REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CONSTITUTIONAL PETITION NO. 1 OF 2011

RUTONGO'T FARM LTD...PETITIONER

VERSUS

HONOURABLE ATTORNEY GENERAL..1ST RESPONDENT

KENYA FOREST SERVICE..2ND RESPONDENT

PERMANENT SECRETARY MINISTRY OF FOREST AND WILDLIFE.....3RD RESPONDENT

COMMISSIONER OF LANDS..4TH RESPONDENT

R U L I N G

1. The applicant Kenya Forest Service who are the second respondent in the Petition filed a Notice of motion dated 16th July, 2014 seeking five prayers. Two of the prayers have since been spent. There are three which remain to be determined. They are as follows;-

(a) That there be a stay of execution of the judgement in Kitale High Court Constitutional Petition No. 1 of 2011 pending the hearing and determination of the Appeal herein.

(b) Further proceedings in Kitale High Court Constitutional Petition No. 1 of 2011 be stayed pending the hearing and determination of the Appeal herein.

c. Costs of this application be provided for.

2. The applicant contends that it has preferred an appeal to the court of Appeal which appeal has high chances of success and that if stay is not granted, the applicant will suffer substantial loss. The applicant is seeking stay of execution of this court's judgement delivered on 3/7/2014 in which the petitioner was declared to be the owners of LR NO 6657 and 10832 and quashed a Gazette Notice declaring the two parcels to be Government forests. The court also gave orders to the Commissioner of Lands ordering him or anyone under his charge to sign transfer documents in favour of the petitioner.

3. The stay is being sought on the basis that the applicant has appealed against the judgement delivered on 3/7/2014. Attached to the application for stay is a draft memorandum of appeal in which the applicant contends that the petition which resulted in the judgement of 3/7/2014 was irredeemably incompetent and fatally defective. That the court erred in proceeding to allocate a Gazetted forest to a private company. That the National Land Commission was not involved as it is the custodian of public land. That the court disregarded the submissions by the appellant. That the court did not apply the principals for which the

Environment and Land Court was created. That the court made scornful remarks against the appellant which showed that the court was biased. That the court should have converted the petition into an ordinary civil suit which should have been heard under the civil procedure rules. That the court was trying to enforce an unenforceable private contract without involving the seller of the land and that the court gave an illegal and unforceable judgement.

4. The application was opposed by the respondent through a replying affidavit sworn on 22/7/2014. The respondent contends that the applicant's application is an abuse of the process of court. The respondent contends that there is actually no forest as such on the land and that the deponent has actually started farming on the land. The respondent also contends that the grounds of appeal as contained in the draft memorandum of appeal have no merits.

5. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. The order under which the application was brought provides that an appeal per se shall not operate as stay of execution; Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows;-

> ***(2) No order for stay of execution shall be made under sub rule (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"***

6. The rules quoted above have given limits within which an order of stay of execution may be made. There are three conditions to be met. Those are;

> ***I. Demonstration that substantial loss will ensue.***
>
> ***II. Application to be made without unreasonable delay.***
>
> ***III. Furnishing of security for due performance of the decree.***

7. In this application Professor Sifuna has argued that if stay of execution is not granted the petitioner's members will move into the forest and cut down the trees on the same and this will be catastropic to the ecosystem and will affect even future generations. Professor Sifuna's submission of substantial loss must be considered in light of what led to the judgement of the court. The petitioner's members have been farming in the land which the court gave them. There was evidence of the status of the land which was considered before arriving at the judgement. The Deputy Registrar of the court visited the land in question and made a report. What is being described as a forest are pockets of trees remaining. The Departmental committee on land and Natural Resources visited the land in question and recommended that the land should revert to th petitioner. If there was any danger of degradation of the Environment, the members of the committee should not have recommended that the land do revert to the petitioner. The report of the committee should not have even been adopted by Parliament. One cannot argue that the committee members and even Parliament were ignorant of what they were doing. It cannot therefore be argued that the applicant will suffer any substantial loss. There were even pictures on record showing animals grazing on the land and very few trees. The trees which had been planted on the land had been harvested for use at Pan Paper Factory Webuye when it was still operational. There is therefore no demonstration by the applicant that it will suffer substantial loss if stay is not granted.

8. The cornerstone for grant of stay of execution is demonstration that substantial loss will ensue. The mere fact that an applicant has preferred an appeal is not reason for court granting stay of execution. There is no good reason why the petitioner's members should be denied enjoyment of the fruits of the judgement. In the case of Carter & Sons Ltd -Vs- Deposit Protection Fund Board and Others Civil Appeal No. 291 of 1997, the Court of Appeal stated thus;-

> ***"In our view the mere fact that there are strong grounds of appeal would not in itself justify an order of stay. A party is expected to prefer an appeal only when there are strong reasons for doing so".***

9. The application herein was filed on 16/7/2014. The judgement being appealed against was delivered on 3/7/2014. There was therefore no delay in bringing the application. An order for security can only be made if the court is satisfied that substantial loss may befall the applicant if stay is not granted. For the reasons given above, I find that applicant's application lacks merits. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of July, 2014.

E. OBAGA

JUDGE

In the presence of Professor Sifuna for applicant and Mr Mokua for respondents and Mr Odongo for Attorney General. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

31/07/2014