

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 12 OF 2010

CECILIA NYAMBURA MURUNGA.....APPELLANT/APPLICANT

VERSUS

JOHN NDUNG'U MAINA.....RESPONDENT

RULING

The applicant, Cecilia Nyambura Murunga, brought the instant notice of motion dated 22nd March, 2012 seeking, among other prayers, an order for stay of execution of the judgment delivered on 10th January, 2012 in Nyahururu PMCC NO. 118 of 2011 pending the hearing and determination of this appeal.

The application is premised on the grounds that the applicant has preferred an appeal against the judgment of the lower court; that the application has been made without unreasonable delay; that the respondent has commenced steps to execute the decree; that the applicant is ready to furnish security for due performance of the decree and that she will suffer substantial loss if the decree is executed.

The application is opposed by the respondent who has denied having either applied for execution or taken steps to execute the decree. He has deposed that the application has been brought after inordinate delay and without explanation for the delay; that there is no likelihood of the applicant suffering substantial or any loss since she has other plots; and that should the orders sought be granted more injustice and hardship would be occasioned to him as he has been waiting for justice for over six (6) years.

An order of stay of execution will be granted by the High Court where it is satisfied that substantial loss may result to the applicant if the order is not made and the application for stay has been brought without unreasonable delay. The applicant must also demonstrate willingness and readiness to abide by any order as to security. (See **Cecilia Nyambura Murunga V. Stephen Kuhora**; High Court Civil Appeal No. 176 of 2011).

The applicant has challenged the lower court's judgment in this appeal and the subject matter is land. She is apprehensive that if she complies with the order and the property is transferred to the respondent, the latter may in turn transfer it to a third party and put it beyond her reach, should the appeal eventually succeed. It is such fears, if genuine, that must be weighed against the respondent's right to enjoy the fruits of the judgment given in her favour. I have considered the submissions made by the advocates for the respective parties and the law applicable. Even though it is contented that the application was made long after the judgment was delivered. I hold the view that the delay of 10 weeks before filing of the present application was not so unreasonable as to warrant denial of the order sought.

As regards security, the applicant has in her supporting affidavit averred that she is prepared to furnish security for the performance of the decree. On whether the applicant will suffer substantial loss unless the order sought is granted, notwithstanding the contention by the respondent that he has not began executing the decree, there is no denying that without any order restraining the execution of the decree, nothing stops the respondent from executing it. The fundamental question is whether the applicant will suffer substantial loss should execution be allowed to proceed.

As pointed out earlier, the subject matter in this appeal is land. The applicant is apprehensive that if

it is transferred to the respondent, he (the respondent) may transfer it to a third party thus making it impossible for her to recover it if she succeeds in the appeal.

As the application was brought without undue delay and the applicant has given an undertaking to provide security I allow the application and grant a stay of execution pending hearing and determination of the appeal on condition that the applicant shall deposit Kshs.30,000/= into a joint interest earning account in the name of her counsel and counsel for the respondent within thirty (30) days from the date hereof failing which the order of stay stands vacated without further orders.

Dated, Signed and Delivered at Nakuru this 8th day of October, 2012.

**W. OUKO
JUDGE**