



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL CASE NO. 208 OF 2009**  
**ABDI HASHI YUSUF.....PLAINTIFF**  
**VERSUS**  
**DR. YUSUF MBURU NJOGU.....1<sup>ST</sup> RESPONDENT**  
**BARCLAYS BANK OF KENYA LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 2<sup>nd</sup> May 2012 is for issuance of a stay of execution order in Senior Resident Magistrate's Court Land dispute **No. 80 of 2011** pending hearing and determination of this suit.
2. The application is premised on grounds that on the 29<sup>th</sup> September 2011, the Senior Resident Magistrate, Kajiado adopted a tribunal award in respect of land parcel, **Ngong/Ngong/20397**; The 1<sup>st</sup> respondent has applied for execution of the award and it is in the interest of justice that the application be allowed.
3. The application is supported by an affidavit deposed by the applicant who states that on 6<sup>th</sup> August 2001 he guaranteed the 1<sup>st</sup> defendant to secure a loan facility of **Ksh.1,000,000/=** from the 2<sup>nd</sup> defendant whereby title to his property – **Ngong/Ngong 20397** was charged. The loan was serviced by the 1<sup>st</sup> defendant and his property was discharged. Following negligence on the part of the 2<sup>nd</sup> defendant, the title deed was released to the 1<sup>st</sup> defendant. He filed a suit seeking release of the title deed. While the suit was pending in court the 1<sup>st</sup> defendant complained to the Land Disputes Tribunal who heard the dispute and ordered that part of the land be excised. The award was adopted by the court. Enforcement of the decree would render proceedings in the suit filed by the applicant nugatory.
4. In a reply thereto the 1<sup>st</sup> respondent deposed that the title deed was released to him by the 2<sup>nd</sup> defendant in the presence of the applicant. Thereafter the applicant permitted him to deposit the title deed as security with Standard Chartered bank where he obtained a loan. The loan facility was however not advanced whereby they are demanding for it, a fact well within the knowledge of the applicant who was advised to put a caution on the property.
5. He stated further that the applicant sold to him part of the parcel of land measuring 1½ acres whereby he needs a title deed.

6. The 2<sup>nd</sup> respondent did not respond to the application. The only replying affidavit on record is the one in response to the application dated 9<sup>th</sup> April 2010.

7. This court has unfettered discretion of staying proceedings where justice demands. In doing so however the court must consider the circumstances of the case and the need to do justice. The parties concerned must also be considered. Their conduct must be considered.

8. It is not in dispute that the 1<sup>st</sup> respondent deposited the applicant's title deed with the 2<sup>nd</sup> respondent as security for a loan advanced to him. It is also established that the 2<sup>nd</sup> respondent released the title deed to the 1<sup>st</sup> respondent. Whether or not the document was released in the presence of the applicant is a matter to be determined in the course of hearing of this suit. Further, whether or not the document was deposited with the Standard and Chartered Bank and/or with the consent of the applicant is also a matter to be determined by the court.

9. What is apparent is the fact that after this suit was instituted in court on the 7<sup>th</sup> July 2009 seeking release of the title deed; in the year 2010, the 1<sup>st</sup> respondent filed a claim in the Land Disputes Tribunal claiming grant of land **parcel No. Ngong/Ngong/20397**. The tribunal awarded **1½ acres** being part of the land to the 1<sup>st</sup> respondent. The award was adopted as judgment of the court and a decree issued.

10. The applicant herein has not only claimed for release of the title deed to the subject land but also claimed general damages. Failure to halt the order granted will mean execution issuing. According to the decree if the applicant does not sign transfer documents the executive officer will be obliged to do it. The Land Registrar is also required to legalize land documents in favour of the 1<sup>st</sup> respondent.

11. Taking into consideration the circumstances of the case, the conduct of the 1<sup>st</sup> respondent of filing a different suit during pendency of this particular suit in respect of the same subject matter makes his conduct questionable. Equity, good conduct and fair play dictates that the order sought do issue.

12. In the premises it is hereby ordered that there be a stay of execution of the decree issued in Senior Resident Magistrate's Court **Land Dispute No. 80 of 2011** pending hearing and determination of this suit.

13. In order for this order not to be seen as some device to postpone proceedings indefinitely, a condition must be imposed. Consequently, the applicant is directed to ensure the instant case is heard and determined on priority basis within **120 days**.

14. Costs of the application shall be in the cause.

15. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 21<sup>ST</sup> day of MAY, 2014.**

**L.N. MUTENDE**

**JUDGE**