applicant to facilitate final determination of the suit before the lower court;
- (d) that the applicant has no documents or any authority allowing her to built on a road reserve to the detriment of the respondent who cannot utilize her property to the maximum;
- (e) that a surveyor from Nyandarua North District surveyor's office and an officer from the Municipal Council of Nyahururu testified in the lower court and confirmed that the applicant had no right at all to be on the suit premises;
- (f) that the applicant built the structure without the consent of the Municipal Council of Nyahururu and without any approved building plans contrary to the Physical Planning Act cap 286 Laws of Kenya;
- (g) that the applicant's structure is illegal and without any foundation or support of law and the same should be removed at the earliest opportunity possible as the same is also an eyesore;
- (h) that the application is unmerited and should be dismissed with costs at the earliest opportunity;
- (i) that the applicant cannot suffer irreparable loss if the order of stay is vacated as she has no rights at all to the land she has erected her structure on.

During the hearing of the application the parties basically reiterated the contents of their respective affidavits.

The applicant, in particular, stated that the Council had approved her building plans; that she had built permanent houses on the land and that the ruling in respect of her application for stay in the lower court was delivered in chambers and in her absence. Regarding the issue of completion of the structures when there was a court order stopping the constructions she stated that she was not served with any court order stopping her.

Learned counsel for the Respondent, on her part, conceded that the ruling was read in chambers in the absence of the applicant but contended that that was not a reason for granting stay. She Further submitted that the application had been brought under wrong provisions of the law. She reiterated that the property was built on a road reserve and that there was an order restraining the applicant from proceeding with the construction and an application for contempt had been filed against the applicant but later abandoned. She also contended that the applicant had not deposited security and that she had neither given any evidence of ownership nor demonstrated any loss.

The law regarding when a court may stay execution is provided for under **Order 42 rule 6** of the **Civil Procedure Rules**, which requires, among other things that:

- i) the applicant must show that there will be substantial loss if the relief is not granted;
- ii) the applicant must be ready to provide security. It must also be demonstrated that the application has been brought without unreaonable delay.

See **Newstanley Hotel Limited V. Arcade Tobacconists Limited (1986) KLR 757.**

From the pleading and the submissions of the parties in this application it is not in doubt that the applicant is living in the suit property, it is also not in doubt that the respondent has obtained a judgment against the applicant's occupation of the suit premises and requiring the applicant to demolish the structures erected on the suit property.

It is also clear that the applicant has filed an appeal challenging the decision of the lower court. Clearly the applicant stands to suffer substantial loss, if the orders sought are not granted and the respondent executes the judgment of the lower court before her appeal to this court is heard and determined.

I am also satisfied that the application was made without undue delay. There will be an order of stay pending hearing and determination of the appeal. The applicant will deposit Kshs.20,000/= in court within thirty (30) days failing which the order of stay will stand discharged without further orders.

Costs to be costs in the appeal.

Dated, Signed and Delivered at Nakuru this 13th day of July 2012.

W. OUKO
JUDGE