



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC PETITION NO. 3 OF 2018**  
**IN THE MATTER OF ARTICLES 27, 29(c), (d) AND**  
**(f), 39(3), 47(a), 60 (1) (a) AND (d) OF THE**  
**CONSTITUTION OF KENYA**

**BETWEEN**

JOHN MASINDE KACHENJA.....PETITIONER

TRANS NZOIA COUNTY LAND

ADJUDICATION & SETTLEMENT OFFICER.....1<sup>ST</sup> RESPONDENT

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

THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

**AND**

JEREMIAH MARABU MIYORO.....INTERESTED PARTY

**RULING**

**(On Stay of Execution of a Decree arising from a Judgment)**

1. The Interested Party and the Respondents being dissatisfied with this Court's Judgment delivered on **06/07/2021** lodged two Notices of Appeal dated **8/07/2021** and **23/07/2021** respectively against the judgment. The Interested Party then moved the Court under Certificate of Urgency on **14/07/2021** although the Application dated **09/07/2021** was filed on **12/07/2021**. The Respondents supported the Applicant.

2. The Application was brought by way of by Notice of Motion under **Sections 1A, 1B, 3, 3A and 63 (e)** of the **Civil Procedure Act, Order 42 Rules 1, 2, 3, 4, 5 and 6** of the **Civil Procedure Rules**. The Applicant sought the following specific orders:

1. ...spent.

2. **THAT this Honourable Court be pleased to issue orders for stay of execution of the Court's judgment pending the hearing and determination of the intended appeal.**

3. ...spent.

4. **Costs be provided for.**

3. The Application was based on four (4) grounds which I summarize here. One was that the Interested Party resided on the parcel of land and he risked being evicted from it following the judgment of the Court. The others were that the Applicant having filed a Notice of Appeal, the interest of justice demanded on their part that the orders sought be granted.

4. The Supporting Affidavit sworn by him on the same date repeated the grounds of in support of the Application save that he added that he had carried substantial developments on the land including fencing it, planting trees and crops, and building a house on it. He annexed photos

of the trees, crops and house and marked them as **JMM 3 a, b, c, d and e**. He then stated that the Appeal would be rendered nugatory and he suffers substantial loss if the orders sought were not granted. Lastly, he stated that he was ready to deposit in Court security as consideration for the orders of stay of execution.

5. The Petitioner opposed the Application through a Replying Affidavit he swore on **24/07/2021**. In the Affidavit he stated that he had been in actual and exclusive possession of the entire parcel of land. To buttress his deposition he annexed the Orders of the Court issued on **28/01/2019** and **23/03/2021**. These were to the effect that he was not to be evicted from the suit land and the maintenance of *status quo* respectively. His deposition was that the Applicant could not allege to be in possession when the Court restrained him from taking possession of or doing anything on it. He deposed that the photos of trees and crops taken by the Interested Party were of a neighbor while that of a house was his and of the ploughed portion it was where he (Respondent) had ploughed. He said that by the time the Applicant moved the Court all farms in the surrounding area had maize crop dazzling and the photos annexed to the Applicant's Affidavit were fake.

6. His further deposition was that the grounds of Appeal were baseless in law and purely academic. He emphasized that the Applicant had not demonstrated that he would suffer substantial loss yet his ownership was illegal. He stated that he should be allowed to enjoy the fruits of his judgment, and if the Application was allowed, **Article 3(1)** of the **Constitution** would be violated. He deposed that on the one hand, as a law abiding citizen he bound himself not to charge or sell the suit land or interfere with it until the appeal is heard. He stated that on the other hand the interest of justice and fairness would be that cancellation of title be stayed on condition that the Respondents retains possession and that the Applicant does not alter the *status quo* including not charging the subject land.

### **SUBMISSIONS**

7. The Applicant filed written submissions on **20/12/2021** in which he stated that the Application was brought under **Order 42 Rule 6** of the **Civil Procedure Rules**. He basically summarized the events leading to the judgment which he was aggrieved with. He then relied on the case of Narok Environment and Court, ***ELC Appeal No. 5(B) of 2019, Emmanuel Lekakeny Kayo v. Oramat ole Sentu*** which cited the Court of Appeal decision ***Butt v. Rent Restriction Tribunal [1982] KLR 417*** which gives a number of principles for determining an Application of stay of execution pending appeal. He then relied on the Court of Appeal ***Civil Appeal No. 114 of 2013 (UR 77/2013), Kenya Airports Authority v. Mittu-Bell Association & the A-G.***

8. The Respondents also submitted, reiterating the contents of **Order 42 Rule 6** of the **Civil Procedure Rules** and the Affidavit of the Applicant, more so that the Applicant has an arguable case with high chances of success. To them, it was incumbent on the Petitioners to demonstrate that the Applicants did not comply with the conditions in **Order 42 Rule 6**. They emphasized that the Court had jurisdiction to order stay of the judgment in terms of the Order relied on and its power in granting the application was discretionary.

9. They then submitted that **Order 42 Rule 8** exempted the Government from giving security for due performance of the judgment and in any event there was no financial performance levelled against the Interested Party so as to require security to be given. They stated that it was in doubt as to who was in possession of the land hence the need to stay the judgment. They relied on the case of ***Celestica Limited v. Gold Rock Development Ltd [2015] eKLR.***

### **ANALYSIS AND DETERMINATION**

10. Upon careful consideration of the Application, the Affidavits in support and opposition thereto, the submissions on record, the law relied upon and the case law cited, I am of the view that the following issues lie for determination:-

*a) Whether the Application is merited.*

*b) Whether the government should offer security for due performance of the decree.*

*c) Who to bear the costs of the Application.*

11. I will begin with analyzing the straightforward issue and that is the second one. The issue is whether the government should give security for due performance of the decree herein. It is not in dispute that the government, through the office of the Attorney-General undertook a defence on behalf of the three Respondents. The respondents therefore fall within the provisions of **Order 42 Rule 8** of the **Civil Procedure Rules**. The provision is to the effect that “*No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.*” By the provision, it is clear that the government is not under obligation to give security for due performance of any decree or order from which it appeals. Thus, this Court agrees with the Respondents that they should not be required to offer security herein. However, that does not absolve the Interested Party from the said obligation. To the extent that the said party moved this Court for stay of execution of the decree herein, he was under obligation to fulfill the conditions required for the success of such an application.

12. On the first issue, the requirements for the grant of an order for stay of execution pending appeal are contained in **Order 42 Rule 6(1)** of the **Civil Procedure Rules**. It provides, at the relevant part, as follows:-

*“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, ...”*

13. The provision as compared with **Section 109** of the **Evidence Act** in so far as it relates to facts that support the Application such as the one before the Court obligates the party seeking stay of execution to satisfy the requirement therein in order to be granted the prayers sought. It is not upon the Respondent to demonstrate that the Applicant has not demonstrated that the Applicant did not comply with **Order 42 Rule**

6, as was submitted by the Respondents in the Petition. To do so would go to the clear principle of law that he who asserts proves unless the burden is placed by law on any other person. Nowhere in the provisions of law is the burden shifted to a respondent to prove otherwise.

14. The filing of an Appeal does not grant an automatic stay of execution. The stay is not a matter of right. The Applicant ought to show sufficient cause to the court in order for it to grant the orders sought. Before I discuss the Applicant's compliance or otherwise of sufficient cause, I deal with whether the Application was brought without undue delay. Besides good cause being shown to exist the Application should be made without undue delay. In *Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR* the Court of Appeal held that:

*The application must of course, be made without unreasonable delay.*

*In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows:*

*"In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory."*

*These two principles go hand in hand and failure to prove one dislodges the other."*

15. There is no doubt about the fact that the Application was filed on 12/07/2019, only six days after the delivery of the judgment. Whereas it has been expressed by Courts many times over that any delay in moving the Court ought to be explained satisfactorily, that does not affect a party's right to move the Court. And where a party does so before the prescribed timelines for taking other steps as permitted by law, then not fault can be attributed in terms of delay on the part of the party, and he should not be unnecessarily burdened to explain the time taken before moving the Court. It is my humble view that since the Applicant moved the Court within six days of the delivery of the judgment, but the law permits filing of Notice of Appeal within fourteen (14) days and service of the same within seven, there was no delay on the Applicant's part.

16. The term **sufficient cause** means *bona fide* and more than inaction on the part of a party. In *Parimal v. Veena, [2011] 3 SCC 545*, the Supreme Court of India defined the terms by stating that:-

*"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".*

17. The definition the Court gave are to the effect that a party has to give enough or adequate reason in order to avail himself, by Court, of the grant of the orders sought. The terms adequate and enough are both subjective meaning their attainment will depend on the facts of each as analyzed by the judge. However, that should be borne out of good faith, honesty, blamelessness and diligence in action.

18. In the instant case, the Applicant argues that stay of execution ought to be granted because one of the reason is that he is likely to be evicted from the parcel of land in question. However, the issue as to who is in occupation of the land has long been settled by the findings of the Court when, previously, found the Petitioner to be in possession and granted conservatory orders thereto. It is thus inaccurate and a falsehood for the Applicant to state that he is in occupation and would be evicted from the parcel of land. On that account alone, it casts doubt as to whether the rest of the averments in his Affidavit in support of the Application can be taken to be true so as to form the basis of the Application. It has been emphasized many times over through judicial pronouncements not only of this country but world over that he who comes to equity must do so with clean hands. Where a party misleads the Court it is a clear demonstration of soiled hands. Such a party cannot avail himself of the discretion of the Court. Equity and by extension all law require that one approaches the Court through them in honesty and nothing but honesty and facts. On account of this the applicant has failed to demonstrate any substantial loss he will go into, and even any prejudice he will suffer, if the Application is not granted.

19. I have perused the draft Memorandum of Appeal annexed to the Affidavit. I do not find it raising arguable grounds of appeal. In my view it may not be rendered nugatory if the Application is denied. For the reasons above the Application fails.

20. In regard to the third issue, once a Court is moved and it makes a decision thereon, and the parties had prayed for costs, there has to be a determination as to who to pay the costs. **Section 27 of the Civil Procedure Act** provides that an award of costs in any matter is at the discretion of the judge, but the same provision gives a proviso that costs follow the even and the Court will order the unsuccessful party to bear them unless there is good cause to order otherwise. I see none here. The Applicant will bear the costs herein.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**