



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KISUMU**

**HCC NO.48 OF 2013**

**ALI GADAFFI HAMISI.....1ST APPELLANT**

**FARIDA A. SALIM .....2ND APPELLANT**

**VERSUS**

**FRANCIS MULINA MUTUNGU ..... 1ST RESPONDENT**

**BEPHINE N. SHIRAHU & MARGARET A. SHIRAHU (Having been**

**substituted as the personal representative of the estate of**

**RICHARD SHIRAHU (Deceased).....2ND RESPONDENT**

**RULING**

1. **Ali Gadaffi Hamisi** and **Farida A. Salim**, the Appellants, filed the notice of motion dated 22nd May 2015 seeking for temporary stay of execution of the judgment and decree in **Winam SRMCC NO.495 of 2004** dated 20th June 2013 and costs. The application is based on the seven grounds on the notice of motion supported by the affidavit of **Ali Gadaffi Hamisi** sworn on 22nd May 2015.
2. The 2nd Respondents, **Bephine N. Shiraho** and **Margaret A. Shiraho**, as personal representatives of the estate of **Richard Shiraho**, opposed the application through the grounds of opposition dated 10th February 2016.
3. Mr Odeny and Ragot for the Appellants and Respondents respectively made their rival submissions on the 10th March 2015.
4. The issue for determination is whether the Appellants have satisfied the requirements for issuance of stay pending appeal in accordance with Order 42 Rule 6(2) of Civil Procedure Rules.
5. The court has considered the grounds on the notice of motion, the supporting affidavit, the grounds of opposition, the rival submissions and come to the following conclusions:

a) That while prayer "C" in the notice of motion is for "temporary stay of execution of the judgment and decree in **WINAM SRM CC NO.494 OF 2004 dated 20/6/213**". The deposition in the supporting affidavit at paragraph 3 makes reference to a different case, being "**Winam Srmcc no.495 of 2004**." The court notes that though the two documents refer to two different case references, no effort to correct or clarify this was taken by the Appellants. That notwithstanding if the court was to take the deposition in the affidavit is correct, then this court having declined to grant a similar application on 7th May 2015 cannot allow the current application as it contravenes **Section 7 of the Civil Procedure Act** by being res judicata.

b) That the deposition in the supporting affidavit at paragraph 4 and 5 suggests that the application for stay is in respect of the court's ruling of 7th May 2015. The court notes that the prayers on the notice of motion are therefore at variance with the supporting affidavit. There is also no affidavit filed in support of the prayers on the notice of motion.

c) That the Notice of Appeal annexed to the supporting affidavit, though dated 7th May 2015 and filed on 11th May 2015 refers to "**the ruling and/or decision of Honourable Justice A.K. KANIARU delivered at Kisumu on the 7th day of May 2014**". This clearly shows that the ruling decision subject matter of the annexed notice of appeal was made about one year before the notice of appeal. That the annexed notice of appeal cannot be taken as an appeal in respect of the orders of 7th May 2015 as it clearly refers to a ruling of 7th May 2014.

d) That though the application was filed through counsel, it is undoubtedly frivolous and an abuse of the courts process for the reasons set out above.

6. That in view of the foregoing, the notice of motion dated 22nd May 2015 is without merit and is dismissed with costs and the interim orders of stay of 28th May 2015 are hereby vacated.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 12TH DAY OF MAY 2016**

In presence of;

Appellants ABSENT

Respondents BELPHIN N. SHIRAHU PRESENT

Counsel Mr Odeny for Appellants and Mrs Onyango for 2nd Respondent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/5/2016**

12/5/2016

S. M. KIBUNJA

Oyugi court Assistant

Parties absent except Belphin N. Shiraho who is present.

Mr Odeny for the Appellants Mrs Onyango for the 2nd Respondent.

2nd Respondent.

Court: Ruling delivered in open court in presence of Mr Odeny for Appellants and Mrs Onyango for the 2nd Respondent and Belphin N. Shiraho one of the 2nd Respondents.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/5/2016**