



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CONSOLIDATED PETITION NO. 1 OF 2020 AND 4 OF 2021

IN THE MATTER OF ARTICLES 2 (6), 22 (2) (a) (3) (d), 23 (1), (3), 162 (2) (b) & 165 (3)(a), (b), (d) (i), (ii), OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26 (1), (3), 27 (1), (2), 28, 29 (c), (d), (f), 35 (1), (2), 40 (1) (a), (b), (3), (4), 43 (1) (b), (c) (f), 45 (1), 47 (1), (2), 50 (1), 53 (1) (b), (c), (d), (2) & 57 (b), (c), 9d) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 152 B, C, D, E, F, G OF THE LAND ACT 2012

AND

IN THE MATTER OF REG. 63 (1) (2), 66-69 OF THE LAND REGULATIONS, 2017

AND

IN THE MATTER OF SECTIONS 2, 3, 4, 5, 6, 7, 10, 11 & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF INTERNATIONAL LAW INSTRUMENTS:

UNIVERSAL DECLARATION OF HUMAN RIGHTS

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

UN BASIC PRINCIPLES AND GUIDELINES ON DEVELOPMENT BASED EVICTION AND DISPLACEMENT (2007)

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (AFRICAN CHARTER)

BETWEEN

FATUM KHAMIS BILAL.....1ST PETITIONER

RASHID SADI KEMIS.....2ND PETITIONER

KADMALA AHMED.....3RD PETITIONER

RUKIA KHAMIS.....4TH PETITIONER

NOOR RAJAB.....5TH PETITIONER

MICHAEL ODHIAMBO.....6TH PETITIONER

(Suing in the public interest on their own behalf and on behalf of 3,500 co-petitioners being residents of Kibos settlement located in Kisumu whose land is threatened by illegal possession by Kenya Railways Corporation)

VERSUS

THE KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

THE CABINET SECRETARY, NATIONAL

TREASURY AND PLANNING.....2ND RESPONDENT

THE CABINET SECRETARY, LANDS.....3RD RESPONDENT

CABINET SECRETARY FOR INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT.....4TH RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH RESPONDENT

KISUMU COUNTY GOVERNMENT.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

AND

LEGAL ADVICE CENTRE (Kituo cha Sheria).....1ST INTERESTED PARTY

KISUMU MUSLIM ASSOCIATION.....2ND INTERESTED PARTY

KENYA NATIONAL COMMISSION ON

HUMAN RIGHTS (KNCHR).....3RD INTERESTED PARTY

RULING

The Appellants case

On 17/9/2021, the 1st Respondent filed the application dated 16/9/2021 seeking orders that the court be pleased to grant stay of execution of the judgment and or decree issued on the 27/8/2021 by this court pending the hearing and determination of the appeal. The application is based on grounds that the 1st respondent is aggrieved by the Judgment delivered by Hon. Justice A. Ombwayo, on 27th August 2021. The 1st respondent has since preferred an appeal with high chances of success. There is clear substantive loss to be suffered by the 1st respondent as the petitioners are at liberty to execute the judgment. This application has been made without unreasonable delay.

The 1st respondent is ready and willing to provide for any security to the court which the court may deem fit to order for due performance of the order as may be ultimately binding to them. The appeal may be rendered nugatory unless stay is granted as sought. The application has been made in good faith and is in the interest of justice.

The application is supported by the affidavit of Stanley Gitari the Legal Officer of the applicant who states that the Hon. Justice A. Ombwayo, delivered his Judgment on 27th August 2021, allowing the petition as prayed.

The 1st respondent is aggrieved by the judgment delivered by Hon. Justice A. Ombwayo on 27th August 2021 and has since instructed its advocates to prefer an appeal against the judgment.

In allowing the petition, the petitioners are at liberty to move for executing for costs and even prefer another suit for damages.

In the circumstances, there is clear substantive loss to be suffered by the 1st respondent as the petitioners are at liberty to execute the judgment. This application has been made without unreasonable delay. The 1st respondent is ready and willing to provide for any security to the court which the court may deem fit to order for due performance of the order as may be ultimately be binding to them.

1st respondent has met the conditions to warrant stay of execution of the judgment/decre as sought as the 1st respondent has demonstrated that it shall suffer substantial loss unless stay is granted; The application has been preferred without undue delay; and The 1st respondent is willing and ready to abide by the terms that may be set by the court to guarantee security for costs. The appeal has a reasonable chance of success.

This court has unfettered discretion to grant stay as sought and which it is urged to do so in favour of the 1st respondent.

No prejudice will be occasioned on the part of the petitioners should stay of execution of judgment issue. On the other hand, the 1st respondent will be greatly prejudiced as its appeal will be rendered nugatory.

The appeal may be rendered nugatory unless stay is granted as sought.

It is in the interest of justice that a stay of execution be granted pending the hearing and determination of the appeal.

This application is brought in good faith.

The Responses

The 1st Interested Party filed a replying affidavit sworn by Dr. Annette Mbogoh who states that the court should consider the provision of Order 42 Rule 6 of the Civil Procedure Rules 2010. According to the 1st Interested Party the applicant has not demonstrated that he has an arguable appeal. The 1st Interested Party states that the petitioners are at liberty to execute for costs and to file another suit. Dr. Nicholas Wasonga Orango filed a replying affidavit whose gist is that the respondent has failed to disclose any substantive and reasonable justification for the stay of execution of the decree herein.

Determination

I have considered the application, affidavits in record and the rival submissions and do find that the court allowed the petition with costs and further found that the petitioners are at liberty to file a suit seeking damages. The 1st respondent now seeks the stay of execution of the decree extracted and the Judgment.

Paragraph 10 of the decree reads *“This court orders that the petitioners are entitled to the full protection from discrimination which right was violated by the 1st and 4th respondents and therefore the petitioners are entitled to full compensation for the loss suffered during and after the illegal demolition of their structures. However, the petitioners ought to file a separate civil suit for compensation as the damages incurred cannot be ascertained in such petition as the one before me.”*

Order 42 rule 6 provides for stay of execution pending appeal. It thus provides that:

“6. (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, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

In this matter, it is the petitioners inalienable right to file a suit seeking reliefs that can compensate them for damages if any. They do not

require the leave of the court to file a suit. Conversely the court cannot prevent them from filing a suit for such reliefs. I do decline them to order for the stay of filing of a suit by the petitioners. Moreover, the respondents have not demonstrated that they shall suffer substantial loss if stay is not granted. Costs have not been taxed and therefore this court cannot discern the amount of money the petitioners will be awarded. I find the application to be misconceived and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17th DAY OF FEBRUARY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.