



Editorial Summary

1. *Civil Appeal*

2. *Subject of subordinate court case*

LAND

- 2.1 *Plot No. 195
Rhamu Township
Mandera County*

- 2.2 *Parties:*
 - i) *Original plot owners
Haji Ismail Suhu

now deceased.*

 - ii) *Appellant/original 1st defendant

Muktar Dubail Hassan

bought plot from

Abdifatah Ismail

2nd respondent/original 2nd defendant

Step brother to 1st respondent

original plaintiff*

 - iii) *1st respondent/original plaintiff:*

- a) *Appellant bought land from
2nd respondent*
- b) *Without authority*
- c) *Without letters of grant from courts*

2.3 *Trial at Mandera law Courts:*

- a) *No letters of grant*
- b) *2nd respondent no authority to sell land.*
- c) *Judgment for original plaintiff/
1st respondent*
- d) *Effect of judgment 1st & 2nd defendants
respondents no dealing with land.*
- e) *Eviction from property
(18th November 2010)*

2.4 *Appellant original 1st defendant files appeal
on 8th November 2010 in High Court of Kenya
Meru.*

2.5 *Court file falling under jurisdiction of Nairobi
ordered transferred to Nairobi on 16th November 2010
Lesiit J*

2.6 *Application for stay of execution*

dated 14th February 2012 and filed

dated 23rd February 2012.

3. *Application by appellant:*

- a) *There be a stay of execution.*
- b) *Applicant had lived on land since 1999 and done substantial development.*
- c) *Bought plot 195 in 1999 for Ksh. 18,000/-*
- d) *There be stay of execution pending appeal.*

4. *Case Law:*

5. *Advocates :*

- i) *S Keyonzo holding brief for C. Nzili instructed by C. Nzili & Co Advocates for appellant/applicant*
- ii) *J O Omboga instructed by Omboga & Co Advocates for respondent/respondent*

REPUBLIC OF KENYA
IN THE HIGH COURT

AT NAIROBI
MILIMANI LAW COURTS
Civil Appeal 375 of 2011

MUKTAR DUBOW HASSAN APPELLANT/ APPLICANT

VERSUS

SHAMSA HAJI ISMAIL

ABDI FATAH ISMAIL RESPONDENTS/ RESPONDENTS

(Being an appeal from the Judgment of Hon. Ondenyo (Principal Magistrate) in Case No. 1 of 2010 dated 24th February 2012 at Mandera Court)

RULING

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Application for Stay of Execution
Dated 1st November 2010

I. PROCEDURE

1. The subordinate court which heard the original suit that arises out of land is the Principal Magistrate's court at Mandera.
2. Being aggrieved with the decision of the court (which decision had the effect of ordering that he vacates the premises he occupies on the question land, that he claims he had been living on since 1999), he filed an appeal to the High Court at Meru (8th November 2010)
3. The Hon. Judge in charge High Court Meru directed that the file be brought to Nairobi as Mandera was under the administration of the High Court of Kenya Nairobi (Lesiit J, 16th November 2010).
4. The applicant/appellant instead filed a new certificate of urgency dated 14th February 2012. The first application was then withdrawn dated the 1st November 2010.

II REPRESENTATION

5. The matter before the magistrate involved land

Plot No. 195,

Rhamu Township Mandera County

6. The parties herein are:
 - 6.1 The original plot owner
Haji Ismail Suhu (now deceased)
There has been no estate legal representative
Appointed?
 - 6.2 Appellant/original 1st defendant
Muktar Dubaii Hassan
Who bought the Plot No. 195 from
Abdifatah Ismail
 - 6.3 2nd respondent original 2nd defendant
Abdifatah Ismail
Who is alleged to have sold the plot in question.

He is the step brother to the 1st respondent original plaintiff

Shamsa Haji Ismail

- 6.4 The 1st respondent original plaintiff
Shamsa Haji Ismail who filed the
Original suit in Mandera

7. When the owner of Plot No. 195, Rhamu Township Mandera County passed away, no letters of grant or legal representative was appointed.

8. It transpired during the trial before the Hon. Magistrate that the

2nd respondent, a step brother to the 1st respondent original plaintiff, without permission of the court sold the land in 1999 to the appellant without any colour of right to do so.

9. The Hon. Magistrate being alive to the fact that no lawful transaction may be taken up unless the deceased estate is represented, allowed the original plaintiff/1st respondent's prayer.

10. Orders were granted that both the 1st and 2nd respondent would not be allowed to have any dealings upon the land.

11. By this time the 2nd respondent had not entered appearance nor filed defence. It meant that judgment was to have been entered against him. I believe this may be the position. The original file not being before the court, this court is unable to confirm this fact.

12. The other aspect that came out was that the 2nd respondent was a school going young man and may have not have had the capacity to enter the said agreement.

13. When the application came for interparte hearing, matters took an interesting turn.

III REPRESENTATION II

14. The advocate representing the original plaintiff, 1st respondent in this appeal filed a notice of appointment of advocate on 5th March 2012 stating that he was now representing the 1st and 2nd respondents.

15. He stated from the bar that he all along represented the original plaintiffs in the subordinate court. The 2nd respondent had no advocate. There was interlocutory judgment entered against him. He was a step brother to the plaintiff and as such the advocate saw nothing wrong in now representing the two.

16. The advocate for the applicant had no objection to this representation when the matters came up on the 21st March 2012.

IV OPINION

17. The 2nd respondent, it is admitted has an interlocutory judgment against him. It has not been set aside for him to be able to participate in this appeal. The orders against him are final.

18. Further the 2nd respondent cannot be represented by the advocate for the opponents who is the advocate for plaintiff. It matters not that the two are close relatives. They must have separate advocates to represent them due to the conflict of interest and prejudice that might arise to the appellant's case.

19. I would in the circumstances order that there be stay of execution pending the 2nd respondent obtaining an independent advocate to adequately advise him. If he does not wish to do so, then he should not be active in this appeal and allow the Hon. Magistrate's judgment against him to stand.

20. There are pure points of law that arise from this appeal and not necessarily of facts although the High Court will look at both the law and facts.

21. The notice of appointment on behalf of the 2nd respondent is hereby struck out. The respondent No. 2 will be given 90 days in which to appoint an advocate, failure to the appeal is to proceed without him, if there is proved that an interlocutory judgment has been entered.

22. In the meantime stay of execution is granted till the determination of appeal.

23. The deputy registrar is to call up for the lower court file after 90 days and comply with Section 79B of the Civil Procedure Act.

24. There will be costs in the appeal.

DATED THIS 26TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

i) *S Keyonzo holding brief for C. Nzili instructed by C. Nzili & Co Advocates for appellant/applicant*

ii) *J O Omboga instructed by Omboga & Co Advocates for respondent/respondent*