



**REPUBLIC OF KENYA.**

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

**HCCA. NO. 10 OF 2010.**

**FRANCIS OSIKE MASABA**

**SEMEYO NYONGESA MASABA.....PLAINTIFFS**

**=VERSUS=**

**HENRY KHAKHUBI.....DEFENDANT**

**R U L I N G.**

**FRANCIS OSIKE MASABA** and **SEMEYO NYONGESA MASABA**, hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> Applicants, filed the notice of motion dated 11<sup>th</sup> December, 2012 seeking for the following prayers;

- “(a) That the decree of the High Court dated 19<sup>th</sup> November, 2012 be set aside.
- (b) That there be a stay of execution in Busia Law court Civil suit No. 154 of 2004 pending determination of this application.
- (c) That the costs of this application be provided for.”

The application is based on the five grounds marked (a) to (e), supporting and supplementary affidavits of Francis Osike Masaba sworn on 11<sup>th</sup> December, 2012 and 15<sup>th</sup> October, 2014 respectively.

Prayer (b) has already been dealt with through the hearing of the Applicants’ subsequent application dated 27<sup>th</sup> August, 2013 and courts ruling of 28<sup>th</sup> July, 2014.

The Applicants, who are also the Appellants, had filed Busia HCCA No. 10 of 2010 challenging the lower court’s judgment of 4<sup>th</sup> March, 2010 in Busia PMCC. NO. 154 of 2004 ordering the lifting of the cautions the Appellants had filed on Land parcel Bukhayo/Kisoko/348. Earlier on, the Appellants had filed Busia H.C.C.A. NO. 19 of 2007 challenging the Lower court’s ruling restraining them from interfering with the suit land.

When the Appellants/Applicants and counsel for the Respondent appeared before Justice Kimaru on 19<sup>th</sup> November, 2012, the court consolidated the two appeals upon the application of the Appellants/Applicants. The court made a further order that the two appeals would be heard as one under Appeal number 10 of 2010. The Appellants/Applicants then applied for adjournment which was opposed by the Respondent’s counsel. The court rejected the application for adjournment and after the Appellants/Applicants insisted they were not ready to prosecute the appeal, the court dismissed the two appeals, that is Busia H.C.C.A No. 19 of 2007 and 10 of 2010, with costs. It is this order that the

Applicants seeks to have set aside in their application dated 11<sup>th</sup> December, 2012.

I have considered the grounds on the application, the contents of the supporting and supplementary affidavits and find as follows;

1. That contrary to the Applicants claim that the court did not consider their presentation, the record of the proceedings of 19<sup>th</sup> November, 2012 shows a different position. The Applicants' request to consolidate the two appeals were recorded and allowed.
2. That the Applicants claim that they never applied for adjournment in their presentation of 19<sup>th</sup> November, 2012, but the court record shows clearly that indeed both Applicants indicated they were not ready for the hearing and sought for it to be rescheduled. Their request was rejected and instead of prosecuting their consolidated appeals, they repeated the same application for adjournment. The court then made the observation that they were not ready to prosecute the appeals and proceeded to dismiss them with costs.
3. That Article 17 of the Constitution cited on ground (e) of the application deals with revocation of citizenship and has no relevance in this matter. The court believes the Applicants wanted to refer to Article 27 of the Constitution which deals with equality and freedom from discrimination. The record of the proceedings of 19<sup>th</sup> November, 2012 clearly shows each party was given opportunity to be heard before the orders were made. There is nothing on the record, and Applicants have not given any particulars, to suggest that they were discriminated against at any stage of the proceedings. The court has an obligation to ensure justice is not delayed in all proceedings before it.
4. That the Applicants have not shown that they are now prepared to prosecute their appeals even if the order of 19<sup>th</sup> November, 2012 was to be set aside. The contents of paragraphs 8 and 10 of the supplementary affidavit sworn on 15<sup>th</sup> October, 2014 confirms this.
5. That considering the judgment in Busia PMCC. NO. 154 of 2007 only ordered the lifting of cautions filed on land parcel Bukhayo/Kisoko/348 and was not about interests and privileges on the land, the Applicants will not suffer any prejudice if the orders of 19<sup>th</sup> November, 2012 are not lifted and or set aside.
6. That for reasons shown above the application dated 11<sup>th</sup> November, 2012 is without merit and is dismissed with no orders as to costs. The stay orders issued on 28<sup>th</sup> July, 2014 in relation to the application dated 17<sup>th</sup> August, 2013 are vacated.

It is so ordered.

**S. M. KIBUNJA.**

**JUDGE.**

**DATED AND DELIVERED ON 13<sup>th</sup> DAY OF NOVEMBER, 2014**

**IN THE PRESENCE OF;**

**P.I.P.....1<sup>ST</sup> APPLICANT/APELLANT**

**N/A.....2<sup>ND</sup> APPLICANT/APELLANT**

**N/A.....DEFENDANT/RESPONDENT.**

**Mr. Jumba for Respondent.**

**JUDGE.**