



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Case 102 of 1994**

**PAUL KHAKINA MUSUNGU ..... PLAINTIFF**

**VERSUS**

**PEPELA KHATELI ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH CHEBAYI CHESOLI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The 2<sup>nd</sup> defendant/applicant has in his application dated 24<sup>th</sup> January 2013 sought the following prayers;

- (a). Service of this application be dispensed with in the first instance.
- (b). A temporary injunction be issued restraining the plaintiff by himself, his agents and servants from entering the land, ploughing, harvesting trees or disposing of the suit land pending inter partes hearing of this application.
- (c). That the status quo obtained before judgment be ordered maintained pending determination of intended appeal.
- (d). The plaintiff be ordered arrested and committed to prison for discarding stay orders initially granted by the court.
- (e). Costs be provided for.

The motion is based on the grounds on its face and on the affidavit sworn by the applicant. The motion is opposed and the plaintiff/respondent has filed a replying affidavit thereto.

According to the replying affidavit at paragraph 6, the plaintiff/respondent states that he has been in occupation of the suit land even before the commencement of this suit. At paragraph 9, he states that he has never engaged a purchaser to dispose of the suit land and the applicant is still registered as owner of this land. They

opposed the application because the orders sought are omnibus and therefore cannot be granted and finally if the orders sought are granted, he will be greatly prejudiced.

The application is brought under order 42 Rule 6 (i) of the CP Rules which basically deal with stay pending appeal and therefore the application is properly before the court and the technicalities raised by the respondent is disregarded by this court given backing on the provisions of Art 159 of the Constitution of Kenya. The provision on sections 63 will not be adjudicated by this court as the applicant abandoned prayer (d) of the application which sought to have the respondent arrested for violation of the stay orders given earlier by the trial judge. It is not disputed from the records and from the bar that the plaintiff/respondent is in occupation of this land. The applicant has also annexed a notice of appeal filed on 21<sup>st</sup> December 2012 demonstrating he is appealing against the judgment delivered on 20<sup>th</sup> December 2012 as required by law. The applicant's worry is that the respondent may transfer the suit land to himself and dispose of it thus rendering the appeal nugatory in the event of success. The respondent has himself admitted in his affidavit that he does not intend to dispose of this land thus if this court grant stay orders in terms of prayer (c) in the application, he will suffer no prejudice. Prayer (c) asks for the status quo obtained before judgment be maintained pending determination of intended appeal. My interpretation of this status quo and which I order to be maintained is that the applicant remains as registered owner of suit parcel title Ndivisi/Ndivisi/64 while the respondent is in occupation and user of it pending the determination of the appeal. However the stay is conditional to the effect that if the applicant does not file his record of appeal within the stipulated time, then the stay orders granted are automatically vacated and the respondent be at liberty to move the court to execute. Costs shall abide the outcome of the appeal.

**RULING DATED, SIGNED, READ AND DELIVERED** in open court this 11<sup>th</sup> day of February 2013.

**A. OMOLLO**

**JUDGE.**