



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 961 OF 2016**

**(FORMERLY HCC NO. 308 OF 2012)**

**ROBERT ADERA OPIYO .....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**TERESIA ACHIENG OPIYO .....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**Both suing as administrator and administratrix of the estate of**

**JETHRO OPIYO CHIEWU (Deceased)**

**VERSUS**

**ROSELINE AMONDI OTIENO .....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Court rendered judgment in this matter on 20<sup>th</sup> March 2019 where it dismissed the suit by the Plaintiffs against the Defendant but allowed the Defendant's counterclaim as against the Plaintiffs. Inter alia the Court declared the Defendant as the lawful owner of land parcel **South Sakwa/Alego/901** which was already registered in her name and ordered the Plaintiffs to vacate therefrom within 30 days from the date of Judgment. The Plaintiff being aggrieved and/or dissatisfied with the decision filed a Notice of Appeal on 3<sup>rd</sup> April 2019 signifying their intention to appeal to the Court of Appeal against the whole judgment of this Court.

2. On the 24<sup>th</sup> April 2019 the Plaintiffs filed a Notice of Motion dated 18<sup>th</sup> April 2019 seeking a stay of execution of the Judgment and decree of the Court pending the hearing and determination of the intended appeal to the Court of Appeal. The application was grounded on the grounds set out on the body of the application and the affidavit sworn in support of the application by Robert Adera Opiyo the 1<sup>st</sup> Plaintiff herein.

3. The Defendant/Respondent, Roselyne Amondi Otieno swore a replying affidavit in opposition to the Plaintiff/Applicant's application for stay dated 20<sup>th</sup> May 2019. The Defendant under paragraph 6 of the affidavit has deposed as follows:-

**6. That upon the expiry of the thirty (30) days period granted by the Honourable Court in the judgment, the Respondent herein extracted and executed a decree in respect of the judgment thereof, and more particularly in respect of South Sakwa/Alego/901 registered over six years ago, in the name of the Respondent, accordingly therefore, there exists nothing more to be stayed.**

During the trial it was clear and evident that the Plaintiffs did not reside in the suit property and it was only one Jane Onyango who occupied and had a homestead on the land parcel **South Sakwa/Alego/902** which the Respondent has stated is still occupied by the said Jane Onyango and there is no interference with her occupancy by the Respondent. The Respondent has been decreed the rightful owner of land parcel **South Sakwa/Alego/901** and she is presently the registered owner. Unless and until the Respondent's ownership of land parcel **South Sakwa/Alego/901** is annulled and/or overturned on appeal the Respondent would be entitled to the use and possession of the suit property.

4. I do not consider that unless a stay of execution is granted the Applicant's appeal would be rendered nugatory. The Respondent is presently the registered owner of land parcel **South Sakwa/Alego/901**. In the event the Applicant's appeal is successful in the Court of Appeal, the Respondent's title will be nullified and/or cancelled and the register will be appropriately rectified. However, though I find no basis upon which I can stay the judgment and decree of this court, I am conscious that the real contest in this matter is the ownership of land parcel **South Sakwa/Alego/901** which is registered in the name of the Respondent and was so registered even at the time the judgment was rendered by this court.

5. I think there is merit in making an order preserving the said property in the status it is in until the appeal is heard and determined. This is necessary to avoid any complications in the event the current registered owner carries out any transactions that could have the effect of alienating the property to, may be, third parties whom the Applicant would not reach in the event he is successful in the appeal without instituting possibly other legal proceedings. In that regard even though I decline to grant any stay of execution of the judgment and decree, I make an order preserving the suit property in terms of prayer No. (5) of the Notice of Motion dated 18<sup>th</sup> April 2019.

6. The costs of the application will abide the outcome of the appeal.

7. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 26<sup>TH</sup> DAY OF JULY 2019.**

**J. M. MUTUNGI**

**JUDGE**