



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 2069 OF 1996**

**KEMFRO (A)  
LTD.....  
.....  
PLAINTIFF**

**VERSUS**

**KABARE BARAGWI  
& NGARIAMA**

**CO-OP SOCIETY  
LTD.....  
.....1ST  
DEFENDANT**

**EDWIN NJENGA  
MUHORO**

**T/A EDM;UN  
ENTERPRISES.....  
.....2ND  
DEFENDANT**

**GICHUGU HOUSING  
CO-OP SOCIETY  
LTD.....3RD  
DEFENDANT**

**JOSIAH MUCHIRI  
KANAKE.....  
.....4TH  
DEFENDANT**

**R U L I N G**

At the time the plaintiff's application was filed on 19th August, 1996, the 4th defendant Josiah Muchiri Kanake, who is now the applicant, was not a party to the proceedings. He was however

subsequently joined as a party.

The plaintiff's said application succeeded vide the ruling of this court delivered on 19th March, 1997. As at that time the applicant herein (the fourth defendant) had taken possession of the suit premises. The impact of the success of the plaintiff's application was, inter alia, to have it restituted to the suit premises as per prayer NO. 4 in the said application. That order directly affected the applicant herein.

There is now before me an application by way of Chamber Summons under Order 41 Rule 4 and order 21 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for orders that there be a stay of execution pending appeal; status quo obtaining on 19th March, 1997 be maintained until further orders and that costs be in the cause. The application is supported by an affidavit sworn by the applicant to which the learned counsel for the plaintiff has sworn and filed a replying affidavit and grounds of opposition. I also have the submissions of both counsel on record.

The applicant having filed a notice of appeal, an appeal to the Court of Appeal shall be deemed to have been filed (Order 41 Rule 4(4)). However, that notwithstanding, the applicant has to satisfy the requirements of order 41 rule 4(2) in order to secure stay of execution. Rule 4(2) aforesaid provides as follows: “ (2) No order for stay of execution shall be made under sub-rule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Among the authorities cited are H.C.C.C. No 2411 of 1990 Indar Singh Gill Limited –v- Njoroge Gichara C. APPLICATION NO. NAI 15 OF 1990 (UR) VISHRAM HALAI & ANOTHER –V- THORNTON & TURPIN (1963) LIMITED & CIVIL APPLICATION NO. NAI 129 OF 1995 (57/95 UR) N;YALS (Kenya) Limited –v- United Housing Estate Limited. I have gone through the said authorities and noted the principles enunciated therein. I also bear in mind C.A. NO. 160 of 1995 M/s Gusii Mwalimu Investment co. Ltd –v- M/s Mwalimu Hotel Kisii Ltd and C.A No. 186 of 1992- Kamau Mucuha –v- The Ripples Ltd which I addressed in my ruling of 19th march, 1997.

In my ruling aforesaid, I found that the distress was unlawful and that possession was equally unlawful. I believe I was right. However, the applicant has an undoubted right of appeal. This is not the last court. Further, it has been held in several authorities that a judge who feels no doubt in dismissing a claim to an interlocutory injunction may perfectly consistently with his decision recognize that his decision might be reversed and that the comparative effects of granting or refusing an injunction are such that it would be right to preserve the status quo pending appeal.

The applicant herein is in possession. The refusal to grant stay shall lead to his eviction. The premises may change hands and his power to possess the same removed beyond recall. In such a case, the intended appeal if successful will be rendered nugatory. Substantial loss may thereby occur. The application for stay was filed timeously.

In view of the foregoing I am inclined to grant the stay sought by preserving the status quo. The applicant however shall cause to be filed a bond of Kshs. 250,000/- executed by either an insurance company or a sound financial institution within 30 days hereof.

The costs of this application shall await the outcome of the appeal,. Orders accordingly.

Dated and delivered t Nairobi this 2nd day of July, 1997.

MBOGHOLI MSAGHA

JUDGE