



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MACHAKOS**  
**ELC JUDICIAL REVIEW NO. 58 OF 2017**

REPUBLIC.....APPLICANT

-VERSUS-

DEPUTY COUNTY COMMISSIONER YATTA SUB COUNTY.....1<sup>ST</sup> RESPONDENT

THE COUNTY LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT

THE COUNTY SURVEYOR.....3<sup>RD</sup> RESPONDENT

AND

KISILU MULWA.....1<sup>ST</sup> INTERESTED PARTY

BONIFACE MUASYA KILONZO.....2<sup>ND</sup> INTERESTED PARTY

ANASTACIA KILONZO.....3<sup>RD</sup> INTERESTED PARTY

Representing Gregory Kilonzo (deceased)

AND

JOHN NTHUKU MAINGI

ALEXANDER KILONZO MAINGI

DANIEL NZYOKA MAINGI

PETER MUTINDA MAINGI

WANZA MAINGI KIANGI

VICTORIA KITHIA MAINGI (Legal representatives of the estate of

MAINGI KIANGI (Deceased).....APPLICANTS

**R U L I N G**

By a Notice of Motion application dated the 16<sup>th</sup> March, 2020 brought pursuant to Section 3A of the Civil Procedure Act and Order 42 Rules 6(1), 2, 3 and 4 of the Civil Procedure Rules, the Applicants seek for the following Orders:

- a) **That the court so make an order of stay of execution of the Decree/Judgment made on 31/01/2020 until this application is heard and determined.**
- b) **That the court so make an order of stay of execution of the Decree/Judgment made on 31/01/2020 until the intended appeal in the Court of Appeal is heard and determined.**
- c) **The costs of the application do abide the result of the Appeal.**

The application is premised on the grounds on the face of it and supporting affidavit of the 5<sup>th</sup> Applicant, Wanza Maingi Kiangi who deposes that Judgment in this case was delivered on 31<sup>st</sup> January, 2020 and being dissatisfied with the same she filed a Notice of Appeal dated 13<sup>th</sup> February, 2020. She avers that they have an arguable appeal with high chances of success. She contends that the application has been filed without undue delay and they stand to suffer irreparable loss if the orders sought are not granted. She states that the Respondents would not be prejudiced in any manner if the orders sought were granted.

In response, the 1<sup>st</sup> Interested Party KISILU MULWA filed a replying affidavit where he deposes that the application was fatally defective as the Applicant had not explained the delay in filing the same since judgment was entered on 31<sup>st</sup> January, 2020 while the application was filed on 16<sup>th</sup> March, 2020. He states that the 1<sup>st</sup> Respondent had jurisdiction to hear the appeal in question and therefore the Applicant would not suffer any irreparable loss as the ownership of the suit land was determined by the arbitration board which decision was properly upheld by the 1<sup>st</sup> Respondent. He explains that the right of appeal ought to be balanced with the right of the decree holder to enjoy the fruits of the Judgment and the court should dismiss the instant application.

The application was canvassed by way of written submissions and on record are both the Applicants' and 1<sup>st</sup> Interested Parties' submissions dated 21<sup>st</sup> April, 2021 and 14<sup>th</sup> June, 2021 respectively.

#### **Analysis and Determination:**

Upon consideration of the Notice of Motion application dated the 16<sup>th</sup> March, 2020, the respective affidavits and rivalling submissions, the only issue for determination is whether the Court should issue a stay of execution against the Judgment dated 31<sup>st</sup> January, 2020 pending appeal.

The Applicants' in their submissions contended that they shall suffer substantial loss which cannot be compensated by way of damages and they were willing to give reasonable security as a prerequisite of Order 42 of the Civil Procedure Rules. They urged the court to grant a stay of execution pending appeal. To buttress their averments, they relied on **Civil Appeal No.107 of 2015, Masisi Mwita v Damaris Wanjiku Njeri (2016) eKLR.**

The 1<sup>st</sup> Interested party in his submissions insists that the Court found that the 1<sup>st</sup> Respondent had jurisdiction to hear the Appeal in question; parties were heard and judicial review application dismissed. He further submits that the Appeal will not be determining ownership of the suit land therefore the argument that the applicants will suffer irreparable harm does not hold water. Further, that the application has been brought after an inordinate delay. To support his arguments, he has relied on the following cases: **Salome Naliaka Wabwile v Alfred Okumu Musinaka (2021) eKLR** and **Muguga Green Apartments Vs Attorney General & 2 Others (2021) eKLR.**

On stay pending Appeal, Order 42 Rule 6(2) of the Civil Procedure Rules provides inter alia: **No order for stay of execution shall be made under subrule (1) unless— (a) 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; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’

Further, Rule 5 (2)(b) of the Court of Appeal Rules provides thus: “Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

In the **Bungoma HC Misc Application No. 42 of 2011 Wangalwa & Another Vs Agnes Naliaka Cheseto** the Court held that: “The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the essential interests of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

See also the decisions of **Jaber Mohsen Ali & Another V Priscillah Boit & Another (2014) eKLR** and **Mwaura Karuga t/a Limit Enterprises Vs Kenya Bus Services Ltd & 4 Others (2015) eKLR**.

In the current scenario, judgement was delivered on 31<sup>st</sup> January, 2020 dismissing the Applicants’ application for judicial review. The Applicants being dissatisfied with the whole of the said judgement filed a Notice of Appeal on 13<sup>th</sup> February, 2020. The Applicants are apprehensive that the Interested Parties will proceed to subdivide the suit land to their detriment. They are ready to provide security for due performance of the Decree. The 1<sup>st</sup> Interested Party insists the 1<sup>st</sup> Respondent had jurisdiction to hear the appeal in question and therefore the Applicant would not suffer any irreparable loss as the ownership of the suit land was determined by the arbitration board which decision was properly upheld by the 1<sup>st</sup> Respondent. Further, that parties were heard and judicial review application dismissed. He reiterates that since the Appeal will not be determining ownership of the suit land, then the Applicants will not suffer irreparable harm.

I note in this instance, the Court simply dismissed an application for judicial review which sought to quash the decision of the 1<sup>st</sup> Respondent that had upheld the determination of the Arbitration Board in respect to the title of the suit land. From the averments in the supporting affidavit, I find that Applicants have not demonstrated factors which show that the execution will culminate in their suffering substantial loss as the dismissed suit did not determine ownership of the suit land. In the case of **Co-operative Bank of Kenya Limited –vs- Banking Insurance & Finance Union (Kenya) [2015] eKLR**, the Court of Appeal (Kantai J.A) held as follows: -

*“...An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order”–either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No.13 of 1984) where it was stated:*

**‘... an order for stay of execution must be intended to serve a purpose ...’**”

Based on the facts as presented and relying on this Court of Appeal, I find that there is no positive order to be stayed. Further, it is my considered view that since the Applicants had already lodged a Notice of Appeal in the Court of Appeal, the instant application for stay of execution pending Appeal, should have been filed in the Court of Appeal. Based on the facts as presented while relying on Rule 5 (2) (b) of the Appellate Jurisdiction Act (Court of Appeal Rules) cited above and associating myself with the decisions quoted, I find that the Applicants have failed to meet the threshold set for granting stay of execution and will decline to grant the said orders.

It is against the foregoing that I find the Applicants' Notice of Motion application dated the 16<sup>th</sup> March, 2020 unmerited and will proceed to dismiss with no order as to costs.

**DATED SIGNED and DELIVERED VIRTUALLY at MACHAKOS this 23<sup>RD</sup> Day of FEBRUARY, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**