



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

**AT MALINDI**

**ELC CIVIL CASE NO. 41 B OF 2012**

**HASSAN HASHI SHIRAWA.....1<sup>ST</sup> PLAINTIFF**

**OMAR ALI HAMED.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**1. SWALEH MOHAMED SALES MOHAMED**

**2. BAKARI ALI MZEE**

**3. OMARI WAZIRI**

**4. ABDALLA WAZIRI**

**5. AYUBU SHEKUE**

**6. ABDILLAHI MOHAMED**

**7. ABDALLA SHEE.....DEFENDANTS**

**R U L I N G**

**Introduction:**

1. On 6<sup>th</sup> June, 2013, I allowed the Plaintiffs' Plaint. The Defendants/Applicants have now filed an Application dated 7<sup>th</sup> June, 2014 seeking for the following orders:
  - a. **THAT the execution of the judgment herein dated 6<sup>th</sup> June, 2014 be stayed pending the hearing and determination of the intended appeal against the said judgment.**
  - b. **That the costs of this application be provided for.**

**The Defendants'/Applicants' case:**

2. The Application is premised on the grounds that the Applicants stand to suffer substantial loss if the orders are not granted; that the Applicants have both emotional and cultural connections to the suit property and that the Applicants remain discontented with the decision of the court and only wish to have their rights as inhabitants of the land acknowledged and their interests safeguarded.
3. The 5<sup>th</sup> Defendant, on his own behalf and on behalf of the rest of the Defendants deponed that the

Judgment of this court has a consequence of disenfranchising the Defendants and the villagers of Kiongwe of approximately 150 Ha permanently.

### **The Plaintiff's/Respondent's case**

4. In response, the 2<sup>nd</sup> Plaintiff deponed that the Defendants have never been in possession of the suit property and that the Judgment simply prevented the Defendants from trespassing on the Plaintiffs' land.
5. It is the Plaintiffs'/Respondents' case that the Defendants/Applicants have never lived or cultivated the suit property and therefore do not stand to suffer any substantial loss.

### **Submissions:**

6. The parties' advocates appeared before me on 9<sup>th</sup> September 2014 and made their oral submissions.
7. The Defendants' counsel submitted that during trial, this court was obligated to deal with not only the issue of possession of the suit property but the procedure of allocating land.
8. Counsel submitted the allocation of the suit property to the Plaintiffs was done unprocedurally.
9. The Defendants'/Applicant's counsel further submitted that the Defendants are pastoralists and that they have buried their ancestors on the suit property. Consequently, it was submitted, they stand to lose a connection with their heritage if the order of stay of the Judgment of this court is not granted.
10. Counsel finally submitted that the court should appreciate the sensitive nature of the dispute in question.
11. The Plaintiffs'/ Respondents' counsel submitted that the Plaintiffs sought for a prohibitory injunction and that the court confirmed in its Judgment that the Defendants do not live on the suit property.
12. Consequently, it was submitted, there is nothing to stay because the court only issued a prohibitory injunction.

### **Analysis and Findings:**

13. Order 42 Rule 6 (2) of the Civil Procedure Rules provides that an order for stay of execution of Judgment can only be granted if the court is satisfied that substantial loss may result to the applicant unless the order is made and the application must have been made without unreasonable delay. The court may also impose security on the applicant for the due performance of the decree.
14. In my judgment of 6<sup>th</sup> June 2014, I raised two issues for determination that is, whether the suit property was lawfully allocated to the Plaintiffs and whether the Defendants/Applicants are entitled to the suit property. In my judgment, I found that the Plaintiffs were lawfully allocated the land and the Defendants are not entitled to it. The merits and demerits of that holding can only be ventilated in the appellate court(s).
15. In my Judgment, I observed as follows:

**“This court visited the suit property on 22<sup>nd</sup> November 2013. This court observed that the Defendants and other family members stay in an area called Kiongwe Mjini. All the houses are in that area. From Kiongwe Mjini, the court drove to where the suit property is situated, which was approximately six kilometers away....However, and as I have already stated, the suit property is Government land and was at the time of allocation unalienated Government land.”**

16. The Defendants'/Applicants' do not live on the land. It is the Plaintiffs who are in possession of the land by virtue of having the title document.
17. The Judgment of the court reiterated the position that was on the ground and prohibited the Defendants from trespassing on the suit property. There is therefore no evidence placed before this court to show the substantial loss that the Defendants are likely to suffer if the order of stay is not granted. To the contrary, it is the Defendants who might encroach on the suit property if an order

- of stay is granted to the Plaintiffs' detriment. An order of eviction was granted just in the event any of the Defendants trespassed on the land.
18. There is therefore no order or decree to be stayed. The issue of the Defendants/Applicants having graves of their family members on the suit property is not in the Applicants' Affidavit. The Applicants' counsel's submission that the suit property has graves is therefore unsubstantiated.
19. For the reasons I have given above, I dismiss the Applicants' Application dated 7<sup>th</sup> June, 2014 with costs.

Dated and delivered in Malindi this **10<sup>th</sup>** day of **October**, 2014.

**O. A. Angote**

**Judge**