



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL APPEAL NO. 05 OF 2009**

*(Being an Appeal from the Judgment of the Honourable Senior Resident Magistrate J. Nduria delivered on 5<sup>th</sup> February 2009 in Kilifi SRMCCC NO. 188 of 2005, Emmanuel Ngade Nyoka -Vs- Kadheka Mutisya)*

**KADHEKA MUTISYA NGATA.....APPELLANT/RESPONDENT**

**=VERSUS=**

**EMMANUEL NGADE NYOKA.....RESPONDENT/APPLICANT**

**AND**

**1. SCHWAZ HELDI SIEGLINDE & NDILIMA MAINGI  
NGUNDA**

**2. GEORGE WINJIRA**

**3. CHARO KISAO TITO.....INTERESTED PARTIES/APPLICANTS**

**RULING**

**Introduction**

1. Before me are two Applications. The first Application is the one dated 20<sup>th</sup> December 2013 filed by the Interested parties while the second one is dated 20<sup>th</sup> February, 2014 filed by the Respondent. Both Applications are seeking for a stay of execution of the Judgment of this court pending the hearing of the intended appeal.
2. According to the Applicants, the Judgment of this court allowed the Appellant's appeal and ordered for the cancellation of title in respect of the suit property by rectification of the register.
3. It is the contention of the Applicants that unless the said Judgment is stayed, they will automatically lose the suit property.

**The Respondent's case:**

4. The Appellant/Respondent filed his grounds of opposition in which he averred that the Application by the Respondent/Applicant is a gross abuse of this court having sold the suit property during the pendency of the suit; that there is no pending appeal before this court and that there has been inordinate delay in filing the Application.

5. The parties filed their respective submissions which I have considered.

**Analysis and findings:**

6. On 19<sup>th</sup> December 2013, this court pronounced its Judgment in respect of land known as Kilifi/Kijipwa 137. In the Judgment, the court directed the register in respect of the suit property be rectified by cancellation of Titles Kilifi/Kijipwa 1333,, Kilifi/Kijipwa 1334 and Kilifi/Kijipwa 1335 registered in the names of the Interested Parties/Applicants and the same be restored in the name of the Appellant/Respondent.
7. The law relating to stay of execution pending the hearing and determination of the appeal is provided for under Order 42 Rule 2 of the Civil Procedure Rules. According to the said Order, the trial court may order for a stay of execution pending appeal where the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay. The Applicant, in certain circumstances, is required to provide security for the due performance of such decree as may ultimately be binding upon him.
8. In land matters, the issue of the Applicant providing security may not arise because land, being an immovable asset, will always be available to satisfy any decree that the Court of Appeal may finally issue.
9. In my Judgment of 19<sup>th</sup> December 2013, I found that the Respondent did sub-divide parcel of land number 173 within Kijipwa settlement scheme and sold it to the Interested Parties (Applicants). I directed that the suit property should revert to the Appellant by way of rectification of the register.
10. Indeed, the rectification of the register by cancellation will give rise to the registration of Kilifi/Kijipwa 1333, 1334 and 1335 in the names of the Appellant/Respondent who is likely to deal with them in any manner he deems fit. The Interested Parties/Applicants, who bought the suit property during the pendency of the suit are likely to suffer substantial loss in the event the Appellant/Respondent sells the suit property to a third party, or develop it before the intended Appeal is heard and determined by the Court of Appeal.
11. However, the Respondent/Applicant, having sold the suit property to the Interested Parties has not established the loss that he is likely to suffer if an order for stay of execution is not granted to him.
12. The Judgment in this matter was delivered on 19<sup>th</sup> December, 2013, a few days before the Christmas vacation commenced. The Application for stay of execution was filed by the Interested Parties the following day. There was therefore no delay in the filing of the Application.
13. In the circumstances, I find that the Interested Parties/Applicants have satisfied this court that an order of stay of execution should issue pending the hearing of the Appeal.
14. I therefore allow the Interested parties' Application dated 20<sup>th</sup> December, 2013 with no order as to costs. On the other hand, the Respondent's Application dated 20<sup>th</sup> February, 2014 is dismissed with costs to the Appellant.

Dated and delivered in Malindi this 30<sup>th</sup> day of **May**, 2014

**O. A. Angote**

**Judge**