



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 298 of 2003**

SAMMY MWANGANGI.....1<sup>ST</sup> PLAINTIFF  
MUSYOKA ILIMA .....2<sup>ND</sup> PLAINTIFF  
NZULA MUEMA .....3<sup>RD</sup> PLAINTIFF  
MULI MWANGO .....4<sup>TH</sup> PLAINTIFF  
MATHEKA MALEI .....5<sup>TH</sup> PLAINTIFF  
MAUNDU MUTHOKA .....6<sup>TH</sup> PLAINTIFF  
MUTHUSI MUEMA .....7<sup>TH</sup> PLAINTIFF  
KISILU MUNYWOKI .....8<sup>TH</sup> PLAINTIFF  
JANE MUIKIA .....9<sup>TH</sup> PLAINTIFF  
NZULE MUSYOKA .....10<sup>TH</sup> PLAINTIFF

- VERSUS -

COMMISSIONER OF LANDS .....1<sup>ST</sup> DEFENDANT  
THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT  
THABITI FINANCE COMPANY LIMITED .....3<sup>RD</sup> DEFENDANT  
NATIONAL BANK OF KENYA LIMITED .....4<sup>TH</sup> DEFENDANT  
JAMES GAMAU WAINAINA .....5<sup>TH</sup> DEFENDANT  
LUCY NYAWIRA .....6<sup>TH</sup> DEFENDANT  
SERA WANJIKU .....7<sup>TH</sup> DEFENDANT  
SIMON MUTURI WANGUO .....8<sup>TH</sup> DEFENDANT

**RAPHAEL MUIGAI MWANGI .....9<sup>TH</sup> DEFENDANT**

**PAUL KIHUTI KONDIAH .....10<sup>TH</sup> DEFENDANT**

### **RULING**

1. This is the plaintiffs' notice of motion dated 24<sup>th</sup> July 2012. The plaintiffs pray for stay of execution of the judgment and decree dated 9<sup>th</sup> July 2012 pending the hearing of an intended appeal. The motion is expressed to be brought under order 42 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.

2. The plaintiffs, being dissatisfied with the judgment have lodged a notice of appeal at the High Court dated 13<sup>th</sup> July 2012. A draft memorandum of appeal is annexed to the affidavit of Sammy Mwangangi sworn on 24<sup>th</sup> July 2012. The plaintiffs' case is that they have an arguable appeal that would be rendered nugatory by execution of the decree. They aver they would suffer substantial loss as they are in possession of the suit land and have developed it. The decree is for their eviction from the land that they allege to have occupied for many years.

3. The motion is contested by the 9<sup>th</sup> and 10<sup>th</sup> defendants. They rely on a replying affidavit sworn by Raphael Muigai on 17<sup>th</sup> September 2012. They state that the value of the suit land is Kshs 114,900,000. Litigation has been ongoing since the year 2003. They contend that the applicants should provide security for due performance of the decree in that sum. It is however their case that the motion is unmerited for two key reasons: the 9<sup>th</sup> and 10<sup>th</sup> defendants hold registered title over the suit land; and, the plaintiffs' claim for prescriptive rights over unalienated government land is a misnomer. The defendants' case is that they should enjoy the fruits of their judgment.

4. I have heard the rival submissions. The parameters for grant of stay of execution pending appeal are well settled. In the case of *Butt Vs Rent Restriction Tribunal* [1982] KLR 417 the learned Judge, Madan JA (as he then was) quoted with approval the views of Brett L.J. in *Wilson vs Church* (No 2) 12 ch D [1879] 454 AT 459.

*"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory"*

Justice Madan then rendered himself thus in the *Butt* case (Supra) at page 419,

*"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings"*

5. Again the court will grant a stay if special circumstances of the case dictate so. See *Attorney General Vs Emerson and others* 24 QBD [1889] 56 at page 59. In the *Butt* decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a "special circumstance" that gave the applicant an undoubted right of appeal. These general principles were also stated in *Madhupaper International Limited Vs Kerr* [1985] KLR 840. See particularly page 846.

6. In addition the court should also pay regard to the overriding objective to do justice to the parties captured at section 1A and 1B and as read together with section 3A of the Civil Procedure Act. I cannot put it better than the court of Appeal in *Harit Sheth T/a Harit Sheth Advocate vs Shamas Charania* [2010] e KLR (Civil Application No 68 of 2008);

*"The next aspect of such an application like this is, however, difficult to resolve. This is whether or not the appeal, if successful would be rendered nugatory. In our view, the sum of Shs.32 million is relatively substantial taking into account the station of the applicant's legal practice. We draw guidance herein*

*from this Court's decision in the well known case of Oraro & Rachier Advocates v. Co-operative Bank of Kenya Ltd [1999] 1EA 236. Further in this regard, we have also taken into account the provisions of section 1A and 1B of the Civil Procedure Act and section 3A and 3B of the Appellate Jurisdiction Act, which provisions came into force on 23<sup>rd</sup> July, 2009. By these new concepts of jurisprudence the courts, including this Court, in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or in exercising any power must take into consideration the overriding objective as defined in the two Acts. The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. See E. Muriu Kamau t/a Muriu Mungai & Co. Advocate vs. National Bank of Kenya Ltd Civil Application No.Nai. 258/2009 (unreported)."*

7. I would then return to the circumstances of this case. I am satisfied that the application has been made without delay. I do not wish to delve deep into the merits of the intended appeal. A notice of appeal has been filed. For purposes of order 42 rule 6 of the Civil Procedure Rules, that constitutes the appeal under the Appellate Jurisdiction Act. However, I hold the view that litigation should come to an end. This case has been in the court since the year 2003. I have studied the judgment made on 9<sup>th</sup> July 2012 in favour of the 9<sup>th</sup> and 10<sup>th</sup> defendants. The defendants bought the suit land in 1997 from the original allottees by the Government. They hold registered title. The plaintiffs claims are predicated upon prescriptive rights accrued over the suit property. I express doubts whether the rights could arise over unalienated government land. Those are matters best left to the appellate court. But I am also minded that the claim is over land. Land will always be there. If the plaintiffs were to prevail on appeal, the appellate court has jurisdiction to reverse any activity by the decree holders or to grant other suitable reliefs. See Ngugi Kimuhu Vs Wagutu Mwaniki and another Nairobi, High Court case 600 of 1985 (unreported) where Khamoni J stated:

*".....even if he is evicted and eventually wins his intended appeal the appeal will not be nugatory as an award of compensation will be sufficient".*

8. So much so that the plaintiffs have not persuaded me that they would suffer substantial loss merely by execution of the decree or that their intended appeal would then be rendered nugatory. The plaintiffs did not make any offer in their deposition for security for due performance of the decree. Their learned counsel in his submissions in court did not think that this is a proper case to furnish security. He opposed the grant of an order to furnish security based on the value proposed by the defendants of Kshs 114,900,000. I have perused the valuation report annexed to the defendants' replying affidavit marked "RMM 4". In the opinion of Mwai Githiomi Associates dated 13<sup>th</sup> September 2012, the suit land is worth Kshs 114,900,000. The plaintiffs have not controverted that valuation. By granting a stay, the 9<sup>th</sup> and 10<sup>th</sup> defendants would be denied the use of their land worth that sum and in the absence of any sufficient security by the plaintiffs. Justice is a two way street. Since the defendants' rights have crystallized under the decree, it would not be in the interests of justice to deny them the fruits of their judgment at this stage. I am in the result disinclined to exercise my discretion in favour of the plaintiffs.

9. For all the above reasons, the plaintiffs' notice of motion dated 24<sup>th</sup> July 2012 is hereby dismissed with costs to the 9<sup>th</sup> and 10<sup>th</sup> defendants.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> day of November 2012.**

**G.K. KIMONDO  
JUDGE**

**Ruling read in open court in the presence of**

Ms Ngereza for Mr. Musyoki for the Plaintiffs/Applicants.

Ms Mokeira for Mr Makome for the 9<sup>th</sup> and 10<sup>th</sup> Defendants/Respondents.