



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 10 OF 2012**

**PETER NGANGA MUIRURI ..... APPLICANT**

**AND**

**CHIERA WAITHAKA ..... RESPONDENT**

**An application to stay execution pending appeal from the order of the High Court of Kenya in Nairobi (Mutava J.) given on 13<sup>th</sup> December 2011  
in  
H.C.C.C. 235 OF 2009)**

**RULING**

**Peter Nganga Muiruri**, the applicant, is named defendant in a suit which was commenced in the High Court at Milimani, Nairobi, by **Chiera Waithaka**, the respondent, claiming a mandatory injunction and damages for trespass. The applicant is in occupation of land known as **L.R. No. 7752/225** situated at Loresho Nairobi. The land was originally registered in his name, but it was sold to the respondent by Housing Finance Company of Kenya in exercise of its statutory power of sale.

On 16<sup>th</sup> February 2011, Khaminwa J. ruled that the applicant had no proprietary interest over the aforesaid property and the land in question was registered in the name of the respondent herein. That notwithstanding, the learned Judge dismissed the respondent's application for an interlocutory mandatory injunction to compel the applicant herein to vacate the suit property and deliver vacant possession to the respondent and thereafter a restraining injunction to issue to bar re entry by the applicant.

The respondent was aggrieved and brought an application seeking review of the aforesaid ruling. For some reason, the review application was heard by Mutava J., who by his ruling dated 13<sup>th</sup> December, 2011, allowed the application for review and set aside the ruling of Khaminwa J. dated 16<sup>th</sup> February, 2011; and allowed the respondent's application for a mandatory injunction. It is that ruling for which a stay is sought in the motion before me dated 23<sup>rd</sup> January 2012.

The applicant in the aforesaid motion contends that the motion is urgent and has requested that it be so certified. He fears that he will soon be evicted from the property and thus render the success of his intended appeal against the order commanding him to vacate the suit property, nugatory. Mr. Wamalwa for the applicant submitted before me that the mandatory orders of injunction were "cooked" and therefore should not be left to stand even for a moment.

Miss Odari for the respondent urged me not to certify the motion as urgent because, first the applicant was granted a stay by the High Court, and, second, because the motion is a replication of another

application for stay pending for hearing in the High Court. That application is dated 23<sup>rd</sup> December 2011 and is due for hearing on 28<sup>th</sup> March 2012. The application before me was filed in court on 25<sup>th</sup> January 2012, about a month after the one pending before the High Court. On 25<sup>th</sup> January 2012 I declined to certify it as urgent. This is an *inter partes* hearing on the question of urgency.

Mr. Wamalwa referred me to a court order by the High Court made on 10<sup>th</sup> January 2012 in which Mutava J. directed the Deputy Registrar to forthwith issue and execute orders granting a mandatory injunction. The direction was given notwithstanding that an application for stay of execution had been filed and was pending for hearing. Mr. Wamalwa submitted that in view of Mr. Mutava J's direction to the Deputy Registrar, the applicant has no chance in the stay application in the High Court.

When Mutava J. granted a mandatory injunction on 13<sup>th</sup> December 2011, he granted the applicant 14 days to apply for a stay of execution of his order. The applicant indeed filed the application. However, it is unclear why the applicant had to file two almost identical applications before two different courts. It would not be proper procedurally to fast track a later application and leave the earlier one in time pending. The general policy of the law is that the matter filed earlier in time is normally heard first. The applicant, according to his counsel, fears that he might be forced to appear before Mutava J., who, according to his counsel on record, has already made up his mind on the merits of the applicant's case. The applicant is the one who filed that application and if that fear existed, then there was no basis for filing that application in the High Court.

In my considered view, the circumstances of this case constrain me to decline to certify the motion dated 23<sup>rd</sup> January, 2012 as urgent. I make no order as to the costs of the *inter partes* hearing on the question of urgency.

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of March 2012**

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**