



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Case 64 of 2004**

**MWINYI HAMISI ALI KOMBO .....1<sup>ST</sup> PLAINTIFF**  
**MOHAMED KARISA MWISHO.....2<sup>ND</sup> PLAINTIFF**  
**CHENGO NGUMA BENGUMA .....3<sup>RD</sup> PLAINTIFF**  
**BARDALE TAPATA .....4<sup>TH</sup> PLAINTIFF**  
**PARTSON JKAHINDI NYUNDO .....5<sup>TH</sup> PLAINTIFF**  
**NGALA CHIGUNDA JIRA .....6<sup>TH</sup> PLAINTIFF**  
**GLADYS RIZIKI NYAMAWI .....7<sup>TH</sup> PLAINTIFF**  
**BODZE JILANI (Suing for and on behalf of 4001 others).....8<sup>TH</sup> PLAINTIFF**

**VERSUS**

**DARIUS M. MBELA.....1<sup>ST</sup> DEFENDANT**  
**PHILEMON MWAISAKA .....2<sup>ND</sup> DEFENDANT**  
**JULIUS KARIUKI GECAO .....3<sup>RD</sup> DEFENDANT**  
**MIKE MAINA .....4<sup>TH</sup> DEFENDANT**  
**SIGNON FREIGHT .....5<sup>TH</sup> DEFENDANT**  
**FAIRPLAY ENTERPRISES .....6<sup>TH</sup> DEFENDANT**  
**RAJABA INVESTMENTS.....7<sup>TH</sup> DEFENDANT**  
**KENLIFE INVESTMENTS.....8<sup>TH</sup> DEFENDANT**  
**NJEWAWA INVESTMENTS .....9<sup>TH</sup> DEFENDANT**  
**PRINCIPAL REGISTRAR OF TITLES.....10<sup>TH</sup> DEFENDANT**

COMMISSIONER FOR LANDS.....11<sup>TH</sup> DEFENDANT

ATTORNEY GENERAL .....12<sup>TH</sup> DEFENDANT

KRYPTONITE ENTERPRISES LTD. ....13<sup>TH</sup> DEFENDANT

### RULING

On the 27<sup>th</sup> day of February 2009, this court issued both mandatory and prohibitive orders of injunction against the plaintiffs in respect of plot numbers MN/III/516, 520 and 525 pursuant to the 6<sup>th</sup> and 8<sup>th</sup> defendants' summons dated 27<sup>th</sup> June 2008. In essence, the plaintiffs were restrained from trespassing, occupying, developing, allocating, leasing, and selling etc the aforesaid parcels of land. They were also required to vacate and demolish all structures standing on the suit premises. The plaintiffs felt aggrieved by the orders, consequently they filed a notice of appeal to intimate their intention to challenge the decision in the Court of Appeal. They have now filed a notice of motion dated 24<sup>th</sup> March 2009, in which they have sought for an order of stay of execution pending the hearing and determination of the intended appeal. The motion is taken out pursuant to the provisions of order Xli rule 4(1) of the Civil procedure Rules. It is the subject matter of this ruling. The same is supported by the affidavit of Gladys Riziki Nyamawi sworn on 24.3.2009. The 6<sup>th</sup> and 8<sup>th</sup> Defendants filed grounds of opposition to oppose the motion.

Under order XLI rules 4 of the Civil Procedure Rules, an application for Stay of Execution pending appeal is determined upon the consideration of the following principles:

First the application must be made without an unreasonable delay. It is the submission of Mr. Okanga, learned advocate for the plaintiffs that the motion was filed without an unreasonable delay. It is the submission of Mr. Mogaka, learned advocated for the defendant that the motion was filed after an unreasonable delay. I have considered the rival submissions and the material placed before this court. There is no doubt that the decision appealed against was made on 27.2.2009. A notice of appeal was lodged on 2<sup>nd</sup> March 2009. The motion was filed on 24<sup>th</sup> March 2009. I am convinced that the motion was timeously filed and that the delay to file the same is not inordinate.

Having come to the conclusion that the applicants have fulfilled the first requirement, let me now consider the second principle, which is to the effect that an applicant must show that he would suffer substantial loss if the order is not given. It is the submission of Mr. Okanga, that the plaintiffs would suffer substantial loss in that they would be required to vacate and demolish their known homes before the appeal is heard and determined. Mr. Mogaka did not address his mind over this issue. I have considered the resultant effect of the orders made on 27.2.2009 if implemented. It will result to the demolition of the plaintiffs' structures and their eviction. That in my view is enough illustration that the plaintiffs will suffer substantial loss if they are denied the order for stay of execution.

The third principle which must be considered, is security for the due performance of the decree. Mr. Okanga has stated from the bar that his clients are ready to abide by any conditions as to security imposed by this court. Mr. Mogaka has proposed that the plaintiffs be ordered to deposit a sum of Kshs.20 million. I have considered the able submissions and the pleadings on record. The provision for security is to ensure due performance of the decree or order at the end of the appeal. If the appeal fails, it will mean that the applicants must be forcefully evicted and their structures standing on the land in dispute will have to be demolished. It is difficult to quantify how much will be required to carry out the exercise. I will fix a conservative figure of Kshs.500,000/- to be the estimated cost.

A peripheral issue regarding the competency of the notice of appeal was raised. It is the submission of Mr. Mogaka that the notice of appeal was issued pursuant to the provisions of order XLI rule 4(10) of the Civil Procedure Rules instead of rule 74 of the Court of Appeal rules hence the notice of appeal is incompetent. Mr. Okanga was of the view that the issue can only be canvassed in the court of Appeal. With respect, I agree with the submissions of Mr. Okanga that the issue touching on the competency of

the notice of appeal can only be determined by the court of appeal. It is one of the steps required to be undertaken under order XLI rule 4(4) of the Civil Procedure Rules to institute an appeal.

In the end I am convinced that the plaintiffs should be given a conditional order of stay. Consequently an order for stay of execution pending appeal is given on condition that the plaintiffs should deposit in court a sum of Kshs.500,000/- within 14 days from the date hereof. In default the motion shall stand dismissed. Costs shall abide the outcome of the intended appeal.

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of April 2009.**

**J.K. SERGON**

**J U D G E**