



**CIVIL**  
Stay of execution  
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 190 OF 2009 (O.S)**

IN THE MATTER OF: LAND PARCEL NO. KWALE/UKUNDA 965

**AND**

IN THE MATTER OF: REGISTERED LAND ACT CAP 300 LAWS OF KENYA

**AND**

IN THE MATTER OF: HIGH COURT CIVIL SUIT NO. 336 OF 2008 (OS)

MWANAJUMA MOHAMED MWAJINGA.....

.....PLAINTIFF

**-VERSUS-**

ATHMAN SAID GUO.....

.....DEFENDANT

BAKARI OMAR

MWATUNU.....PROPOSED

INTERESTED PARTY

**RULING**

The application dated 13<sup>th</sup> March 2012 seeks the following prayers.

1. *That leave be granted by the court to open a skeleton file.*
2. *That there be a stay of execution pending the hearing and final determination of the warrants to hand over possession of the suit property.*
3. *That in alternative there be temporary stay of execution pending hearing and determination of this application.*
4. *That this court be pleased to issue a temporary injunction restraining the plaintiff either by herself, or by her agents, servants and/or employees or anyone else acting under their directions from evicting the defendant and the proposed interested party from the suit property known as*

***Kwale/Ukunda/965.***

Because the defendant and the proposed interested party have told so many half truths in support of their application, I wish to set out the record straight. As I see it, in the files that are before me.

I need to state that the original court file that is HCC MSA 190 of 2009 (OS) was traced by the Deputy registrar of this court and that it is before me as I do this ruling. Inside that file, I also found another file, that is, Miscellaneous Civil Application No. 336 of 2008 (OS). Inside the latter file, there are documents relating to the genesis of this matter. The dispute all along related to the ownership of parcel number Kwale/Ukunda/965. The dispute began between Mwanajuma Mohamed Mwakjunga (Mwanajuma) and Athman Saidi Guo (Athman). The dispute was first heard by the land Dispute Tribunal Msambweni being land dispute No. 6 of 2001. The tribunal in that case delivered its judgment on 7<sup>th</sup> June 2001. It found that the subject land belong to Mwanajuma. Athman being dissatisfied with that decision filed an appeal before the appeals committee coast province, being appeal no. 172 of 2001. It is worthy noting that at the hearing of the appeal, the proposed interested party namely Bakari Omar Mwatunu was a witness for Athman. The appeal's committee by its judgment of 28<sup>th</sup> December 2007 upheld the decision of Msambweni Tribunal. Mwanajuma by an application before the RM kwale in Land Case No., 24 of 2005 obtained the following order:

**“REPUBLIC OF KENYA**

**IN THE SENIOR RESIDENT MAGISTRATE COURT AT KWALE**

**LAND CASDE NO. 24 OF 2005**

***ATHUMAN SAIDI GUO .....PLAINTIFF***  
***-VERSUS-***

***MWANAJUMA MOHAMED MWAJINGA..... DEFENDANT***

**ORDER**

***This land case appeal was heard by Province Land disputes tribunal case no. 172 of 2001 and before Senior resident Magistrate Ogembo D.O. on 14<sup>th</sup> February, 2008 in the presence of both parties, IT IS HEREBY ORDERED THAT:***

- 1. That the land in dispute Kwale/Ukunda/965 belongs to MWANAJUMA MWAJINGA.***
- 2. The Appeals committee upholds the decision of the Msambweni Land Tribunal.***
- 3. It is further ordered that the appellants to surrender the title deed to the District Land Registrar for cancellation.***

**Penal Notice**

***“Any party so served with this order refuses to comply, the same shall be cited for contempt of court”***

**GIVEN UNDER my hand and seal of this Honourable court this 18<sup>th</sup> March, 2008.**

***Ogembo D.O***

***Senior Resident Magistrate***

**KWALE**

**ISSUED at Kwale this 18<sup>th</sup> day of March, 2008.**

Mwanajuma filed **High Court Misc. Application No. 336 of 2008 (OS)** seeking orders for cancellation on plot 965 in the name of Athman and replacing it with one in the name of Mwanajuma. Justice Njagi on 11<sup>th</sup> Decemebr 2008 in his judgment, found in favour of Mwanajuma. He had this to say in that judgment.

***“Litigation must come to an end. Since the decisions of the Tribunals in favour of the applicant (Mwanajuma) were adopted by the Senior Resident Magistrate’s Court, Kwale, and no appeal was preferred, and the respondent(Athman), by his words and conduct has adequately demonstrated that he has thrown in the towel, the applicant is entitled to the orders she has sought. I accordingly direct the Land Registrar, kwale District Registry, to rectify the register in respect of land parcel N. KWALE/UKUNDA/965 by replacing the name therein and entering the name of MWANAJUMA MOHAMED MWAJINGA in the register as the duly registered proprietor of the said parcel of land.***

***As the defendant did not resist the suit, and never filed any papers herein, I don’t think that it would be proper to burden him with costs. I accordingly order that each party will bear its own costs.”***

Mwanajuma filed this present case seeking orders that the plot No, 965 be declared to be hers and for a vesting order, which was required by the land registrar, be issued. The evidence on record shows that although served with both matters in the High Court Athman did not defend the same. As a consequence in this matter Justice Odero by her judgment of 16<sup>th</sup> October 2009 found in favour of Mwanajuma. In that judgment she stated as follows:

***“I have obtained and perused Misc. Civil App. No. 336 of 2008 (OS) in which Hon. Justice Njagi did on 11<sup>th</sup> December, 2008 make orders as follows:***

***“1. THAT the Registrar of land, kwale District Registry be and is hereby directed/ordered to rectify the register in respect of the land parcel No. KWALE/UKUNDA/965 by replacing the name therein and entering the name of MWANAJUMA MOHAMED MWAJINGA in the Register as duly registered proprietor and a Title Deed be issued forthwith.”***

***That order has not in any way been challenged nor appealed against by any party whatsoever. The dispute over this parcel of land was settled by the Kwale Land Disputes Tribunal who made their award in favour of the applicant herein. That award was duly confirmed by the Resident Magistrate, Kwale on 18<sup>th</sup> March, 2008 followed by the above mentioned Ruling by Hon. Justice Njagi. My role therefore is merely to give orders vesting the said parcel of land in the applicant which I hereby do. I do now allow this present application in terms of prayer (1) thereof.***

***Costs to be met by the applicant.”***

It should be noted that Mwanajuma was issued with a title for the plot no. 965 on 3<sup>rd</sup> November 2006. An application was filed in this matter by Bakari Omar Mwanatunu as a proposed interested party. It was dated 7<sup>th</sup> January 2011. Bakari sought stay of execution of the judgment and order of justice Odero of 16<sup>th</sup> October 2009. To support that application, Bakari stated that he was a co-owner of plot 965 together with Athman. His complaint was that he had not been made a party in the action between Mwanajuima and Athman. In that application filed by Bakari, there was no prayer for him to be joined as a party in this matter. That application was heard ex parte by Justice Ibrahim (as he then was) on 10<sup>th</sup> January 2011. The judge granted temporary stay of execution pending interpartes hearing of that application on 25<sup>th</sup> February 2011. On 25<sup>th</sup> February 2011, Justice Ibrahim noted that Mwanajuma had a title which was issued in her name of plot No.965 following orders made in HCC MSA 394 of 2006 (OS). The matter was adjourned to 18<sup>th</sup> March 2011. On that day, the counsel for Athman sought an adjournment and the matter was adjourned to 7<sup>th</sup> April 2011. Onthat day counsel for Athman was still not

ready and the court made the following order:

***“The defendant (Athman) and the interested party (Bakari) to file fresh applications within next 14 days. The plaintiff (Mwanajuma) to respond. A date to be taken at the registry. In default the plaintiff to be at liberty to proceed with execution.”***

Mwanajuma in accordance with that order and since there was no order of stay, obtained warrants of eviction of Athman. That eviction order is in this court file and is dated 21<sup>st</sup> February 2012.

The application dated 13<sup>th</sup> March 2012 should be understood in the background of those facts. To date, Athman has not appealed against the decision of Justice Njagi (11<sup>th</sup> December 2008) and of Justice Odera (16<sup>th</sup> October, 2009) nor has he sought to set them aside or have them reviewed. Since neither Athman nor Bakari have moved this court in that regard, one then wonders what the stay which is sought in the application of 13<sup>th</sup> March 2012 relates to. I need to state that the original file does not have a copy of the notice of motion dated 9<sup>th</sup> May 2011 which is marked ‘ASG3’ in the affidavit of Athman dated 13<sup>th</sup> March 2012. Amongst the documents relied on by Athman, there seems to be an appeal file by him in this court being HCC Appeal No. 76 of 2008. It is an appeal against the decision of the Coast Province Appeals Committee decisions. Since however, it does seem that Athman did not obtain stay in that appeal, orders were issued in favour of Mwanajuma as stated above. Those orders finally vested plot 965 in the name of Mwanajuma.

The application dated 13<sup>th</sup> March 2012 in view of the fact set above is *fait accompli*. It has no merit and the same is dismissed with costs to the plaintiff. The stay of execution granted on 15<sup>th</sup> May 2012 and extended on 22<sup>nd</sup> May 2012 is hereby vacated and set aside. The plaintiff may proceed with execution of the warrant of eviction issued against Athman Said Guo.

**DATED and DELIVERED at MOMBASA this 5<sup>th</sup> day of July, 2012.**

**MARY KASANGO**

**JUDGE**