



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 218 OF 2010**

**DANIEL MWAURA KIARII.....1<sup>ST</sup> APPELLANT**  
**WANJOHI MURAGE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**STEPHEN NJUGUNA MWAI.....RESPONDENT**

**RULING**

The Notice of Motion dated 6<sup>th</sup> December 2010 was filed by **Daniel Mwaura Kiarrii** and **Wanjohi Murage** against Stephen Njuguna Mwai. The appellants seek the following orders:-

- 1. An order staying the orders issued by the Magistrate on 20<sup>th</sup> July 2010 in Nyahururu CMCC 37 of 2010 pending hearing of this application;***
- 2. An order to stay lower the court's order issued on 20<sup>th</sup> July 2010 pursuant to the application dated 12<sup>th</sup> February 2010 pending the hearing and determination of Nakuru HCCA No. 218 of 2010;***
- 3. The proceedings in Nyahururu CMCC No. 37 of 2010 be stayed pending the hearing and determination of this appeal.***

The application is based on grounds found on the face of the application and the affidavit of **Daniel Mwaura Kiarrii. Mr. Kipkogei**, state counsel, urged the application on behalf of the appellants/applicants. The application was opposed and Stephen Njuguna Mwai, the Respondent, swore a replying affidavit on 11<sup>th</sup> January 2011. He was represented by Mr. Mwangi Advocate.

The applicants are the defendants in PMCC Nyahururu No. 37 of 2010. The 1<sup>st</sup> defendant is the Chief of Geta Location while the 2<sup>nd</sup> defendant is an Administration Police Officer at Geta Chief's Camp. By an amended plaint dated 8/10/2010, the Respondent sought the following orders against the appellants;

- (a) An order for release of a donkey and calf to the plaintiff;***

**(b) General damages for wrongful detention of the plaintiffs, one donkey and calf and trespass to the property or alternatively, general damages for detinue and Kshs.40,000 being the value of the donkey.**

**(c) Special damages of Kshs.60,000 and further Kshs.8000 from September 2010 until the release of the donkey to the plaintiffs.**

Filed simultaneously with the original plaint was an application seeking interim orders. It was heard *ex parte* and an order was issued that the applicants release the donkeys the subject of the suit (**DMK2**). The appellants filed a replying affidavit demonstrating why they did not have possession of the donkey (affidavits are **DMK3**). Later, the application dated 12/2/2010 was heard and the court granted the orders under the order dated 20/7/2010. The State Counsel sought to stay the order, but the same was dismissed under a ruling dated 5/10/2010 (**DMK5**). The court ordered the Applicants to pay Kshs.50,000/- to the respondent as compensation within 14 days as money spent by the plaintiff for hiring alternative donkey. The applicants are challenging the orders on grounds that mandatory orders were granted *ex parte*.

The applicants fear being cited for contempt if they do not comply with the court orders. The applicants sought a stay pending appeal but on 5/10/2010 the same was granted on condition that they deposit Kshs.50,000 as security. Mr. Kipkogei argued that the 14 days are over and they fear that the court may cite them for contempt and that even if an order of stay is granted, the Respondent is unlikely to suffer any loss. It was also submitted that the suit is still pending and all these issues will be canvassed at the full hearing. The applicants contend that they have an arguable appeal as the mandatory order was given *ex parte*.

In opposing the application, the Respondent disagreed that the Respondent has not demonstrated that they will suffer substantial loss if the order is not granted. He opposed the stay of the order of stay granted on 5<sup>th</sup> October 2010 as the applicants have failed to pay the security required nor have they released the donkey. It was also argued that the applicants have not given any security for the due performance of the decree. The Respondent denied that the appeal against orders issued on 20<sup>th</sup> July 2010 and 5<sup>th</sup> October 2010 raises any arguable case.

It is not in dispute that the orders made on 20<sup>th</sup> July 2010 were mandatory in nature and they were made at an interim stage. The main suit in which similar orders are sought, is yet to be heard.

An order of stay may be granted upon the applicant satisfying the court that substantial loss may result unless the order is made, the application has to be made without unreasonable delay, and lastly the applicant has to offer security for due performance of the decree. **Order 41 Rule 4(1)** of the **Civil Procedure Rules** also provides that stay may be issued upon sufficient cause. In the instant case, the order of 20<sup>th</sup> July 2010, ordering the release of the donkeys was made at an interim stage. The case is still pending and the same order is sought in the main suit. It is a mandatory order. When can a mandatory injunction issue? A mandatory injunction is an order of the court that is affirmative in nature. It commands the doing of a specified act. It is sometimes referred to as an affirmative injunction. The courts exercise extra caution in the grant of interlocutory mandatory injunction and this was clearly expressed in the case of **LOCABAIL INTERNATIONAL V AGRO EXPORT AND ANOTHER (1986) 1 ALL ER 901** where the English Court described the circumstances under which a mandatory injunction may be issued. The court said:-

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and that only in clear cases either where the court thought the matter ought to be decided at once, or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had tried to steal a march on the plaintiff moreover before granting a mandatory injunction the court had to feel a sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.”***

As observed, the suit in the lower court is still pending and all issues need to be canvassed before a final determination is made. If the applicants do not comply with the Lower Court's order of release of the donkey, they are likely to be cited for contempt. If the applicants were to comply at this stage, what will happen if the court were to arrive at a different finding after hearing the suit. I think there are indeed serious issues that need to be addressed in the appeal.

The applicants are public servants. They have been sued in their personal capacities yet in the plaint, they are alleged to have abused their office. If orders were made against them in their personal capacity when in fact they were performing official duties, they are likely to suffer substantial loss if mandatory order is not granted.

When the applicant applied for stay, the same was given on condition that a sum of Kshs.50,000 be deposited in court as a security. The applicants have not complied with that order and seek stay of that order made on 5<sup>th</sup> October 2010. **Order 41(4)** allows a party aggrieved by an order of stay from the court appealed from, to apply to the appellate court to have the order set aside. Though an order of stay was made, it was conditional and the Applicants find it hard to comply with the said court order. That is why they seek a stay. This case being yet to be determined, it is my view that the Respondent will not suffer any prejudice if the order of 5<sup>th</sup> October 2010 is stayed. Besides it is clear from the plaint that he seeks an alternative prayer of damages if the donkey and calf are not released back to him. The question then is whether the magistrate should have given the mandatory order when there is an alternative remedy sought. That will be considered at the hearing of the appeal. After considering all the submissions above, it is in the interests of justice that the orders of 20/7/2010 and 5/10/2010 in CMCC No. 37/2010 on 5/10/2010 be stayed pending hearing and determination of the appeal and the proceedings in CMCC No. 37/90 be stayed to allow for hearing of this appeal. Costs will be in the cause.

**DATED and DELIVERED this 4<sup>th</sup> day of March, 2011.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Ikua for the appellants.

Mr. Ndegwa holding brief for Wahome for the respondent.

Kennedy – Court clerk.