



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**JUDICIAL REVIEW CASE NO. 9 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL  
REVIEW ORDERS FOR PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA,**

**ARTICLE 10(2), ARTICLE 67 & ARTICLE 249**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 28, 29(d), (f),**

**31(b), 40(3), 47, & 60(1)(a) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT**

**AND**

**IN THE MATTER OF AN APPLICATION BY**

**CHANIA TRAVELLERS CO-OPERATIVE SAVINGS AND**

**CREDITS SOCIETY LIMITED.....APPLICANT**

**VERSUS**

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

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THIKA SUB-COUNTY LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT**

**AND**

**DANIEL TIMOTHY MURIUKI.....1<sup>ST</sup> INTERESTED PARTY**

PATRICK KARANJA NGUGI.....2<sup>ND</sup> INTERESTED PARTY

COOPERATIVE BANK OF KENYA.....3<sup>RD</sup> INTERESTED PARTY

PETER MWANGI GACHERU.....4<sup>TH</sup> INTERESTED PARTY/RESPONDENT

### RULING

The matter for determination is the Notice of Motion Application dated 22<sup>nd</sup> January 2020, by the Ex parte Applicant seeking for orders that;

1. *That there be a stay of Execution of the Judgment dated 1<sup>st</sup> November 2019 and consequential Decree herein pending the hearing and determination of the Ex parte Applicant's Appeal.*

2. *Costs of this Motion be in the cause.*

The Application is premised on the grounds that on 1<sup>st</sup> November 2019, the Court dismissed the Ex parte Applicant's Motion and granted the 4<sup>th</sup> Interested Party's/ Respondent's claim to the suit property through the National Land Commission. That the Applicants have since filed a Notice of Appeal on the said decision granting the Court jurisdiction to intervene and grant stay of execution pending Appeal. That the Applicants have been waiting for the typed and certified proceedings in order to lodge their Record of Appeal at the Court of Appeal, without which they cannot proceed with the Appeal.

Further that the intervening period was Christmas and New Year vacation and the Applicant's Advocate resumed business on 15<sup>th</sup> January 2020, and it was not feasible to have the Notice of Motion made prior. That the 4<sup>th</sup> Interested Party/Respondent has sought to execute the Decree and has motioned the 1<sup>st</sup> Interested Party to vacate the suit property valued at Kshs.150,000,000/= each.

That the intended demolition of the Applicant's property and taking over of the 1<sup>st</sup> Interested Party's business premises leased from the Ex parte Applicant will be injurious as their right under the Constitution is threatened by the threatened demolition. That the Appeal will be rendered a mere academic exercise should the threatened change in title of the suit property into the name of the 4<sup>th</sup> Interested Party/Respondent from the Applicant be effected. That the Applicant will suffer irreparably if the 4<sup>th</sup> Interested Party/Respondent takes possession of the suit property. It was thus contended that it is imperative that there be a stay of execution of the Judgment and Decree as the Applicants have a Constitutional right to access Justice. That the 4<sup>th</sup> Interested Party/Respondent may move anytime to have the change in proprietorship commence absent of stay.

Further that the 4<sup>th</sup> Interested Party/Respondent will suffer no injury should the Appeal be lost as he is resident elsewhere. That access to justice under Article 48 of the Constitution envisages the hearing of all parties and the Applicants stands to be most injured if the Court does not intervene. That on 15<sup>th</sup> January 2020, the 4<sup>th</sup> Interested Party/Respondent visited the suit property and surveyed the property with an apparent view to proceed with the overseeing taking over from the applicant.

In his Supporting Affidavit, John Kiarri Gicharu, the Chairman of the Ex Parte Applicant averred that upon the delivery of Judgment on 1<sup>st</sup> November 2019, he and his Co-Officials instructed their Advocates to lodge an Appeal against the said decision. That his Advocate advised him that they applied for proceedings to enable them lodge the Appeal. That the proceedings have not been availed to them, hence they have not filed the Record of Appeal. He further averred that he has been advised by his Advocate that the readying of Court proceedings is an administrative act on the part of the court which they cannot be faulted should it be slow.

That on 15<sup>th</sup> January 2020, the 1<sup>st</sup> Interested Party called him stating that he had in his possession a copy of a Decree for execution against him by the 4<sup>th</sup> Interested Party/Respondent which meant demolition of the suit property where he does business. Further that the 4<sup>th</sup> Interested Party alerted him that he would be on the ground on 29<sup>th</sup> January 2020, to occupy both the 1<sup>st</sup> interested Party's rental premises and the Applicant's. That he contacted his Advocates who informed him that he was not aware of any execution Application pending in Court.

It was his contention that the Applicants were shocked that the Court's Decree was issued without their approval. That the developments on the suit property are valued at Kshs. 150,000,000/= and the Ex parte Applicant has no other place to go should it be demolished. That the Ex parte Applicant acquired a lawful title developed the suit property and for 12 years the 4<sup>th</sup> Interested Party/Respondent who is claiming ownership was out of the Country. That the 4<sup>th</sup> interested Party/Respondent stands secured with the fact that the suit property is sufficient security pending determination of the Appeal.

Further that their appeal would be rendered nugatory in the event the said Appeal succeeds as they have an arguable Appeal since the 4<sup>th</sup> Interested Party merely relied on a letter for Allotment that had expired, their occupation of the suit property was never impeached, they are bonafide purchasers for value.

The Application is opposed and the 4<sup>th</sup> Interested Party filed a Replying Affidavit sworn by Peter Mwangi Gacheru on 6<sup>th</sup> February 2020, and averred that the Ex Parte Applicant did not have positive outcome arising from the proceedings it commenced and consequently there is nothing to stay. That the Applicant has made misleading and untruthful depositions being that he

intends to evict the 1<sup>st</sup> Interested Party as he has not made any such threats. Further that he visited 1<sup>st</sup> Interested Party's premises on 15<sup>th</sup> January 2020 and that the letter dated 3<sup>rd</sup> December 2019, to the 1<sup>st</sup> Interested Party was a threat to tenancy, yet it was meant to notify it of the outcome of the case and the need to regularize tenancy. It was his contention that the 1<sup>st</sup> Interested Party chose not to participate in the instant proceedings and should therefore keep off.

That the Ex Parte Applicant being aware of the instant proceedings and the ownership dispute entered into a lease with the 1<sup>st</sup> Interested Party and the lease was signed on 9<sup>th</sup> March 2017, yet the instant proceedings commenced in January 2017. That the Ex parte Applicant despite being aware of the proceedings before the National Land Commission and this Court, went ahead and entered into a lease agreement with the 1<sup>st</sup> Interested Party which was meant to defeat the claim to the suit property. He averred that the Application is meant to subvert the conclusion of the taxation proceedings, since a draft Decree was forwarded to the Ex Parte Applicant's Advocates vide a letter dated 13<sup>th</sup> November 2019, and its Advocates took no action leading to his Advocates on record presenting it to Court for final approval and execution. That the Ex Parte Applicant has been awakened upon being served with a taxation notice and if it desired to appeal, it should expedite the process not estop him from enjoying the fruit of lawful outcome.

He further averred that the Ex Parte Applicant has engineered all forms of delay tactics, lies and untruths in these proceedings which actions depicts a vexatious litigant who is out to abuse legal processes and defeat his right to the suit property. That this Court cannot adjudicate any factual competing claims on ownership, since this not the purview of Judicial Review. That there is need to bring litigation to an end and therefore the Application is unnecessary. The Court was therefore urged to dismiss the Application.

The 4<sup>th</sup> interested Party/ Respondent also filed grounds of opposition dated 6<sup>th</sup> February 2020, and averred that:-

1. *The Application is based on misapprehension of the law and there cannot be any stay granted when the Court dismissed the Ex Parte Applicant's case.*
2. *The Application is based on wrong and unknown legal principles as stay is unavailable to the Ex Parte Applicant.*
3. *The filing of a Notice of Appeal does not automatically render any Appeal arguable and this Court is functus officio in determining the merits, if any that such an appeal would raise*
4. *The Ex Parte Applicant misguided claims and untruthful on intent to demolish are imaginary, malicious spiteful, unreasonable and irrational.*
5. *The Ex Parte Applicant has all along been aware of the Judgment and the 4<sup>th</sup> interested Party cannot be vilified for notifying any party of the outcome of this case.*
6. *The Ex Parte Applicant's Application for stay has untenable claims and irresponsible depositions that are factually distorted to suit its interests and not geared to bring closure to the matter.*

On the 29<sup>th</sup> of July 2020, the Court directed the parties to file written submissions and the parties duly complied. The issue for determination is *whether the Ex Parte Applicant is entitled to the orders sought.*

The Applicant has sought for stay of Execution pending the hearing and determination of the Appeal. The guiding provisions of the Law with regards to Stay of Execution are to be found in **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010** which provides that an Applicant must demonstrate the following:-

- a. *Substantial loss may result to the applicant unless the order was made;*
- b. *The application was made without unreasonable delay; and*
- c. *Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.*

**From the above provision of law, it is evident that for the Court to exercise its discretion, the Applicant/Applicant should meet the conditions as set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010.**

It is not in doubt as pointed out by the Respondents that the Court granted a negative order as the court merely dismissed the Judicial Review Application as sought by the Ex parte Applicant. Courts have on various occasions held that when a Court has granted negative orders, there is nothing that can be stayed. See the case of **Western College Farts And Applied Sciences ...Vs... Oranga & Others [1976] KLR 63** where the Court held that:-

*“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”*

*The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”*

Further In the case of John Mbuu Muthoni & Another...Vs...Ruth Muthoni Kariuki (2017) eKLR, the Court held that;

*“33. I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga’s decision in R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances. 34. I am persuaded that the circumstances here are the same as those in the Wananchi Group Case which I find to be persuasive. It is in accord with the James Hoseah Gitau Mwara Case cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be “executed.” A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed.”*

Given that the order of the Court dismissing the suit was a negative order, the Court’s finds that there is no order to be executed and therefore the Court finds and holds that it cannot stay the orders that had been issued as negative orders are incapable of being stayed.

The Upshot of the foregoing is that the **Notice of Motion Application** dated 22<sup>nd</sup> January 2020, is **not merited** and the same is dismissed entirely with costs to the 4<sup>th</sup> Interested party/ Respondent.

It is so ordered.

**Dated, signed and delivered at Thika this 4th Day of March 2021.**

**L. GACHERU**

**JUDGE**

**4/3/2021**

**Lucy - Court Assistant**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**No appearance for the Applicant**

**M/s Ndundu for the 1<sup>st</sup> Respondent**

**No appearance for the 2<sup>nd</sup> Respondent**

**No appearance for the 3<sup>rd</sup> Respondent**

**No appearance for the 4<sup>th</sup> Respondent**

**No appearance for the 1<sup>st</sup> Interested Party**

**No appearance for the 2<sup>nd</sup> Interested Party**

**No appearance for 3<sup>rd</sup> Interested Party**

**Mr. Mathenge for the 4<sup>th</sup> Interested Party/Respondent**

**L. GACHERU**

**JUDGE**

**4/3/2021**