



**IN THE COURT OF APPEAL AT NAIROBI**

**CORAM: R.N. NAMBUYE, JA**

**CIVIL APPLICATION NO. 199 OF 2018 (UR no. 159 /2018)**

**BETWEEN**

HENRY MULI MUNGUTI .....1<sup>ST</sup> APPLICANT

HENRY MWAKE.....2<sup>ND</sup> APPLICANT

DAVID NYUNGU.....3<sup>RD</sup> APPLICANT

MICHAEL KIOKO.....4<sup>TH</sup> APPLICANT

PENINA MUMBE.....5<sup>TH</sup> APPLICANT

ALICE WANGECI.....6<sup>TH</sup> APPLICANT

**GOOD HOPE REHABILITATION**

**CENTRE (CERTIFICATE NO. 26442).....7<sup>TH</sup> APPLICANT**

**VERSUS**

CYRUS ROBBERT SALA ZIBU.....1<sup>ST</sup> RESPONDENT

DR. KLAUS HERBERT RICHTER.....2<sup>ND</sup> RESPONDENT

STEVEN MAKAU.....3<sup>RD</sup> RESPONDENT

PETER KIMEU MWANGANJ.....4<sup>TH</sup> RESPONDENT

LILIAN KATUNGE MUEMA .....5<sup>TH</sup> RESPONDENT

PETER MANG'ALA .....6<sup>TH</sup> RESPONDENT

GIDEON KIOKO KIVAGULI.....7<sup>TH</sup> RESPONDENT

PETER MUSAU.....8<sup>TH</sup> RESPONDENT

JUMA OLIVER MASILA.....9<sup>TH</sup> RESPONDENT

MUTUKU KATALA.....10<sup>TH</sup> RESPONDENT

NATIONAL LAND COMMISSION.....11<sup>TH</sup> RESPONDENT

GOVERNMENT OF THE MAJUENI COUNTY.....12<sup>TH</sup> RESPONDENT

REGISTRAR OF SOCIETIES.....13<sup>TH</sup> RESPONDENT

HON. ATTORNEY GENERAL.....14<sup>TH</sup> RESPONDENT

(Being an application under rule 5 (2) (b) of the Court of Appeal Rules, 2010 for stay of execution pending the lodging, hearing and determination of an intended appeal from the Judgment of the Environment and Land Court at Makueni by the Hon Justice Mbogo delivered on the 20<sup>th</sup> June, 2018, in ELC case No. 78 of 2017

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(formerly Machakos Civil Case No. 1 of 2014)

**BETWEEN**

CYRUS ROBBERT SALA ZIBU.....1<sup>ST</sup> PLAINTIFF

DR. KLAUS HERBERT RICHTER .....2<sup>ND</sup> PLAINTIFF

STEVEN MAKAU.....3<sup>RD</sup> PLAINTIFF

PETER KIMEU MWANGANI.....4<sup>TH</sup> PLAINTIFF

LILIAN KATUNGE MUEMA.....5<sup>TH</sup> PLAINTIFF

PETER MANG'ALA.....6<sup>TH</sup> PLAINTIFF

GIDEEON KIOKO KIVAGULI.....7<sup>TH</sup> PLAINTIFF

PETER MUSAU.....8<sup>TH</sup> PLAINTIFF

JUMA OLIVER MASILA.....9<sup>TH</sup> PLAINTIFF

MUTUKU KATALA.....10<sup>TH</sup> PLAINTIFF

(Suing on their behalf and on behalf of

the People of Makueni County)

=VERSUS=

HENRY MULI MUNGUTI.....1<sup>ST</sup> DEFENDANT

HENRY MWAKE.....2<sup>ND</sup> DEFENDANT

DAVID NYUNGU.....3<sup>RD</sup> DEFENDANT

MICHAEL KIOKO.....4<sup>TH</sup> DEFENDANT

PENINA MUMBE.....5<sup>TH</sup> DEFENDANT

ALICE WANGECHI.....6<sup>TH</sup> DEFENDANT

NATIONAL LAND COMMISSION.....7<sup>TH</sup> DEFENDANT

GOVERNMENT OF THE MAJUENI COUNTY.....8<sup>TH</sup> DEFENDANT

REGISTRAR OF SOCIETIES.....9<sup>TH</sup> DEFENDANT

HON. ATTORNEY GENERAL.....10<sup>TH</sup> DEFENDANT

GOOD HOPE REHABILITATION

**RULING**

This is a ruling arising from an inter partes hearing resulting from a single Judge refusal to certify the applicant's Notice of Motion dated and filed on the 9th day of July, 2018, as urgent.

The brief background to the inter partes hearing is that the respondents sued the applicants and four (4) others before the Environment and Land Court (ELC) at Makueni, in ELC case number, 78 of 2017, formerly Machakos HCC No. 13 of 2014 and formerly Nairobi HCC No. 77, of 2017, substantively seeking declarations that: the relationship then subsisting as between the 2<sup>nd</sup> respondent and the 1<sup>st</sup> applicant resulted in the creation of an implied trust; the applicants were trustees of the 2<sup>nd</sup> respondent; the implied trust between the 2<sup>nd</sup> respondent and the 1<sup>st</sup> applicant graduated to and became a public trust in respect of which the respondents and the people of Makueni County are beneficiaries; that the 7<sup>th</sup> applicant which is registered under Registration Certificate Number [particulars withheld] is an asset /entity of the respondents and the current officials who are the applicants herein hold office in the said 7<sup>th</sup> applicant as trustees for the respondents; that a mandatory injunction do issue compelling the Registrar of Societies to substitute the current officials of the 7<sup>th</sup> applicant with officials appointed by the respondents; that a mandatory injunction do issue compelling the 1<sup>st</sup> to the 6<sup>th</sup> applicants by themselves, their agents and / or servants to surrender all bank accounts and the deposits therein, movable and immovable assets in their custody and or currently in the name of the 7<sup>th</sup> applicant to the respondents; that a mandatory injunction do issue compelling the National Land Commission to register plot Number 3792 in the names of the 7<sup>th</sup> applicant; that a perpetual injunction do issue restraining the 1<sup>st</sup> to 6<sup>th</sup> applicants by themselves, their servants and or agents from interfering with the operations of the 7<sup>th</sup> applicant, together with an attendant prayer for costs and any other order that the Court may deem fit to grant. After a merit trial of the suit before the ELC Court at Makueni, the trial Judge **Mbogo C.G. J.**, allowed the respondent's claim as against the applicants and the mentioned four (4) others, in the intended impugned Judgment dated the 20<sup>th</sup> day of June, 2018.

The appellants were aggrieved by the said decision. They intend to appeal against the whole of the said Judgment. They have signified the intention to appeal vide, a Notice of Appeal dated the 21<sup>st</sup> day of June, 2018, and lodged in the relevant Court Registry on the 5<sup>th</sup> day of July, 2018. It is on the basis of the aforementioned Notice of Appeal that the applicants have anchored the aforesaid Notice of Motion. The application is premised on Rule 5 (2) (b) of the Court of Appeal Rules 2010, and brought vide a Certificate of Urgency, substantively seeking stay of execution of the intended impugned Judgment of the ELC Court at Makueni, pending the lodging and determination of the intended appeal.

The matter was placed before a single Judge, **Nambuye**, Judge of Appeal, on the same 9<sup>th</sup> day of July, 2018 for Certification of the application as urgent, which request was declined by the single Judge. It is the above action of the single Judge declining to certify the matter as urgent that prompted the applicants' request vide their letter Ref: **HA/LIT/41(A) 17/A** of 18<sup>th</sup> July, 2018, requesting for an inter partes hearing on the issue of urgency pursuant to Rule 47 (5) of the Court of Appeal Rules, Cap 9, laws of Kenya. The matter was placed before the same single Judge, **Nambuye** Judge of Appeal, on the 24<sup>th</sup> day of July, 2011 for directions on the way forward. Directions were given that the matter does proceed by way of interparties hearing on the Certificate of Urgency on the 30<sup>th</sup> day of July, 2018 at 2.30 p.m.

On the date fixed for the inter parties hearing, learned Counsel **Mr. Duncan Anzala** appeared for the applicants, while learned Counsel **Mr. Samson Musenya** appeared for the 1<sup>st</sup> to the 10<sup>th</sup> respondents. The single Judge being satisfied with the representations made by the participating learned Counsel, that the 12<sup>th</sup> respondent's participation in the proceedings resulting in the intended appeal had been dispensed with at the ELC Court and that the Office of the Attorney General on record for the 11<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> respondents had due notice of the inter parties hearing on the Certificate of Urgency, having been notified of the said hearing date on the 27<sup>th</sup> day of July, 2018, allowed learned Counsel present to canvase the Certificate of Urgency by way of oral submissions.

Learned Counsel, Mr. Anzala while reiterating all prayers sought in their plaint already highlighted above, submitted *inter alia* that the Certificate of Urgency was necessitated by the fact that the respondents have moved with speed and obtained the decree which they are threatening to execute; that of great grievance to them is the execution of item (h) of the said decree, vide which the National Land Commission has been compelled to register plot number 3792 in the name of the 7<sup>th</sup> applicant; that currently the said plot is registered in the name of the 1<sup>st</sup> applicant; that the applicants are apprehensive that if the registration status of the said plot is reversed, the intended appeal will be rendered nugatory. On account of the totality of the above submissions, Counsel urged me to vacate the order declining to certify the Notice of Motion as urgent and substitute it with an order certifying the Notice of Motion as urgent.

Opposing the request for certification of the Notice of Motion as urgent, learned Counsel **Mr. Samson Musenya** conceded that it was correctly submitted by the applicants that it is the respondents who sued the applicants before the High Court; that the ELC Court at Makueni ruled in favour of the respondents; that it was correct as submitted by the applicants that the decree has already been extracted and execution of the same is underway. Notwithstanding the above admissions, Counsel urged me not to reverse the order declining to certify the Notice of Motion as urgent for the reasons that: first, no prejudice will be suffered by either party to the intended appeal as the plot will be registered in the name of the 7<sup>th</sup> applicant for the benefit of all the parties to the intended appeal. Second, the plot is not yet surveyed and it doesn't have a title. The fear of it being disposed of speedily during the pendency of the intended appeal is remote. Thirdly, the registration can always be reversed should the applicants succeed on their intended appeal.

In reply, learned Counsel Mr. **Anzala** reiterated his earlier submissions and added that the very fact that there is admission from the respondents that the decree has been extracted and execution is underway is sufficient to warrant the reversal of the earlier orders declining to certify the matter as urgent.

I have given due consideration to the contents of both the Certificate of Urgency and the affidavit in support of the Certificate of Urgency sworn by learned Counsel **Mr. Duncan Anzala**, in the light of the rival submissions highlighted above. My invitation to intervene is donated

by Rule 47 (5) of the Court of Appeal Rules. It provides:

**“ 47 (5) The refusal by the Judge to certify an application as urgent under this rule shall not be subject to a reference to the Court under rule 55, but the applicant may apply informally for the matter to be placed before a single Judge for hearing inter partes”.**

In the light of the above limited mandate, I have no jurisdiction to delve into the merits of the pending Notice of Motion, nor the implication of the intended execution of the decree which admittedly is underway, on the merits of the pending Notices of Motion. My jurisdiction is limited to the forming of a judicial impression after hearing the respective parties inter partes on the Certificate of urgency and determine as to whether basis has been laid for me to vacate the order declining to certify the Notice of Motion as urgent. In the light of the above, and considering the admission by the respondents that the resulting decree has been extracted and its execution is underway, and also considering that it is the execution of the same, then intended decree that the applicants intend to move the court to forestall, it is my considered view that the interest of justice to both parties in the circumstances under review would demand that the parties be heard on merit on the pending notice of motion. It is the merit disposal of the said Notice of Motion that will determine the implication of either the progression or the halting of the intended execution of the decree admittedly underway.

In the result, I am satisfied that sufficient cause has been shown to allow the exercise of my judicial discretion to reverse the order declining to certify the Notice of Motion as urgent and substitute it with one certifying it as urgent. Costs of the interparties hearing on certification of urgency in the main application.

**Dated and delivered at Nairobi this 1<sup>st</sup> day of August, 2018.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

DEPUTY

REGISTRAR