



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 228 of 2011

GEORGE KIARIE NGANGA.....PLAINTIFF

VERSUS

SAMWEL WATHANGA KARIUKI.....1ST DEFENDANT

WINFRED MUTHONI KARIUKI.....2ND DEFENDANT

JOHN MUTHEE NGUNJIRI T/A TANGO

AUCTIONEERS & GENERAL MERCHANTS.....3RD DEFENDANT

RULING

The application dated 2/4/2012 is filed by Mboga G.G. & Co. Advocates on behalf of the appellants/applicants. The applicants seek an order of stay of execution of this court's order given on 22/2/2012 pending the hearing of the appeal. The applicants are aggrieved by the court's orders and lodged an appeal on 5/3/2012 (SWK2). The application is premised on the affidavit of the 1st appellant/applicant, Samwel Wathanga Kariuki in which he deposed that the respondent caused extensive damage to the suit premises as a result of which they collapsed; that the premises which the respondent used to occupy no longer exists and the applicants are unable to comply with the court's orders to reinstate the applicant; that the respondents reside in an extension of the property at the back, and so do other tenants reside at the back of the premises which the respondents used to occupy. The said premises collapsed due to the extensive damage; That there was left an open space which exposes other tenants to thuggery and the applicants used some iron sheets to secure the premises but the respondents keep pulling them down. That the court orders to the effect that the applicants do not carry out any developments or remain on the property, are being used to harrass the applicants and that the respondents are likely to bring contempt proceedings against the applicants if an order of stay is not granted because it has become impracticable to reinstate the respondents. It is also the applicants' contention that their appeal will be rendered nugatory if stay is not granted; that the applicant will suffer substantial loss by losing tenants and that the application was brought without delay. In his submissions, Mr. Mboga urged that the respondents have not disputed the facts that the said premises collapsed; that the applicants reside on the suit property or that the fence has been demolished twice.

George Nganga, swore a replying affidavit in opposition to the application. It is the respondent's contention that the application is defective; that the applicants are seeking to stay the court's order which they have disobeyed; that since they have filed a notice of appeal, they ought to file the application for

stay in the Court of Appeal and that the application is brought to set aside or defeat the court's orders. The respondent denies having harassed the applicants and instead is waiting to be reinstated in the suit premises.

For the court to grant an order of stay the applicant has to demonstrate that he has come to court without due delay; that the applicants will suffer substantial loss if the order of stay is not granted and that the applicant is willing to provide security for due performance of the decree.

This court delivered its ruling on 22/2/2012. It is not until 2/4/2012 that this application was filed, about 1½ months later. No explanation has been offered for that period of time. This court bears in mind that the orders granted were of a mandatory nature so that once the time allowed for appeal was over, the applicants were in breach of the court's order.

The orders issued on 22/2/2012 were mandatory in nature; that court having taken into account the applicant's conduct, being flagrant disobedience of the court's order. If this court were to grant an order of stay, it would be tantamount to countenancing the applicant's previous conduct and setting aside its own order which is not the application before me. The reasons why the mandatory order was granted have not changed.

The second requirement which the applicant has to demonstrate is that the applicant will suffer substantial loss unless the order of stay is granted. The applicant contends that if the order is not granted, they will lose their tenants who reside behind the suit premises. The respondent was forcibly evicted from the premises contrary to the court's order and one wonders whether the loss that will be suffered by the applicants is greater than the loss suffered by the respondents. That has not been shown to the court.

It is upon the applicant to offer security for due performance of the decree in order for the court to consider granting stay. The applicants did not make any offer.

In the end, I find that the application lacks merit and does not meet the threshold required under **Order 42 Rule 6** of the **Civil Procedure Rules 2010**. The application is dismissed with costs being in the cause.

DATED and DELIVERED this 4th day of October, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Koech holding brief for Mr. Mboga for the applicant

N/A for the respondent

Kennedy – Court Clerk