



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**JUDICIAL REVIEW NO. 1 OF 2018 (JR)**

**IN THE MATTER OF AN APPLICATION BY: SOITARA SAOLI.....SUBJECT**

**FOR JUDICIAL REVIEW PROCEEDINGS IN THE**

**NATURE OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF**

**PROCEEDINGS AND RULING IN THE NAROK ADJUDICATION OFFICE,**

**UNDER LAND ADJUDICATION ACT, CAP 284 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF APPEAL TO THE MINISTER IN CASE NO. 114 OF 2005**

**AND**

**IN THE MATTER OF**

**THE PROCEEDINGS AND COURT RULING MADE ON 9<sup>TH</sup> MARCH 2018 BY**

**THE DEPUTY COUNTY COMMISSIONER NAROK NORTH SUB-COUNTY**

**AND**

**IN THE MATTER OF AN APPLICATION BY: REPUBLIC.....APPLICANT**

**VERSUS**

**CABINET SECRETARY FOR LANDS.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION.....2<sup>ND</sup> RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, NAROK NORTH SUBCOUNTY....3<sup>RD</sup> RESPONDENT**

**AND**

**PAUL MOROMBI SAOLI**

**(REPRESENTING LEPOSO OLE SAOLI, NOW DECEASED.....INTERESTED PARTY**

**EX-PARTE SOITARA OLE SAOLI.....SUBJECT**

## RULING

### **A. INTRODUCTION**

1. By Notice of Motion dated 13<sup>th</sup> November, 2020 the Applicant sought for the following orders: -

a) Spent.

b) That this court be pleased to grant a temporary order maintaining the status quo in respect of land parcel number CIS Mara/ Olokurto/ 60 and a temporary order of stay of proceedings in Narok ELC No. 264 of 2017 pending the hearing and determination of the application.

c) That this court be pleased to grant a temporary order of inhibition restraining the Restraining the Respondent or any person purporting to act on his behalf, his servants, workmen, licensees or agents from howsoever selling, charging, offering for sale, allotting, sub-dividing, taking over, dispossessing, alienating, reclaiming, and or harassing the Applicant and his family or interfering with their peaceful entitlement, occupation, possession and use of the half portion of land parcel CIS Mara/ Olokurto/ 60 they currently occupy and use pending the hearing of this application *inter partes*.

d) That this court be pleased to grant an order maintaining the status quo in respect of land parcel number CIS Mara/ Olokurto/ 60 and another order of stay of proceedings in Narok ELC No. 264 of 2017 pending the hearing and determination of the appeal preferred from the ruling of this court made on 22<sup>nd</sup> October, 2020.

e) That this court be pleased to grant an order of inhibition restraining the Respondent or any person purporting to act on his behalf, his servants, workmen, licensees or agents from howsoever selling, charging, offering for sale, allotting, sub-dividing, taking over, dispossessing, alienating, reclaiming and or harassing the Applicant and his family or interfering with their peaceful entitlement, occupation, possession and use of the half portion of land parcel number CIS Mara/ Olokurto/ 60 they currently occupy and use pending the hearing and determination of the appeal preferred from the ruling of this court in respect of the Application dated 25<sup>th</sup> April 2018.

2. The Application is based on the grounds thereof and the Supporting Affidavit dated 13.11.2020 and a Further Affidavit dated 11.12.2020. The applicant avers that he and his family have been living and using half portion of land parcel number CIS Mara/ Olokurto/ 60. His Application for Judicial Review was heard and determined vide a Ruling dated 22.10.2020 dismissing the said Application. Intended on appealing against the said Ruling, he has lodged a Notice of Appeal and made the requests for the relevant certified documents to prepare his record of appeal. However, after the delivery of the Ruling, the Respondent have threatened to evict and dispossess him and his family from the said portion of land. It is the Applicant's fear that should the same happen, then he stands to lose irreparably and his intended appeal will be rendered a nugatory. He has therefore brought the application herein to maintain the status quo and prevent any execution that may arise from the ruling of 22.10.2020.

3. The application was opposed. The Interested Party filed a Replying Affidavit dated 04.12.2020 in response to the Application dated 13.11.2020. It is the Respondent's assertion that the court having delivered its ruling on the Judicial Review Application, has now been rendered functus officio and cannot grant any other orders as sought by the Applicant. It is the Interested Party's view that such orders can only be granted from a superior court vide an Appeal.

4. I have read and considered the responses to the Application and the rival submissions by both the Applicant and the Interested Party in this case and the various authorities cited in support of their respective cases and I have taken the same into account in arriving at my decision.

### **B. DETERMINATION AND ANALYSIS**

5. The issues for determination from the present Application are as follows: -

a) Whether an Order for Stay can issue

b) Whether an Order of Inhibition can issue

A) Whether an Order for Stay can issue

6. Section 8 of the Law Reform Act Cap 26 of the Laws of Kenya states the following concerning judicial review orders,

*“(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection 5 of this section,”*

*“(5) Any person aggrieved by an order made in exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.”*

7. In considering this issue I am guided by the decision in the case of ***Devani & 4 Others V. Joseph Ngindari & 3 Others, CA NO. NAI 136 OF 2004***, where the High Court dismissed an application for judicial review and the applicant applied for stay of execution of the order

of the High Court. In holding that the application was incompetent, the Court stated:

**“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application.”**

8. I will also rely on the holding in **John Mbuu Muthoni & Another...Vs...Ruth Muthoni Kariuki (2017) eKLR**, where the Court held that;

*“33. I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga’s decision in R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances. 34. I am persuaded that the circumstances here are the same as those in the Wananchi Group Case which I find to be persuasive. It is in accord with the James Hoseah Gitau Mwara Case cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be “executed.” A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed.”*

See also **R vs Kenya Urban Roads Authority & 3 others ex-parte Cytom Investments Management Ltd [2018] eKLR**.

9. The Applicant herein seeks an Order of stay of execution of the ruling I made on the 22.10.2020 whose effect was to dismiss the Judicial Review Application dated 19.04.2018. As stated in the above decision, the said dismissal was a negative order incapable of execution; it did not direct any of the parties to do anything or to refrain from doing anything. It is therefore unjustified for the Applicant to seek orders staying the same.

10. The Applicant goes further to urge this court to stay the proceedings in Narok ELC No. 264 of 2017. I need to reiterate that this court was exercising a Judicial Review jurisdiction as donated by the Law Reform Act; judicial review is sui generis in nature and it gives specific orders that can be granted; to wit, Mandamus, Prohibition and Certiorari. Any other order granted outside the three would amount to granting orders that were never envisaged by the statute enabling Judicial Review. These orders staying the proceedings should therefore be made at the appropriate forum or at the Superior Court.

11. Judicial review is sui generis and the decline of the court to issue the orders of certiorari, mandamus or prohibition resulted in a negative order incapable of either stay or execution. Given that the order of the Court vide the ruling of 22.10.2020 dismissing the suit was a negative order, this court finds that there is no order to be executed and therefore the Court finds and holds that it cannot stay the orders that had been issued.

12. In view of the foregoing; the Applicant’s prayer for an order of stay of execution and or status quo and further to stay the proceedings in Narok ELC No. 264 of 2017 fails and is hereby dismissed.

#### B) Whether an Order of Inhibition can issue

13. **Section 68** of the Land Registration Act on the Power of the court to inhibit registered dealings states as follows: -

*(1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.*

14. The Applicant in his Notice of Motion and Supporting Affidavit states that the Respondent after the delivery of the Ruling moved fast and has already registered the land in his name. He therefore fears that should an Order of inhibition not be granted, the respondent has threatened to evict and sell and consequently subdivide the land to other third parties.

15. It is important to limit myself to the present Application and avoid delving into the merits of the intended appeal. As earlier pointed out, the court in delivering its ruling on 22.10.2020 was exercising its judicial review jurisdiction; which has clear cut orders that can be granted and an Order of Inhibition, as much as would be sufficient in the cause, is **not** within the said orders as envisaged by the Law Reform Act.

16. Upon delivering the final orders in the Judicial Review Application, the court became functus officio; unable to issue any further or subsequent orders as the ones sought by the Applicant in the present Application. Further, should the same be granted, the same would amount to reversing the orders earlier issued and reviving the dismissed application.

17. For that reason, I do find that I am unable to grant the Order of Inhibition as sought by the Applicant and as such I hold that the same is dismissed.

18. I need to point out that the Applicant has misinterpreted the Applicable law under the present the Application and the nature of the case before this court.

19. The upshot of the foregoing is that, I find that the Notice of Motion Application dated 13.11.2020 is not merited and the same if therefore

dismissed with costs to the Interested Party.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK ON 27TH DAY OF OCTOBER, 2021.**

**MOHAMMED KULLOW**

**JUDGE**

**In presence of:-**