



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 20 OF 2010**

**SAMMY KANYINGI MUGEREKI (*suing as administrator ad colligenda Bona for the estate of KAHUKU KAJARANJA*(deceased)).....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**1. JOSEPH MWAURA MUROKI**

**2. PAUL CHOMBA.....DEFENDANTS/APPLICANTS**

**R U L I N G**

**Introduction**

1. On 27<sup>th</sup> February 2015, this court allowed the Plaintiff claim. The Defendant has now filled an Application dated 9<sup>th</sup> April 2015 seeking for the following orders:

**The Defendant's/Applicant's case:**

**(a) That the Honourable Court be pleased to stay the execution of the decree and/or Judgment delivered by Court on 27<sup>th</sup> February, 2015 pending the hearing and determination of the intended appeal.**

**(b) That the costs for the Application be provided for.**

2. The 2<sup>nd</sup> Defendant deponed that he bought parcel of land known as Lamu/Lake Kenyatta/1460 from the 1<sup>st</sup> Defendant and built residential premises; that the Plaintiff will evict him and that he has filed an appeal
3. In his Replying, the Plaintiff/Respondent deponed that the Applicant has not provided security for the due performance of the decree; that the grounds of appeal have not been exhibited and that the Applicant did not raise the issue of locus standi at trial.
4. In his submission, the 2<sup>nd</sup> Defendant's counsel submitted that his client has built residential houses on the suit property and that he resides in those houses with family.
5. Counsel submitted that unless a stay order is granted, the his entire family will be evicted from the suit premises.
6. The Plaintiff's/Respondent's counsel submitted that the Application has been filed under the wrong provisions of the law; that the Applicant does not have any stake in the land and should provide security and that the Applicant has not annexed on his Supporting Affidavit the written authority of the 1<sup>st</sup> Defendant.

7. Although the 2<sup>nd</sup> Defendant/Applicant is seeking for a stay of execution of the Judgment of this court, he has filed the Application pursuant to the provision of Order 22 Rule 22 of the Civil Procedure Rules instead of Order 42 Rule 6. Order 22 Rule 22 only applies in situation whereby the court that is executing the decree is not the same court that issued the decree.
8. Notwithstanding the fact that the Applicant has quoted the wrong provisions of the law, substantive justice demands that this court considers the merits of the Application by looking at the Applicable law.
9. Order 42 Rule 6(2) of the Civil Procedure Rules provides that an Order of stay of execution shall not be made by the court unless the court is satisfied that substantial loss may result to the Applicant and that Application must have been made without unreasonable delay.
10. The Applicant is also supposed to provide security for the due performance of the decree.
11. The evidence by the 2<sup>nd</sup> Defendant/Applicant is that he purchased the suit property from the 1<sup>st</sup> Defendant and built residential premises.
12. The Plaintiff/Respondent has not denied that indeed the 2<sup>nd</sup> Defendant purchased the suit property from the 1<sup>st</sup> Defendant.
13. The Plaintiff has not denied that the 2<sup>nd</sup> Defendant has put up residential houses on the suit property.
14. The effect of the Judgment of this court is to have the Defendants evicted from the suit property.
15. Considering that the Plaintiff has not denied that the 2<sup>nd</sup> Defendant is in possession of the suit property I find and hold that the 2<sup>nd</sup> Defendant will suffer substantial loss if his family is evicted from the suit property before the Appeal is heard and determined.
16. Considering that the Application was filed within reasonable time, I allow the Application dated 9<sup>th</sup> April 2015 as prayed. However, each party shall bear its own costs.

Dated and delivered in Malindi this 2<sup>nd</sup> day of **October** 2015

**O. A. Angote**

**Judge**