



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CONSTITUTIONAL PETITION NO. 2 OF 2014**

**IN THE MATTER OF**

**ALLEGED CONTRAVENTION OF CONSTITUTIONAL RIGHTS**

**FREEDOMS AND GUARANTEES UNDER**

**ARTICLE 22, 40 AND 47 OF THE CONSTITUTION OF KENYA**

**ISAIAH MBAABU (Suing on behalf of the Athimba clan) ..... 1<sup>ST</sup> PETITIONER**

**PASQUALE MUKETHA (Suing on behalf of Akachiu clan) ...2<sup>ND</sup> PETITIONER**

**IBRAHIM KARANI (Suing on behalf of Nkula clan) ..... 3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE LAND ADJUDICATION & SETTLEMENT OFFICER**

**IGEMBE SOUTH DISTRICT ..... 1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**MATI KABERIA BAIBIRI ..... 3<sup>RD</sup> RESPONDENT**

**KOBIA BAIMURU ..... 4<sup>TH</sup> RESPONDENT**

**PAUL SOLOMON MIRITI ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**A. APPLICATION**

1. The court is urged by the applicants to grant a stay of execution of the judgment made on 14.7.2020 and allow them to prefer an appeal out of time. The notice of motion is supported by a supporting affidavit of Isaiah Mbaabu sworn on 11.8.2020.

2. The grounds are: that the applicants are elderly and on account of vulnerability during Covid 19 pandemic, they were unable to travel to instruct their advocates to proceed with the appeal; that the delay was not inordinate, is explainable, and was not intentional; the appeal has high chances of success; there would be substantial loss and irreparable harm if execution ensues and or the time is not enlarged; they are likely to be evicted from their ancestral lands; the appeal is likely to be rendered nugatory and lastly it is in the interest of justice the orders sought be granted.

3. The application is also supported by an affidavit of Isaiah Mbaabu who repeats the grounds above.

**B. GROUNDS OF OPPOSITION**

4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents oppose the application through grounds of opposition dated 28.9.2020. The grounds are: there has to be compliance with **Order 42 Rule 6**; substantial loss has not been sufficiently demonstrated to the required higher standard than loss, an

ordinary judgment debtor would incur; the uncertainty of the identity of the petitioners militates against the principal that the judgment debtor should not necessarily fetter a successful party from enjoying the fruits of judgment; no security for costs have been offered; appeal cannot be rendered nugatory since the net effect of the judgment was that the **Land Adjudication Act** had sufficient mechanism for ventilating the issues in dispute and lastly the orders of stay are not warranted and are overwhelming, untenable and offend the public interest which is the completion of the adjudication process and further offend the doctrine of intergenerational equity.

5. Reuben Murungi on behalf of 3<sup>rd</sup> – 5<sup>th</sup> respondents and the interested parties opposes the application through a replying affidavit sworn on 5.10.2020 on the basis that the application was an academic exercise already overtaken by events since upon the delivery of the judgment, work progressed over the subject matter and parcel numbers to over 816 beneficiaries had been attained as per annexure marked **RM “I”**; that the land officers had finished the A/R process by 25.8.2020; the pending work had already been concluded and orders cannot issue in retrospect; the application will to hold the community hostage; instructions could have been given on phone since courts were still receiving filings during Covid 19 pandemic; the application and appeal are filed by the applicants’ selfish interests and not for the common good of the community; circumstances had changed and any stay was overtaken by events.

### **C. WRITTEN SUBMISSIONS**

6. With leave of court parties consented to canvass the application by way of written submissions dated 3.10.2020 for applicants, 26.10.2020 for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents and interested parties and 26.10.2021 for the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.

7. The applicants submit they have offered good reasons for not filing the appeal within time. They rely on **Thuita Mwangi –vs- Kenya Airways Ltd [2003] eKLR** on the proposition that the court should consider the length of delay, reasons for the delay, chances of success of the appeal and finally the degree of prejudice if the application was granted.

8. In their view, the applicants submit traveling for elderly people with underlying conditions during Covid 19 period was impossible and the nature of the matter required a physical meeting with their counsels on record for adequate instructions and that being representatives of the three clans made them answerable to many people who constitute the petitioners.

9. It is the applicants submission that a delay of 27 days was not inordinate, that their appeal was arguable with a likelihood of success and that there would be no prejudice to the respondents if the application was allowed.

10. At to substantial loss, the applicants submit they were being evicted from their homes by the respondents following the judgment hence execution would cause substantial loss to those among them residing on the subject land; which has been for several decades and the loss would be immense which was unlikely to be remedied easily.

11. They denied through submissions that the demarcation was already complete hence rendering the application futile.

12. Regarding the delay, it was submitted the application was filed on 11.8.2020 which was less than 27 days after the delivery of the judgment and that by being sickly, elderly and complied with the Covid 19 pandemic, travelling was a real threat.

13. As regards security, the applicants submitted the overriding objective of **Section 1A of Civil Procedure Act** was to facilitate just, efficient, expeditious, proportionate and reasonable resolution of civil disputes and opposed to imposing punitive terms and conditions of stay and since there was no positive decree issued, that they were bound to perform in favour of the respondents.

14. They submitted that security should not arise and if the courts were to impose it, it should not be so stiff as to amount to stifling access to justice as guaranteed by the law. Reliance was placed on **Morris Odhiambo Ouma –vs- Peter Mwaga Ombura [2019] eKLR** on the principles applicable.

15. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on:-

a) **Victory Construction –vs- BM [2019] eKLR quoting Vishram Ravji Halai vs. Thornton & Turpin** on the proposition that over and above the three conditions under **Order 42 rule 6** the court should be guided by the overriding objective on Just determination of proceedings, efficient disposal of the business of court, efficient use of the available judicial and administrative resources and timely disposal at an affordable manner.

b) **Kenya National Highways Authority –vs- Ahmednasir Maalim Abdullahi [2020]** on the proposition that a party seeking a stay order must demonstrate he would suffer something special and he may not be put back to the original position he was before execution; which in their view the applicant has failed to demonstrate.

c) **Century Oil Trading Co. Ltd. -vs- Kenya Shell Ltd eKLR** on the proposition that substantial loss must be more than an ordinary loss and the court must balance the interests of a party seeking to preserve the status quo pending hearing of an appeal and the one seeking to enjoy fruits the of his judgment.

16. The respondents submit that the applicants wanted to delay and or deny the respondents their success where the main beneficiaries of the process of adjudication would be members of public who are entitled to the establishment of a proper system that secures their rights and interests in land.

17. The respondents submitted that the public interest should be at the core of this Honourable court and as held in **Samvir Trustees Limited –vs- Guardian Bank Limited. (2000) JELR**, a party seeking stay must demonstrate special circumstances swaying the court to tilt the scales of justice in his favour especially where a successful party had a matured right and that a mere assertion of substantial loss should

not surface without any empirical or documentary evidence.

18. The 1<sup>st</sup> and 2<sup>nd</sup> respondents urged the court to be guided by the reasoning of the court in *Kenya Shell Ltd –vs- Kibiru & Another [1986] KLR 410* on the proposition that the applicants have failed to prove what loss they stood to suffer and that litigation must come to an end.

19. Regarding security, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted the applicants had not furnished any security or demonstrated willingness to furnish the decretal amount which violates mandatory provisions of **Order 42 Rule 6 (2) Civil Procedure Rules**.

20. On the essence of an adjudication process, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit the process of ascertainment of rights and interests of land on trust land areas and transforming them from customary tenure to individual groups ownership through demarcation, survey and registration ensures a secured and reliable form of proprietorship for future generations.

21. Further, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted under the principle of intergenerational equity each generation bears the earth in common with present, past and future generation on the use and conservation of the environment and the natural resources. Reliance is placed on *County Government of Meru & Another –vs- District Land Adjudication & Settlement Officer Tigania East Sub-County & 18 Others [2018] eKLR* and *Peter K. Waweru –vs- Republic [2006] eKLR* for this proposition.

22. Lastly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted a stay in this matter would amount to travesty of justice for future generation as the halting of the process of adjudication and the incessant process of litigation would mean uncertainty of the interests in land of the future generation.

23. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that the discretion on whether or not to extend time to file an appeal out of time should among other reasons consider the prejudice to the respondents if the application was allowed. The same must be based on sound, factual and legal basis and has to be exercised judicially. Reliance for this is was on *Njuguna –vs- Magichu & 73 Others [2003] KLR 507* where the court held the conditions imposed on travel on account of the Covid 19 pandemic was not a good reason since instructions' to counsel could have been relayed electronically since courts were still working electronically. The submission therefore was the notice of appeal did not require the presence of the client if the party was keen in observing the time for the filing of the appeal.

24. The 4<sup>th</sup> and 5<sup>th</sup> respondents is submitted that the delay was intentional and the prejudice to be suffered by the respondents was that the entire community would be held hostage as this matter involved the community.

25. The he 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents relied on *Antoine Ndiaye –vs- African Virtual University [2015] eKLR* on the proposition that sufficient cause must be shown why stay should be granted.

26. The 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents submitted that the applicants had failed to demonstrate any substantial loss and on the contrary it was the respondents and the entire community who would shoulder the loss, notwithstanding that the parcel numbers had been issued to approximately 816 members hence the application was overtaken by events.

27. As concerns the delay 29 days, reliance was placed on *Machira T/A Machira & Co. Advocates –vs- E.A Standard [2002] 1 KLR 63* on the need to do justice to the parties.

#### **D. ISSUES FOR DETERMINATION**

28. The issues for determination are:-

**1) If the applicants are entitled to leave to lodge an appeal out of time.**

**2) If the applicants deserve a stay of execution pending appeal.**

29. For the court to grant an order for an extension of time and leave to appeal out of time, a party must establish sufficient cause why he or she could not file the appeal within time that the delay was not inordinate, the appeal was arguable and that there will be no prejudice to the respondent.

30. Expounding on the above principles, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* held that the extension of time was not a right of a party but an equitable remedy available only to a deserving party who had laid a basis to the satisfaction of the court and that public interest should be a core consideration.

31. In this case, the applicants moved the court after twenty seven days from the date of the judgment.

32. The reasons given by the applicants for not filing an appeal was out of Covid 19 travel restrictions and being elderly, sickly and the matter involving many clans they had to personally travel and meet with their advocates in person to give them instructions.

33. The court record shows the matter was initially directed to be heard through viva voce evidence. On the day of the hearing the petitioners did not show up on time or at all and their lawyers on record could not reach them on phone. The court had to direct that the matter be heard through written submissions since it had stayed in court for over five years. The judgment was eventually delivered electronically.

34. The petitioners did not allege that they were not aware of the judgment date. They similarly did not allege they were not notified of the

outcome on time. On the other hand, their lawyers have not stated that they were unable to reach their clients on time and or disclose to them the outcome of the petition. All what the applicants alleging was that they are elderly, sickly and were vulnerable to Covid 19 travel restrictions. It is common knowledge the court has been working through an hybrid system. It was therefore not difficult for the applicants to give their advocates on record instructions electronically if at all they were incapable of travelling to the offices of their advocates on record.

35. Secondly, one of the issues raised in the judgment was that the capacity of the petitioners to swear and or appear on behalf of the three clans. Paragraph 2 of the affidavit in support, the instant application is not accompanied by any authority to sue, plead and or institute the application for and on behalf of the other applicants. See *Mohamed Bwana Obo Athman & 24 Others –vs- Kenya Airports Authority [2014] eKLR.*

36. The 1<sup>st</sup> applicant is not acting for interests specific to him but alleges to be acting on behalf of the other petitioners and by extension three clans. If he is representing or bringing the application on behalf of his co-applicants and clans then he must have their authority to swear and express their issues why they did not file an appeal within time and why they deserve a stay and more so substantial loss they are likely to suffer in line with Article 258 of the Constitution.

37. This court has already pronounced itself that the petitioners lack capacity and authority to bring the petition. The same reasoning extend to the instant application and the supporting affidavit. See *Communication Workers Union & Another –vs- Communication Authority of Kenya [2015] eKLR, James Nduji & 4 others –vs- Jamleck Waitaha Kinyua & 7 others [2021] eKLR.*

38. The 1<sup>st</sup> applicant and by extension the applicants have to demonstrate that the application has been brought without inordinate delay, there is substantial loss, security has been offered for the due performance of the decree and that it is in the interest of justice to grant stay orders.

39. The 1<sup>st</sup> applicant at paragraph 8 of the affidavit in support alleges he was mandated by the clan elders to meet their lawyers in person. No authority is attached. At paragraph 10 thereof, he admits execution proceedings commenced and the demarcation had resumed yet his lawyers advised him there was need to preserve the substratum of the appeal.

40. At paragraph 12 thereof, he stated he has been advised his rights and fair trial could only be achieved if stay was granted otherwise the appeal shall be rendered nugatory if further dealings on the land occurred and that there would be irreparable loss of their ancestral land as restitution may not be feasible if the respondents developed or transferred the land to third parties.

41. Further, at paragraph 15 thereof, he averred there was need for substantive justice as per **Section 159 (2) of the Constitution** and that the appeal had high chances of successful as per the attached draft memorandum of appeal.

42. On the other hand, the respondents and the third party submitted they were the ones to suffer grave loss and damage and the community at large who stood and continued to suffer from the stalling of an adjudication process aimed at ascertaining their rights and interests on land and subsequently the issuance of title deeds so as to enjoy the rights of land ownership under **Article 40 of the Constitution** with the assurance of sanctity to title unlike the petitioners who were busy bodies selfishly seeking to forestall the process and secondly there would be no prejudice at all, since, if aggrieved by the adjudication process, the petitioners could still seek redress within the internal dispute mechanism set up under the adjudication laws.

43. The court merely dismissed the petition herein with costs to the respondents and the interested parties. There is no material placed before this court that costs payable to the respondents and the third parties have been assessed and execution proceedings commenced against the petitioners.

44. The respondents and the third parties did not file a cross petition or wherein positive orders were granted. It is trite law negative orders cannot be stayed for there is nothing to stay as held in *Abdulrahman C. Kirao & 3 others –vs- Said Seif & 3 others [2019] eKLR.*

45. The respondents have averred the demarcation process is completed and numbers have been issued. The 1<sup>st</sup> applicant has also admitted those facts that by the time the application was filed, the demarcation had commenced. In my view the applicants have rights to participate in the adjudication process under **Cap 284 and 283**. There has been no suggestion that the respondents have denied the petitioners that opportunity given there was an admission the adjudication process commenced and was finalized.

46. In essence therefore, my finding is that it will not be in the interest of justice to grant any of the orders sought since a negative order was issued. It would also be in public interest that the process of land adjudication be undertaken but in strict compliance with the law so that both the petitioners and interested parties can have their rights and interests in recorded, determined, claim heard and determined and eventually title deeds issued.

47. The upshot is the application dated 11.8.2020 is incompetent, lacks merits and is hereby dismissed with costs.

48. Any existing orders are hereby vacated.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS**

**16<sup>TH</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

Miss Gikundi for Kiome for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents

Kieti for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Miss Soy for applicants – absent

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**