



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 48 OF 2012

IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF ARTICLES 165(6), 169(1) AND 22 OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF THE REGISTERED LAND ACT CHAPTER 300 LAWS OF KENYA
(REPEALED)**

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (REPEALED)

**IN THE MATTER OF THE DECISION OF THE OLOLULUNGA DIVISION LAND DISPUTES
TRIBUNAL CLAIM NO. 10 OF 2006**

AND

**IN THE MATTER OF THE SUBSEQUENT ADOPTION OF THE TRIBUNAL'S AWARD BY
THE NAROK PRINCIPAL MAGISTRATE'S COURT IN MISC. LAND CASE NO. 13 OF 2006**

BETWEEN

PETER MUNERIA OLE MUNYA..... 1ST PETITIONER

STEPHEN OLE SEUR.....2ND PETITIONER

DANIEL KETUYA SEUR.....3RD PETITIONER

LERIONKA OLE MUIYA.....4TH PETITIONER

LEMUKOK OLE SARBABI.....5TH PETITIONER

VERSUS

PRINCIPAL MAGISTRATE, NAROK.....1ST RESPONDENT

DISTRICT SURVEYOR, NAROK NORTH/SOUTH.....2ND RESPONDENT

AND

LETEIPA OLE KOECH.....1ST INTERESTED PARTY

PARIKEN OLE NGEETI..... 2ND INTERESTED PARTY

MORINTAT OLE MUIYA.....3RD INTERESTED PARTY

OREU OLE KIPKOECH.....4TH INTERESTED PARTY

JOHN OLOONKISHU SEUR..... 5th Interested Party

RULING

1. The Petitioners filed a Petition dated 17th October, 2012 seeking various reliefs from this court on the grounds that their rights to own property and protection from deprivation of property under the Constitution had been violated. Their claim was in regard to the property known as CIS-MARA/OLOLULUNGA/9 measuring approximately 150 hectares. They alleged that the Ololulunga Division Land Disputes Tribunal exceeded its mandate under Section 3 of the Land Disputes Tribunal Act, No. 18 of 1990 (now repealed) when it ordered alteration of the boundaries, and rectification of the map and titles pertaining to the suit property. In this Petition they sought to set aside the Tribunal's decision and the subsequent order adopting it made by the Principal Magistrate's Court in Misc. No. 13 of 2006.
2. By the Ruling delivered on 17th September 2014, this court found that matters raised in the Petition had been heard and determined by a court of concurrent jurisdiction in Nakuru High Court JR. Case No. 10 of 2011 and were therefore, *res judicata*. Accordingly, it dismissed the Petition with no orders as to costs.
3. The Petitioners are aggrieved by this decision and have manifested their intention to appeal against it by filing the Notice of Appeal dated 19th September 2014.
4. By the Notice of Motion dated 24th February 2015 which is now for consideration, they seek stay of execution of the orders made on 17th September, 2014 pending the hearing and determination of the appeal. They have also sought costs of this application.
5. The application is supported by the affidavit of Peter Muneria. It is premised on the grounds that following the dismissal of the Petition, the 2nd Respondent will proceed to implement the order issued on 2nd December, 2014 directing the 2nd Respondent to subdivide the suit property. The Applicants argue that if the property is subdivided, the intended appeal will be rendered nugatory and they stand to suffer substantial damage. They intimated that they are ready to abide by any conditions which the court may issue.
6. The application was opposed by the Interested Parties who filed the Grounds of Opposition dated 17th April, 2015. They raised three grounds, that there is no decree issued by the court capable of being stayed, there is no execution in this matter capable of being stayed and that the court does not have jurisdiction to issue the orders sought.
7. The application was argued before this court on 18th May, 2015. Counsel for the Applicants argued that the Applicants face imminent danger of being evicted if the orders of stay are not granted. She further submitted that the intended appeal, which is arguable, will be rendered nugatory if the orders which have been appealed against are implemented.
8. Counsel for the Interested Parties argued that this court does not have jurisdiction to grant the orders of stay of execution pending appeal. The orders which the Applicants seek to stay were for dismissal of the Petition and are therefore incapable of being stayed. There is no danger of imminent execution which would render the intended appeal nugatory if not stayed. In addition, the Applicants had not satisfied any of the conditions for grant of stay of execution under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. He therefore urged the court to dismiss the application with costs.

ISSUES FOR DETERMINATION

9. I have considered the application and submissions of Counsel. The only issue for determination in this application is whether the execution of the orders issued on 17th September 2014 should be

stayed pending the hearing of the intended appeal.

ANALYSIS

10. In the application, the applicants have implied that there are two orders, those issued on 17th September 2014 and further orders issued on 2nd December 2014. They allege that the latter orders were issued over Misc No. 13 of 2006 and directed that the 2nd Respondent to subdivide the suit land and have sought in this application to stay the intended subdivision.
11. The Ruling on the Petition was made on 17th September 2014. The orders made therein were issued on 2nd December 2014. By those orders the court dismissed the Petition because the issues raised were *res judicata*. There was no direction to the 2nd Respondent or to any other party to act or to refrain from doing any action. In addition, the court did not make any orders as to costs.
12. What the Applicants seek to stay is the order of the Land Disputes Tribunal made on 4th September, 2006 and adopted by the Principal Magistrate's Court in Misc. Land Case NO. 13 of 2006. This Court noted that although couched as a claim for infringement of fundamental rights under the Constitution, the Applicants in fact sought judicial review orders to quash both decisions because they were made in excess of jurisdiction.
13. If a Judicial Review application is dismissed, the court does not make a positive order which is capable of being executed and which may in turn be stayed. This position was stated by the Court of Appeal in ***Exclusive Estates Ltd. V. Kenya Posts and Telecommunications Corporation & Another***, (2005) 1 EA 53 where it held that:

“The stay of execution envisaged by rule 5(2) (b) of the rules of this Court is the execution of a decree or order capable of execution in any of the methods stipulated by section 38 of the Civil Procedure Act. A “decree holder” as defined in section 2 of the Civil Procedure Act:

“means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order.”

The order which dismissed the suit was a negative order which is not capable of being executed.”

14. Similarly, in ***Devani & 4 Others V. Joseph Ngindari & 3 Others***, CA NO. NAI 136 OF 2004, cited with approval by the Court of Appeal in ***Wananchi Group Kenya Limited V. Commissioner for Investigations & Enforcement***, [2014] eKLR, 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.”

15. Accordingly the orders of stay under **Order 42 Rule 6** of the **Civil Procedure Rules** cannot be granted by this court.
16. Even if the orders of stay of execution were available to the Applicants, I find that they have not satisfied the conditions for grant of stay of execution under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.
17. This provision requires the person seeking stay of execution of an order of the court to demonstrate that he stands to suffer substantial loss if execution is allowed to proceed; that the application has been filed without unreasonable delay and to provide such security for the performance of the order or decree as may be ordered by the court.
18. The Applicants argued that the appeal will be rendered nugatory if the 2nd Respondent proceeds to subdivide the suit property. While arguing the application Counsel added a further ground that there was a possibility that the Applicants would be evicted from the suit land.

19. However, the orders of the Tribunal related to alteration of the boundaries and only required rectification of the map and the Applicants' title. It was not demonstrated that the Applicants would be removed from their parcels of land and rendered homeless or suffer such loss or damage which would not be remedied. It is not sufficient to merely state that substantial loss will result or that the appeal will be rendered nugatory. The Applicants should have offered evidence in this regard. In any event, should the intended appeal be successful, then any subdivision that may be done, could be reversed.
20. In addition I find that the Applicants were guilty of unreasonable delay in filing this application. The orders to be stayed were made by this court on 17th September 2014. This application was filed five months later, on 25th February, 2015. The Applicants did not offer any reason for this delay and are therefore not entitled to the orders.

DETERMINATION

21. For the above reasons, this court finds that the application has no merit. The orders for stay of execution pending the hearing of the intended appeal cannot be granted because the orders being appealed against are negative in nature.
22. Accordingly the application dated 24th February 2015 is hereby dismissed with costs.

Dated, Signed and Delivered at Nakuru this 24th day of July, 2015.

A. MSHILA

JUDGE