



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC JR NO. 7 OF 2018**

**PETER NJORGE MUIRURI & OTHERS.....APPLICANTS**

**-VERSUS-**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY.....2<sup>ND</sup> RESPONDENT**

**AND**

**SAMUEL OJOWA ACHIENG.....1<sup>ST</sup> INTERESTED PARTY**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**INTRODUCTION**

1. Vide Notice of Motion Application dated the 17<sup>th</sup> August 2021, the Interested Party/ Applicant herein has sought for the following Reliefs;

*I. ....(Spent).*

*II. Upon hearing this Application ex-parte, this Honourable court be pleased to grant a Stay of Execution against the Judgment delivered on the 29<sup>th</sup> August 2021, pending the hearing inter-partes of this Application.*

*III. Upon hearing this Application ex-parte, this Honourable court be pleased to grant a Stay of Execution against the judgment delivered on the 29<sup>th</sup> August 2021, pending the hearing and determination of the Appeal preferred therefrom.*

*IV. Costs of this Application be provided for.*

2. The subject Application is premised on the grounds at the foot thereof and same is further supported by the Affidavit of the 1<sup>st</sup> interested party, sworn on the 17<sup>th</sup> August 2021.

3. Having being served with the said Notice of Motion Application herein, the Petitioners filed a Replying Affidavit sworn by the 1<sup>st</sup> Petitioner, namely, Peter Muiruri Njoroge, on his own behalf and on behalf of the rest of the Petitioners.

4. However, neither the Respondents nor the 2<sup>nd</sup> Interested Party filed any Response to the subject Application. For clarity, it is therefore apparent that the dispute herein is between the Petitioners on one hand and the 1<sup>st</sup> interested party/Applicant, on the other hand.

**DEPOSITION BY THE PARTIES:**

5. Vide Supporting Affidavit sworn on the 17<sup>th</sup> August 2021, the 1<sup>st</sup> interested party/Applicant has averred a follows;

6. Same was allocated the suit plot in or about the year 1996 by Nairobi City Council, now defunct and replaced by Nairobi City County

Government.

7. It has further been averred that upon being issued with a letter of allotment, same paid the requisite charges and thereafter the allocating authority, namely Nairobi city County conducted the requisite survey culminating into the issuance of a beacon certificate.
8. The 1<sup>st</sup> Interested Party/Applicant has further averred that upon completion of all the preliminaries, the 1<sup>st</sup> Interested Party sought for and obtained approval to commence to construct and/or develop the property and same therefore proceeded to and indeed constructed a massive Storey on the suit property.
9. Be that as it may, the 1<sup>st</sup> Interested Party has further stated that following the filing of the subject proceedings, the court proceeded to and rendered a judgment, which was delivered on the 9<sup>th</sup> August 2021, whereupon the court ordered and directed that the letter of allotment issued to and in favor of the 1<sup>st</sup> interested party be revoked and/or cancelled and that the suit property be allocated to Mathare Mabatini Village on a communion basis.
10. Further, the 1<sup>st</sup> Interested party has averred that following the decision and/or judgment of the court, his ownership to and/or in respect of the suit property, as well as the title, are now on the verge of cancellation.
11. In the premises, the 1<sup>st</sup> Interested party has averred that if execution and/or enforcement of the judgment proceed, he will not only loose the title to the property, but shall also have the entire of the building standing thereon demolished and/or taken over by the Petitioners.
12. Nevertheless, the 1<sup>st</sup> interested party has further averred that upon the delivery of the impugned judgment, same felt aggrieved and/or dissatisfied and therefore filed a Notice of Appeal. In this regard, the 1<sup>st</sup> Interested party has thus averred that the intended appeal to the Court of Appeal raises substantial issues and/or grounds and hence, it would be appropriate that the appeal be heard and disposed of before the execution of the decree herein.
13. Besides, the 1<sup>st</sup> interested party has further averred that unless the orders of Stay sought are granted, the multi- storey building standing on the suit property will be demolished and therefore, same will suffer substantial loss, that will not be compensable in monetary terms by the Petitioners, who in any event, do not have any known and/or disclosed means or at all.
14. On the other hand, the 1<sup>st</sup> Interested Party has also averred that same is ready and willing to offer such security for the due performance of the Decree, that may ultimately arise subject to the direction of the court.
15. In short, the 1<sup>st</sup> Interested party has implored the court to grant the orders of stay and therefore avert damage and/or destruction to the suit property, which will be tantamount to breaching and/or violating his Right to Property as provided for vide **Article 40 of the Constitution, 2010**.

**RESPONSE BY THE PETITIONERS:**

16. Upon being served with the Application, together with the Affidavit in support thereof, one Peter Muiruri Njoroge, has sworn a Replying Affidavit and same has stated as hereunder;
17. First and foremost, the deponent has averred that the 1<sup>st</sup> interested party has not availed and/or adduced any Evidence that the Suit plot was lawfully and/or duly allocated unto him.
18. On the other hand, the deponent has further averred that what comprises the suit plot has been communal land and same has never been allocated to any person and in any event, the suit property comprises of a dwelling place of many families that came together and are known as Muungano Mabatini Mwangaza Group.
19. Besides, the deponent has also averred that the 1<sup>st</sup> Interested party's claim to the suit property, is illegal and unlawful and that the judgment which is sought to be appealed against, was well reasoned and found that the Interested Party acquired the land illegally.
20. Other than the foregoing, the deponent has further averred that subsequent to the lodgment of the matter herein, various judges granted orders of status quo, which were meant to stop further developments on the suit property. However, it is averred that despite the orders of status quo, the 1<sup>st</sup> Interested Party herein proceeded to and constructed the Multi-storey building on the suit property, without due regard to the orders of the court.
21. Owing to the foregoing, the deponent has thus averred that the enforcement of the judgment and the demolition of the building standing on the suit property, will not occasion any loss to the 1<sup>st</sup> Interested Party, because the building was constructed without obedience to lawful court orders.
22. Further, the deponent has averred that following the delivery of the judgment, the Petitioners herein have followed up with Nairobi City County Government for purposes of being issued with a letter of allotment over the suit property and that in this regard, same have been informed that the preparation of the letters of allotment are in the process of being issued shortly.
23. Based on the foregoing, the deponent has therefore contended that the Judgment of the court has since been implemented and/or substantially implemented and therefore the Application for stay has been overtaken by events.

24. In a nutshell, the Petitioners have thus implored the court to Dismiss the Application with costs unto them.

### **SUBMISSIONS BY THE PARTIES:**

25. The subject matter came up on the 29<sup>th</sup> September 2021, for purposes of hearing the Application dated the 17<sup>th</sup> August 2021. However, on the said date the counsel for the Petitioners/Respondents informed the court that same had not filed any response to the Application and in this regard, same sought for and obtained liberty to file the Replying Affidavit.

26. It is imperative to note that the Replying Affidavit by and/or on behalf of the Petitioners, was filed on the 27<sup>th</sup> October 2021.

27. Subsequently, counsel for the 1<sup>st</sup> interested party proceeded to and filed submissions dated the 24<sup>th</sup> November 2021. For clarity, the said Submissions have highlighted two issues as hereunder;

28. Firstly, the 1<sup>st</sup> interested party contended that though the letter of allotment was issued by Nairobi City Council, now defunct, upon such issuance, the Nairobi City Council, would cease to have authority over the suit plot and the remainder of the dealing would be taken over by the Office of the commissioner of land, now defunct, and which was replaced by, National Land Commission.

29. According to the foregoing, it was therefore the 1<sup>st</sup> interested party's submissions that the order of the court, which directed the 2<sup>nd</sup> Respondent to cancel and/or nullify the title belonging to the 1<sup>st</sup> interested party, was therefore erroneous and illegal. Simply put, the Nairobi City Council, or her Successor, cannot revoke Title to Land.

30. Secondly, the 1<sup>st</sup> interested party has contended that following of the allocation of the suit property, same commenced to and thereafter erected a massive, Multi- storey building thereon. For clarity, it has been stated that the massive storey building is currently operational and same constitutes a Substantial source of Income to the 1<sup>st</sup> Interested Party.

31. In the premises, the 1<sup>st</sup> Interested Party has submitted that if the orders that were issued by this Honourable court (differently constituted) are implemented, executed and/ or enforced, same will suffer undue substantial lose.

32. Consequently, the 1<sup>st</sup> interested party has therefore prayed that an order of stay of execution pending the hearing and determination of the appeal to the Court of Appeal.

33. On their part, the Petitioners/Respondents herein did not filed any written submissions, in opposition to the Application or at all. However, the Replying Affidavit remains on record and shall be duly considered.

### **ISSUES FOR DETERMINATION:**

34. Having reviewed the Notice of Motion Application, the Supporting and the Replying Affidavit thereto and having similarly considered the written submissions filed by the 1<sup>st</sup> Interested Party the following issues are germane for determination;

***I. Whether there exists sufficient cause and/or basis that has been laid and/or established by the 1<sup>ST</sup> Interested Party/ Applicant?.***

***II. Whether the 1<sup>st</sup> Interested Party is disposed to suffer Substantial loss?.***

***III. What kind of security ought the 1<sup>st</sup> interested party/ Applicant provide?***

### **ANALYSIS AND DETERMINATION**

#### **ISSUE NUMBER 1**

***Whether there exists Sufficient cause and/or basis that has been laid and/or established***

35. Having evaluated the pleadings, evidence and the submissions that were placed before her, Lady Justice K Bor, Judge, found and held *inter-alia* as hereunder;

***“The 2<sup>nd</sup> Respondent is directed to cancel the allocation to any individual of the land on which Mathare Mabatini Village stands or any part of it and to allocate the land on which Mathare Mabatini Village stands to the residents of Mathare Mabatini Village on a communal basis.***

36. On the other hand, the honourable judge further proceeded to and directed that the 1<sup>st</sup> interested party or his agents be and are hereby restrained from evicting or otherwise interfering with the Applicants/Petitioners occupation and use of the land on which Mathare Mabatini Village stand.

37. Pursuant to the decision and/or judgment of the court, it became apparent that the 1<sup>st</sup> Interested party's allotment and title to the suit

property was cancelled and/or nullified and an order was similarly made to have the suit property allocated to the residents of Mathare Mabatini Village, on a communal basis.

38. Following the delivery of the judgment, the Interested party felt aggrieved and dissatisfied and same proceeded to and filed a Notice of Appeal, thereby signifying his desire to challenge the Decision of this court before the Court of Appeal.

39. It is important to note that the lodgment of a Notice of Appeal, is deemed to constitute an Appeal, pursuant to and in line with the provisions of **Order 42 Rule 6(4) of the Civil Procedure Rules 2010**.

40. In view of the foregoing, it is therefore safe to find and hold that the 1<sup>st</sup> interested party has since filed the requisite Appeal before the Court of Appeal and that the said Appeal, constitutes a sufficient basis and/or cause, as envisaged under the law.

41. In any event, it must be remembered that any litigant has a right to pursue an appeal, if and/or where same feels aggrieved by the decision of a court and whilst a litigant is pursuing such an appeal, it is incumbent upon the court to ensure that the litigant's appeal, in this case, the 1<sup>st</sup> Interested Party's appeal, is not rendered nugatory and/or academic exercise.

42. At any rate, the right to pursue an Appeal forms and/or constitutes a perspective of the Right to access to Justice, in line with the provisions of **Article 48 of the Constitution, 2010**. Essentially, the existence of the Notice of Appeal which has since been filed, coupled with the Right to access to justice, constitute a sufficient basis in this matter.

43. In a nutshell, it is therefore my finding and holding that the Interested Party has established a sufficient cause, premised and/or predicated on the existent of a Notice of Appeal.

### **ISSUE NUMBER 2:**

#### **Whether the 1<sup>st</sup> interested party is disposed to suffer substantial Loss:**

44. The Dispute beforehand, touches and/or concerns the propriety in the allocation and/or alienation of the suit property, to and in favor of the 1<sup>st</sup> interested party/applicant.

45. Nevertheless, there is no dispute that upon the allocation and/or alienation of the suit property to and in favor of the 1<sup>st</sup> Interested party/applicant, same sought for and obtained various approvals for development and thereafter same proceeded to erected a multi- storey complex thereon.

46. In fact, the existence of a Multi- storey complex on the suit property, has not been denied and/or controverted by the Petitioners/Respondents or at all. In any event, the Interested Party, has exhibited Photographs of the said Development to Court.

47. Following the decision of this court, what becomes apparent is that the 1<sup>st</sup> interested party's Title has been cancelled and/or negated and consequently, the 1<sup>st</sup> interested party herein is now bound to be removed and/or evicted from the suit property.

48. On the other hand, given that allocation and/or alienation of the suit plot to and in favor of the 1<sup>st</sup> interested party/Applicant has been found to be illegal, it then follows that the construction and/or the Multi- storey complex, standing on the Suit property, is now on the verge and/or exposed to Demolition.

49. It is worthy to note that if the intended demolition and/or eviction, is carried out and/or undertaken, in execution, enforcement and/or implementation of the Judgment of the court, the entire Building will be brought down and the 1<sup>st</sup> interested party, shall stand evicted there from.

50. It is in this regard, that the 1<sup>st</sup> Interested Party/Applicant has contended that same shall suffer substantial loss and/or prejudice, if the imminent actions, including demolition and eviction, are allowed to proceed, despite pendency of the Appeal before the Honourable Court of Appeal.

51. In my humble view, the loss that would arise and/or ensue from such kind of an action would indeed be substantial and incapable of compensation in monetary terms. For clarity, the loss would be both monetary, social and sentimental, the latter two, which are neither quantifiable nor payable in Money terms.

52. In this regard, I find and hold that the 1<sup>st</sup> interested party has established and/or proven the existence of substantial Loss, which is likely to arise and/or accrue, in the event that the orders of stay of execution pending Appeal are not granted.

53. Suffice it to say, that substantial Loss is the cornerstone to granting an order of stay pending Appeal. Consequently, where evidence of such substantial loss, has been placed before the court, then the court is obligated to avert the occurrence of substantial loss and/or prevent same, pending the determination of the pending Appeal.

54. In support of the foregoing observation, I rely on and adopt the Decision in the case of **Kenya Shell Ltd v Benjamin Karuga & Another (1986) eKLR**, where the court observed as hereunder;

***“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay”.***

55. In short, it is my finding and holding that the execution and implementation of the impugned judgment and decree, shall occasion substantial loss to the 1<sup>st</sup> interested party and hence it is imperative that such Loss be held in abeyance in the meantime.

**ISSUE NUMBER 3:**

**What kind of security ought the 1<sup>st</sup> interested party provide?**

56. As pertains to Application of stay of execution pending Appeal, the court is granted the mandate to order and/or direct provision of security, in respect of the decree that may ultimately ensue, upon the completion of the Intended Appeal, or where the Appeal has been filed, the conclusion of the said Appeal.

57. Whereas it is good practice that any litigant or any party seeking for an order of stay of execution pending Appeal to make an offer and/or state willingness to offer security, however, the mandate and/or Jurisdiction to deal with and/ or decree the provision of security falls at the Door step of the court and not otherwise.

58. In the premises, it is safe to state that even where an Applicant does not make an offer and/or express willingness to provide security, the court is still enjoined to decree provisions of security, in such manner and/or extent, as the court deems fit, appropriate and in the Interest of justice.

59. In support of the foregoing observation, I feel obligated to refer to and quote the Decision in the case **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another [2018] eKLR**, it was stated that:

*“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay, it is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”*

60. Nevertheless, even though the court retains and/or conferred with the discretion to address and/or decree the kind of security to be provided, however in making an order for such security, the court is enjoined to ensure that the security decreed, is such security that is likely to satisfy the terms of the ultimate decree that may arise and/or ensue in the matter.

61. In respect of the subject matter, the ultimate decree that may ensue, may include payment of costs accrued both before the Superior Court, as well as before the Court of Appeal. Consequently, the proposed security, must be one that may be actualized, when time comes and ripens.

62. In determining the nature and scope of security to decree, the court is called upon to way and/or calibrate the rights and/or interests of the Parties and to ensure that neither Party is exposed to undue prejudice and/or detriment.

63. In support of the foregoing observation, I can do no better than to adopt the holding in the Decision in the case of **Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR**, the court stated:

*“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor..... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”*

64. Taking into account the totality of the circumstances herein, I come to the conclusion that the Security that would take care of the interest of both the Interested party, as well as the Petitioners/Respondents, is one that would safeguard the costs that are likely to arise and/or accrue.

65. In the premises, I am of the humble opinion that a Bank Guarantee from a Reputable Banking Institution in the sum of Kshs.2, 000, 000/= Only, would suffice, to take care of the accrued costs and such other costs that may arise, subject to the outcome of the intended Appeal.

**FINAL DISPOSITION:**

66. Having addressed and/or dealt with the issues that were enumerated herein, I must point out that where a party is exercising undoubted Right of Appeal, it is incumbent upon the Court to ensure that the exercise of such Right of Appeal is not curtailed, rendered otiose, and/or defeated, in whatsoever manner.

67. Consequently, and in the premises, I now make the following orders:

***I. The Notice of Motion Application dated 17<sup>th</sup> August 2021, be and is hereby allowed.***

*II. There be and is hereby granted an order of stay of execution of the Judgment and decree issued by the court on the 9<sup>th</sup> August 2021, pending the hearing and determination of the Appeal before the Court of Appeal.*

*III. The 1<sup>st</sup> Interested Party/Applicant herein shall procure and obtain a Bank Guarantee for the sum of Kshs.2, 000, 000/= only, from a Reputable Banking Institution and same to be deposited with the Deputy Registrar of this court within 14 days from the date hereof.*

*IV. In default to provide and/or avail th Bank Guarantee for the sum of Kshs.2, 000, 000/= Only, within 14 days from the date hereof, the orders of stay shall stand Discharged without any Reference to court.*

*V. Costs of the Application herein shall abide the outcome of the Appeal.*

68. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>th</sup> DAY OF FEBRUARY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

**June Nafula Court Assistant**

**Miss Kimuyu H/B for Njugi B G for the 1<sup>ST</sup> Interested Party /Applicant**

**Mr. Keya for the Petitioners/Respondent**

**Miss Makori for the 1<sup>st</sup> Respondent**