



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO. 23 OF 2017**  
**(FORMARLY HCCC NO. 58 OF 2011)**

**GRACE AKINYI AJWANG**

**RICHARD OGENDO (Suing as personal representatives of the Estates of  
MANASON OGENDO BODO).....PLAINTIFFS**

**VERSUS**

**ROSEMARY ATIENO ABUTO.....1<sup>ST</sup> DEFENDANT**

**LEONIDA ACHIENG NYAGWARA alias**

**PHOEBE ATIENO NYAGUDI.....2<sup>ND</sup> DEFENDANT**

**SASAH GENERAL MERCHANTS LIMITED.....3<sup>RD</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LIMITED.....4<sup>TH</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. Sasah General Merchants Limited, the 3<sup>rd</sup> Defendant, moved the court through their notice of motion dated the 22<sup>nd</sup> March 2019 seeking for stay of execution of the Judgment and decree dated the 27<sup>th</sup> February 2019, and all consequential proceedings and or orders, pending the hearing and determination of the Intended Appeal in terms of the Notice of Appeal dated the 7<sup>th</sup> March 2019. They also pray that the costs of the application do abide the outcome of the Intended Appeal. The application is based on the thirty four (34) grounds marked (a) to (hh) on its face and supported by the affidavit sworn by Samwel Akumu Odhiambo, Managing Director, on the 22<sup>nd</sup> March 2019.

2. The application is opposed by the 2<sup>nd</sup> Defendant, Leonida Achieng Nyangwara alias Phoebe Atieno Nyagudi, through the two grounds of opposition dated 1<sup>st</sup> April 2019.

3. The application is also opposed by the Plaintiffs through the replying affidavit sworn by Richard

Ogendo, the 2<sup>nd</sup> Plaintiff, on the 5<sup>th</sup> April 2019.

4. The application came up first for hearing on the 4<sup>th</sup> April 2019 when directions on filing and serving replying papers, and written submissions were given. The court also granted prayer 2 of the application in the interim, pending hearing and determination of the application. The application came up for highlighting of submissions on the 27<sup>th</sup> June 2019, but only the 3<sup>rd</sup> Defendant had by then filed their submissions dated the 21<sup>st</sup> June 2019. That the Counsel for the Plaintiff, and who was also holding brief for the 2<sup>nd</sup> Defendant Counsel, indicated that they will rely on the replying affidavit and grounds of opposition filed. The Counsel in addition asked that the 3<sup>rd</sup> Defendant be ordered to deposit Kshs. 2,000,000/= as security. The Counsel for the 3<sup>rd</sup> Defendant relied on their filed written submissions.

5. The following are the issues for the court's determinations;

**a) Whether the 3<sup>rd</sup> Defendant has made a reasonable case for stay of execution pending the hearing and determination of the Intended Appeal.**

**b) Who pays the costs.**

6. The Court has considered the grounds on the motion and opposition; affidavit evidence by the 3<sup>rd</sup> Defendant and 2<sup>nd</sup> Plaintiff; written submissions by the 3<sup>rd</sup> Defendant's Counsel; the oral submissions by the Counsel for the plaintiff and the 2<sup>nd</sup> Defendant, the record and come to the following findings;

a) That the application is brought pursuant to **Order 42 Rule 6 of the Civil Procedure Rules** among other provisions of the **Civil Procedure Act, Environment and Land Court Act, and the Land Act** as set out in its heading, and **Articles 27 (1), 48, 50 (1), 159 and 165 of the Constitution 2010**. That the conditions to be met by an Applicant, seeking for the Court's discretion under **Order 42 Rule 6 of the Civil Procedure Rules** are first, that must satisfy the court that substantial loss may result if the order is not granted; Secondly that the application was made without unreasonable delay; and finally provide security for the due performance of the decree or order as the court may determine.

b) That the 3<sup>rd</sup> Defendant has shown through the affidavit evidence, and their Counsel's written submissions that they stand to lose the proprietorship of the suit land and leave their financial facility with the 4<sup>th</sup> Defendant unsecured, if the court's Judgment of 27<sup>th</sup> February 2019 under which prayers (a), (c) and (e) of the plaint dated 20<sup>th</sup> April 2011, was executed before their intended appeal is heard and determined. That though the Plaintiffs and 2<sup>nd</sup> Defendant had shown their opposition to the application through the grounds of opposition and replying affidavit filed, they appeared to soften their stand during the last day of the court appearance by only seeking that the 3<sup>rd</sup> defendant do deposit Kshs. 2,000,000/= as security for the due performance in case they lose on appeal.

c) That the 3<sup>rd</sup> Defendant at grounds (cc) and (dd) of their application has indicated their willingness to offer suitable security, and abide by the conditions that the court may set in granting the stay of execution order sought. That willingness is restated by the 3<sup>rd</sup> Defendant's counsel in their written submission from paragraphs 20 to 24. That the court has noted that the 3<sup>rd</sup> Defendant's Counsel did not respond to the proposal by the Counsel for the Plaintiff and 2<sup>nd</sup> Defendant of 27<sup>th</sup> June 2019, that security be set at Kshs. 2,000,000/=. The court will take their silence to be an indication that the amount proposed was reasonable.

d) That the application dated 22<sup>nd</sup> March 2019 was filed on the 25<sup>th</sup> March 2019, which was after less than one month from the date of the Judgment. The application was therefore filed without undue delay.

e) That though the 3<sup>rd</sup> Defendant is successful in the application and would have been entitled to costs under **Section 27 of the Civil Procedure Act**, as costs follow the event, the court is of the considered view that costs of the application abide the outcome of the intended appeal.

7. That from the foregoing, the court finds merit in the 3<sup>rd</sup> Defendant's motion dated 22<sup>nd</sup> March 2019, and filed on the 25<sup>th</sup> March 2019, and orders as follows;

**a) That stay of execution in terms of prayer 3 of the said motion is granted subject to the condition in (b) below.**

**b) That the 3<sup>rd</sup> Defendant do provide security for the due performance of the decree by depositing Kshs. 2,000,000/= [Two Million Kenya Shillings] in an interest earning account with a financial institution in the joint names of their counsel and that of the 2<sup>nd</sup> and Plaintiffs in thirty (30) days.**

**c) That in default of compliance with the condition in (b) above, the stay of execution in (a) above to lapse automatically.**

**d) Costs of the application to abide the outcome of the intended appeal.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF JULY 2019

**In the presence of:**

Plaintiffs Absent

Defendants Absent

Counsel Mr. Onyango for the Plaintiffs and

and holding brief for Anul for 2<sup>nd</sup>

defendant and Mr. Ouma Njoga for

Owaya for 4<sup>th</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**