



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO.48 OF 2013**

**ALI GADAFFI HAMISI**

**ROSELYNE WADEYA.....1<sup>ST</sup>**  
**APPELLANT**

**FARIDA A. SALIM.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**FRANCIS MUHIA MUTUNGU.....1<sup>ST</sup>**  
**RESPONDENT**

**BEPHINE N. SHIRAO & MARGARET A. SHARAO (having been  
substituted as the personal representatives of the estate of the late**

**RICHARD SHIRAO (Deceased)..... 2<sup>ND</sup>**  
**RESPONDENT**

**R U L I N G**

1. This is a ruling on a notice of Motion filed here by the appellants – **ALI GADAFFI HAMISI** and **FARIDA A. SALIM** – against the respondents – **FRANCIS MUHIA MUTUNGU, BEPHINE N. SHIRAO** and **MARGARET A. SHIRAO** on 8/7/2013.

2. The application is brought under sections 1A, 1B , & 3 of Civil Procedure Act (cap 21), order 42 rule 6 of Civil Procedure rules, and other enabling provisions of law. Essentially, what is sought is a stay of execution of the judgment dated 20/6/2013 delivered in WINAM PMCC NO.495 of 2004 pending hearing and determination of the Appeal herein. This is asked for as prayer No.5 in the application. The other prayer concerns costs. It is asked at prayer No.7 that costs be provided for.

3. The grounds advanced in support state that the appellant has filed memorandum of Appeal; that the appeal has good chances of success; and that the appellant is willing to abide by any conditions given by the court.

In the supporting affidavit accompanying the application, the appellant states, inter alia, that the lower court order that he vacates the suit land – stated to be originally **PLOT NO.96 KALOLENI** - and now registered in plaintiff's name as **KSM/BLOCK 5/973** were injurious to him. The appellant said

his house and that of his tenant will be demolished. He will in effect lose investments worth millions of shillings, he deponed.

2. The dispute was said to arise as a result of two allocations by the Commissioner of Lands. The lower court validated the allocation to 1st Respondent while the allocation to the appellant was the one that came first. According to the appellant his appeal will be rendered nugatory if execution proceeds.

3. The response from the respondents side came vide a replying affidavit filed on 02/12/2013. The appellant was blamed for constructing structures on the suit land despite a court order prohibiting it. It was stated that the respondent is the registered owner of the suit land and therefore enjoys the rights that go with such registration.

4. The respondent deponed that the appellant is seeking to protect the same structures he put in defiance of a court order. Also stated is that appellants do not stay on the suit land. They stay in Migosi Estate.

5. The parties agreed to proceed by way of written submissions in lieu of hearing.

The appellants submissions were filed on 29/10/2014. According to the appellants, the 1st respondent has not filed a response and the application should be allowed against him. The submissions reiterated the reasons given in the application to justify granting of stay.

6. The respondents submissions were filed on 27/10/2014. The respondent submitted, inter alia, that the appellant has no automatic right to an order of stay. He must show that there is likelihood of suffering substantial loss or that the appeal would be rendered nugatory if stay is not granted. It was reiterated too that the appellant violated lower court orders prohibiting development of the suit land. This court was urged to decline to grant the order.

7. I have considered the material laid before me including the decided authorities availed. Both sides correctly stated the law applicable when considering whether to refuse or grant an order of stay. Simply put, the appellant needs to demonstrate existence of a good appeal with high chances of success. He is also bound to show the appeal would be rendered nugatory if stay is not granted. Tied to this second condition is the requirement that the appellant should also show the likelihood of suffering substantial loss.

8. While the appellants position is that he has demonstrated all this, the respondent are of the contrary view. But the appellant has not responded to another more grave accusation namely that he disregarded the lower court order when he constructed structures on the suit land.

9. The respondent availed various decided cases dealing with the point. For starters was **NATIONAL OIL CORPORATION OF KENYA VS YESS HOLDINGS LIMITED C.A NO.30/2000, KISUMU, then REV MADARA EVANS OKANGA OONDO VS HOUSING FINANCE COMPANY OF KENYA: HCC NO.262/05, NAKURU. There was also THE PHARMACY & POISONS BOARD VS SIPRI PHARMACEUTICALS LIMITED & another C.A NO.103/1998, NAIROBI.**

10. In the court file itself, there is a letter marked 135/2 dated 16/4/2009 complaining of such violation. The judgment of the lower court also makes reference to the issue.

11. As pointed out, the appellant has not responded to this. Court orders are to be obeyed. You can not disobey them when they do not serve your convenience and proceed to ask for other court order that you think will serve your convenience. What the appellant is asking for is an equitable relief. It is required that he should have clean hands before asking for them. The appellants hands are soiled by disobedience of a lawful court order. Such disobedience matters over and above any merits that his application may have. Infact this application will be decided on the issue and that is why I have not considered the authorities availed on the merits of the application.

12. The appellant is therefore found underserving of the orders he is seeking.

The application herein is dismissed with costs.

**A.K.KANIARU**

**ENVIRONMENT & LAND – JUDGE**

7/5/2015

7/5/2015

A.K. KANIARU j.

John Ogendo Court clerk

Odeny for Appellant

M/S Alinatwe for Ragot for Respondent

Court: Ruling on application filed here on 8/7/2013 read and delivered in open court. Right of appeal 30 days.

**A.K.KANIARU**

**ENVIRONMENT & LAND – JUDGE**

7/5/2015