



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 35 OF 2012.**

**STEPHEN NJAU KAMAU .....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**ERICK JACQUES JEAN MARIE**

**GILES MODAVE.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ANNE ADONGO OLEWE .....3<sup>RD</sup> DEFENDANT/APPLICANT**

**NANCY WATHEKA NJAU.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**JAMES KAMAU NJAU.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

1. **ERICK JACQUES JEAN MARIE GILES MODAVE, ANEE ADONGO OLEWE , NANCY WATHEKA NJUAU and JAMES KAMAU NJAU**, hereinafter referred to as 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Applicant respectively, filed the notice of motion under certificate of urgency dated 6<sup>th</sup> August, 2014 for injunctive order in respect of Land parcel Bukhayo/Mundika/1537, stay of execution of the judgment delivered on 8<sup>th</sup> July, 2014 pending the hearing and determination of the intended appeal and costs. The Applicants have set out five grounds marked (a) to (e). The application is supported by the affidavit of the 3<sup>rd</sup> Applicant sworn on 6<sup>th</sup> August, 2014 to which is annexed a letter dated 18<sup>th</sup> July, 2014 addressed to the Deputy Registrar seeking copies of proceedings and judgment and a notice of appeal dated 21<sup>st</sup> July, 2014.

2. The application is opposed by Stephen Njau Kamau, hereinafter referred to as the Respondent, through his replying affidavit sworn on 27<sup>th</sup> October, 2014.

3. The application is brought under Order 40 Rule 1, Order 42 Rule 6 (1) of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. The Applicants main ground for the application appear to be ground (c) to the effect that the **“Respondent is in the process of executing the orders of the judgment and dispose off the suit property”** In the replying affidavit, the Respondent has deponed that the appeal would not be rendered nugatory as the matter involves a contract between the Applicants.

4. When the application came up for interpartes hearing on 18<sup>th</sup> March, 2015, counsel for the parties

entered into a consent that the application be heard through written submissions and timelines were given. By the time today's ruling date was fixed only the Applicants had filed their submission. No written submissions have been received by the court from the Respondent by the time this ruling was being prepared.

5. The Applicants have submitted that the application was made without unreasonable delay and that unless the orders of stay of execution pending appeal are granted, they stand to suffer substantial loss. The Applicants referred the court to the case of ***Peter Ondande T/A Spreawett Chemis –vs- Josephine Wangari Karanja (2006)*** eKLR quoted in ***Kenya Orient Insurance Co. Ltd., -vs- Paul Mathenge Gichuki (2014)*** eKLR on the three issues to be considered by the court in determining whether or not to grant the application. The Applicants also cited the case of ***Kisiang'ani Tulienge & 2 others -v- Paul Wafula & 2 others (1998)*** eKLR on what amounts to reasonable time and the following four cases on the issue of substantial loss; ***Ann Wanjiru waigwa & Another –v- Joseph Kiragu Kibarua (2009)*** eKLR, ***Tropical Commodities Suppliers Ltd & others –v- International Credit Bank Ltd (in liquidation) (2004) 2 E.A, James Wangafwa & Another –v- Agnes Naliaka Cheseto (2012)*** eKLR and ***Silverstein –v- Chesoni (2002) I. E.A 296***.

6. The issue for determination before this court is whether the Applicants have established a case for this court to issue orders restraining the Respondent from alienating land parcel Bukhayo/Mundika/1537 and staying the execution pending the appeal.

7. The court has considered the grounds on the application, the Applicants' written submissions, the record of the court, the supporting and replying affidavit and found as follows;

- a) That the suit land was Bukhayo/Mundika/1537 and was registered in the names of the 1<sup>st</sup> and 3<sup>rd</sup> Applicants on 31<sup>st</sup> August, 2013 following a transfer from the 4<sup>th</sup> and 5<sup>th</sup> Applicants.
- b) That in the event, the orders in the court's judgment delivered on the 9<sup>th</sup> July, 2014 are executed, the result would be to remove the names of 1<sup>st</sup> and 3<sup>rd</sup> Applicants from the register of the suit land and restore proprietorship to the 4<sup>th</sup> and 5<sup>th</sup> Applicants' names. The orders did not direct that the suit land be registered in the names of the Respondent and there is no way the execution of the orders would cloth the Respondent with powers to alienate the suit land.
- c) That as the execution of the orders of 9<sup>th</sup> July, 2014 would still retain the registration of the suit land in the names of the two of the Applicants herein, the court finds there is no possibility of the Respondent interfering with the legal status of the land without the Applicants knowledge and concurrence. There is therefore no materials presented to support the Applicants allegation that they would or are likely to suffer substantial loss if the orders of 9<sup>th</sup> July, 2014 are executed.
- d) That the Applicants have not presented any materials to support their allegation that the Respondent has interfered with the suit land to their detriment. There is nothing to show what the Respondent has done or threatened to do on the suit that made the Applicants be apprehensive that he intended to sell or dispose the suit land. The execution of the orders of 9<sup>th</sup> July, 2014 is not likely to confer on the Respondent the status of the registered proprietor of the suit land without the Applicants doing so.
- e) That as the court does not issue orders in vain, the court finds no merit in any of the prayers in the application dated 6<sup>th</sup> August, 2014. The application is therefore dismissed with costs.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON...2<sup>ND</sup>...DAY OF ...JULY, ....2015.**

**IN THE PRESENCE OF;**

**PLAINTIFF.....].**

**1<sup>ST</sup> DEFENDANT/APPLICANT ..... ]**

**3<sup>RD</sup> DEFENDANT/APPLICANT..... ].....ABSENT.....**

**4<sup>TH</sup> DEFENDANT/APPLICANT..... ]**

**5<sup>TH</sup> DEFENDANT/APPLICANT.....].**

**COUNSEL.....MR. FWAYA FOR ONSONGO FOR PLAINTIFF/RESPONDENT AND MR. ASHIOYA FOR MAKOKHA FOR KIRUNDI & CO. ADVOCATE FOR DEFENDANTS/APPLICANTS.**