



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Suit 114 of 2006

1. Land law

2. Subject of main suit

Original LR Kericho/Chepsir/119

- a) Sub-divided amongst buyers and sellers by 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs who are man and wife.
- b) First plaintiffs a minor grand child
- c) Portion of land given to buyers paragraph 8 of plaint and to their children.
- d) The youngest son defendant No. 1 given land – transferred to wife who sold same.
- e) Suit filed to restrain the wife 2<sup>nd</sup> defendant from selling land.
- f) Trust alleged according to Kipsigis Customary law.
- g) Fraud alleged.
- h) Court held.  
Defendant 1 (*suit withdraw*) and defendant 2 wife held land absolutely.
- i) Defendant 2 being absolute over and title cannot be challenged.

3. **Application for stay of execution of sale**

Reasons — appeal would be rendered nugatory to the Court of Appeal  
There is a new owner of land 2<sup>nd</sup> defendant who may further sell the land to 3<sup>rd</sup> parties.

4. **In reply**

- a) 1<sup>st</sup> defendant had capacity to sell land
- b) The 2<sup>nd</sup> defendant purchased the land according to law.

5. **Held**

- a) No stay of sale and or transfer.
- b) Application dismissed.

6. **Case Law**

**Advocate for Plaintiff/applicant**

- a) **Malcom Bell v Hon. Daniel Toroitich Arap Moi & Anor.**

Cr. Application No. Nai 342/05 (211/2005 Cr)

**Advocate for defendants/respondents**

- a) **In the matter of the estate of Charles Levitan**

(deceased) Nbi P&A. 159/97 (Khamoni J)

- b) **Loldia Ltd V Kariuki Waithaka**

Nakuru HCCC. 234/96 (D. Musinga J)

7. **Advocates**

N.O. Migiro advocate instructed by M/S Migiro & co. advocates for the Plaintiffs/Applicants originally plaintiff – present

J.R. Kimeto advocate instructed by M/S Bett & co. advocates for the defendant/Respondents originally defendants - present

**MARVIN KIPRONO MUTAI .....1<sup>ST</sup> PLAINTIFF**

**VERSUS**

**SAMUEL KIPRONO MUTAI ..... 1<sup>ST</sup> DEFENDANT**

**EMMY CHEPKORIR MUTAI ..... 2<sup>ND</sup> DEFENDANT**

**RULING NO. 1**

**Application for stay of any dealing with land**

**Dated 31<sup>st</sup> March, 2009**

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**I: Background**

1. On 9<sup>th</sup> February, 2009, I heard and concluded a land case between the Plaintiffs 1, 2 and 3/applicants against 2<sup>nd</sup> defendant the daughter in law to plaintiffs 2 and 3 and defendant No. 3 the buyer of a parcel of land.
2. Plaintiffs 2 and 3 were the original owner of a settlement scheme land being LR Kericho/Chepsir/119 which they sub-divided and sold portion of the land. They gave some portion to their children but kept another portion for themselves.
3. The land given to their son, who was originally sued as the 1<sup>st</sup> defendant and his suit was withdrawn, had been given a sub-divided parcel of land. He gave the whole of this parcel to his wife the 2<sup>nd</sup> defendant (*originally*) the said 2<sup>nd</sup> defendant was estranged from the 1<sup>st</sup> defendant. The said 2<sup>nd</sup> defendant noting that her land was adjacent to her in laws, sold the land to the 3<sup>rd</sup> original defendant one Paul Rono.
4. The suit was to order the said wife Emmy Chepkorir Mutai to return the land their son had given her according to customary law. She refused.
5. The court held in its judgment that the title was obtained absolutely in favour of the 2<sup>nd</sup> defendant. That this right was transferred to the 3<sup>rd</sup> defendant. The suit was dismissed.
6. Being dissatisfied with the decision of this court the plaintiffs appealed to the court of appeal. In the meantime they filed the application of 31<sup>st</sup> March, 2009 seeking the following orders:-

**II: Application 31<sup>st</sup> March, 2009.**

*“That the court be pleased to order stay of registration of any transfer conveyance, lease or any dealing of land known as Kericho/Chepsir/2005 ....*

*b) ...*

*c) That the Court be pleased to order stay of sale by private treaty or otherwise howsoever, completing a transfer or conveyance or leasing, letting otherwise interfering with the ownership of title to and of the parcel known as Kericho/chepsir/205 pending the ruling and determination of intended appeal against the judgment and decree of Hon. Lady Justice Ang’awa delivered on 9<sup>th</sup> February, 2009”*

7. The advocates for the applicant relied on the case law of

**Malcom Bell**

v

**Hon. Daniel Toroitich Arap Moi**

CA 312/05

**(Tunoi, Bosire, O’kubasu JJa)**

where a stay was granted to the applicant pending the appeal but leaving the respondent, who had been on the land for twenty years, in possession of the land.

8. The advocate prayed for similar orders in this case.
9. In reply the respondent relied on the probate case of

**Charles Levitan (deceased)**

**Nbi HCC P&A. 159/97(Khamoni J)**

where the judge held it was pointless to grant a stay as there was nothing requiring execution of any ruling.

10. A second case that the advocate relied on was of

**Loldia Ltd versus Kariuki Waithaka**

**Nakuru HCCC. 234/96 Musinga J**

where it was held that an applicant must demonstrate in his appeal an overwhelming chances of success.

11. There was no such demonstration and the advocate asked the application awaiting appeal be dismissed.

### **III: Opinion**

12. The facts of the **Malcom Bell** case (*supra*) concerns the influence brought to bear by a person in authority to acquire land. The issue of duress would therefore be probably looked into.

13. In this case the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, who sue also as next of friend for Plaintiff No. 1 gave the parcel of land as a gift to their son. His son in turn gave the land to his wife. There was no duress. There were registered as absolute proprietor and their title cannot be challenged.

14. I do not see any merit in this application. It is dismissed with costs to the respondent.

**DATED** this 23<sup>rd</sup> day of October, 2009 at **KERICHO**

**M.A. ANG'AWA**

**JUDGE**

### **Advocates**

N.O. Migiro advocate instructed by M/S Migiro & co. advocates for the Plaintiffs/Applicants originally plaintiff – present

J.R. Kimeto advocate instructed by M/S Bett & co. advocates for the defendant/Respondents originally defendants - present