



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

**Civil Appeal 23 of 2008**

**JONATHAN  
WABALA.....1<sup>ST</sup>  
APPELLANT**

**CHRISTOPHER  
NG'ANG'A.....2<sup>ND</sup>  
APPELLANT**

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V  
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**ROSE AWINJA  
WAFULA.....  
.....RES  
PONDENT**

**RULING**

**This is a ruling on an application dated 3<sup>rd</sup> April, 2009 brought under Order XLI Rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking the following orders:**

- 1. That this honourable court be pleased to set aside the orders refusing stay of execution pending appeal issued by the lower court in the said Busia PM CC No. 500 of 2002 on 12<sup>th</sup> March 2009.***
- 2. Pursuant to ( 1 ) above there be stay of execution of the decree in Busia PM CC No.500 of 2002 pending the hearing and determination of this appeal.***

### **3. Costs be in the cause.**

**The Applicant's application for stay pending appeal in respect of the decree of Busia SPM CC No.500 of 2002 was dismissed by the lower court on 12<sup>th</sup> March 2009. The orders in the lower court were for demolition of structures belonging to 3<sup>rd</sup> parties. The Applicants were condemned to meet the costs of demolition of the said structures. The Applicants will suffer substantial loss if the said orders are executed. Mr. Omondi submitted on behalf of the Applicants that all the requirements under Order XLI Rule 4 have been satisfied. He took the court through the conditions and how the applicant has complied with them.**

**The application was opposed by the Respondent. She was represented by Mrs. Chungu who submitted that, no substantial loss is likely to be suffered by the Applicants since the buildings in question are built on the road reserve adjacent to the Applicant's developed plot No.312, Busia. The Applicant and her tenants have no access to the plot which has been blocked by the said structures.**

**The application is brought under Order XLI Rule 4 which requires that the following conditions be satisfied:**

- a) *That substantial loss is likely to be suffered by the Applicant if the orders sought are not granted;***
- b) *That the application is brought without due delay;***
- c) *That the Applicants' have offered security for the due performance of the decree.***

**The orders of the lower court dismissing the application for stay were made on 12<sup>th</sup> March 2009 and this application was filed on 3<sup>rd</sup> April 2009. This was after a period of less than one month. I find that the Applicant is not guilty of laches.**

**On substantial loss, the Applicant contends that the buildings belong to 3<sup>rd</sup> parties and that the cost of demolition may be enormous. It may also put the Applicant in collision cause with the Municipal Council who planned the buildings. The Municipal Council was not a party to the lower court proceedings and it has not been shown that they had anything to do with the erection of the alleged illegal structures. I am not convinced that the applicants will be put in collision cause with the council for the simple reason that the council approved the building plans. It is not disputed that the structures stand on a road reserve. The estimated cost of demolition has not been shown in this application. It is the duty of the Applicant to prove substantial loss by showing how much in monetary terms or otherwise, he is likely to lose if the orders sought are not granted. The Applicant has a duty to show that in the event of a successful appeal, the Respondent is a woman of straw who is not capable of refunding the expenses of demolition of the said structures. No attempt has been made to satisfy this requirement. The issue of 3<sup>rd</sup> parties owning the existing buildings and the Applicants erecting the illegal structures described in the amended plaint was in the knowledge of the lower court when the case was heard and determined. The annexed pleadings support this observation. The plaint prayed for costs of demolition and costs of the suit. That prayer puts the Applicants on notice in good time and I am surprised that no attempt to join the 3<sup>rd</sup> parties was made in the lower court.**

**The Applicant has failed to convince this court that, he is likely to suffer substantial loss if the orders sought are not granted. The loss that may be suffered herein in execution of the orders of the lower court is capable of being made good in monetary terms in the event of a successful appeal.**

**On close scrutiny of the supporting affidavit, I do not see any offer for the security of the due performance of the decree as required by Order XLI Rule 4. A statement from the bar is not sufficient to satisfy this requirement. The said condition must be met by the Applicants herein.**

**I agree with the Respondent that it is not a requirement in this court for the Applicant to show that his appeal has high chances of success. The Respondent has greatly dwelt on the issue in the replying affidavit. I am opined that the issue is irrelevant in appeal in the High Court.**

**It is my finding that the application has no merit and I dismiss it accordingly by upholding the orders of the lower court for refusal of stay pending appeal. Costs in the cause.**

**F. N. MUCHEMI**

**JUDGE**

***Dated, Delivered and Signed at Bungoma this 3<sup>rd</sup> day of November, 2009 in the presence of Mr. Omondi for the applicants.***