



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.436 OF 2015**

**JOSANA ACADEMY .....PLAINTIFF**

**VERSUS**

**DAVID OWINO ONDENG .....1<sup>ST</sup> DEFENDANT**

**KOSETIONY KIPRUTO TINDERET.....2<sup>ND</sup> DEFENDANT**

**KIPROTICH KORIR.....3<sup>RD</sup> DEFENDANT**

**COMMISSIONER OF LAND.....4<sup>TH</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR, KISUMU.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. **David Owino Ondeng**, the 1<sup>st</sup> Defendant, filed the notice of motion dated 26<sup>th</sup> September 2016 seeking for an order of stay of execution pending the hearing and determination of **Kisumu H.C. Land case No.104 of 2016**. The application is based on the six grounds on the notice of motion and is supported by the affidavit of **George Shane Okoth**, advocate, sworn on the 26<sup>th</sup> September 2016.

2. The application is opposed by the Plaintiff, Josana Academy, through the replying affidavit of Moses J. A. Orengo, advocate, sworn on the 11<sup>th</sup> October 2016.

3. The application came up for hearing on 7<sup>th</sup> February 2017 when Mr. Nyarige and Mr. Orengo, learned counsel for the 1<sup>st</sup> Defendant and the Plaintiff respectively, made their rival oral submissions.

4. The following are the issues for determination by the court;

- a) Whether the 1<sup>st</sup> Defendant has made a case for stay of execution against the Plaintiff.
- b) Whether the 1<sup>st</sup> Defendant has a pending case against the Plaintiff
- c) What orders to issue.
- d) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by both counsel and come to the following conclusions;

a) That the Plaintiff was successful in his case against the 1<sup>st</sup> Defendant and four others as confirmed in the Judgment delivered on 7<sup>th</sup> May 2015, that among others granted him costs as prayed in the amended plaint.

b) That though the 1<sup>st</sup> Defendant filed a notice of appeal dated 11<sup>th</sup> May 2015 and lodged in court on 13<sup>th</sup> May 2015, the same was struck out on 27<sup>th</sup> May 2016 as confirmed by the copy of the Court of Appeal ruling in Kisumu. Civil Application No.32 of 2015 annexed to the replying affidavit.

c) That the 1<sup>st</sup> Defendant had by then filed Kisumu H.C. Civil Suit No.104 of 2016 through the Plaintiff dated 18<sup>th</sup> January 2016 and amended on 18<sup>th</sup> April 2016 as confirmed through the copy of the amended plaint annexed to the supporting affidavit. That the Plaintiff in this suit is not a party in Kisumu H.C.C. Suit No.104 of 2016 and there is therefore no evidence of any suit pending in any court between the parties in the current application.

d) That in the absence of any pending suit between the parties in this application, the court finds no basis on which to order stay of execution of the decree in this proceedings.

6. That flowing from the forgoing the 1<sup>st</sup> Defendant's notice of motion against the Plaintiff dated 26<sup>th</sup> September 2016 is without merit and is dismissed with costs.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF MARCH 2017

In presence of;

Plaintiff                      Absent

1<sup>st</sup> Defendant                Absent

Counsel            Mr. Omayo for Okoth for 1<sup>st</sup> Defendant

Mr. Orengo for the Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**15/3/2017**

15/3/2017

S.M. Kibunja Judge

Oyugi court Assistant

Parties absent

Mr Omayo for Okoth for the 1<sup>st</sup> Defendant/Applicant

Mr Orengo for Plaintiff/Respondent

Court: Ruling dated and delivered in open court in presence of  
Mr Omayo for Okoth for 1<sup>st</sup> Defendant and Mr. Orengo for the Plaintiff.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**15/3/2017**