REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW NO. 13 OF 2017

LYDIA KAUNANKU NJOROGE.....APPLICANT

VERSUS

DLASO TIGANIA EAST SUB-COUNTY.....RESPONDENT

THURANIRA M'MUCHEKE.....1ST INTERESTED PARTY

DAVID KOBIA MUCHEKE.....2ND INTERESTED PARTY

CHARLES MWONGERA.....3RD INTERESTED PARTY

MUKIIRA ITHAE.....4TH INTERESTED PARTY

JUDAH NTOEBE.....5TH INTERESTED PATY

RICHARD MWILARIA.....6TH INTERESTED PARTY

RULING

1. Before me is a Notice Motion dated 26/10/2020 brought pursuant to Article 23 of the Constitution of Kenya, Section 1A, 1B, 72 and 99 of the Civil Procedure Act, and Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules 2010. The applicant (Exparte applicant) seeks the following orders

    1. Spent

    2. That the Honorable Court be pleased to stay the execution of the judgment and decree of this Honorable Court delivered on 30/9/2020, pending the hearing and determination of this application.

    3. That the Honorable Court be pleased to stay the execution of the judgment and decree of this Honorable Court delivered on 30/9/2020, pending the hearing and determination of the intended appeal from the judgment of this Court.

    4. That the Honorable Court be pleased to amend, correct and or rectify t*he names of the 4th and 6th respondents in the judgment delivered on 30/9/2020, so as to give effect to its manifest intention.*

    5. That the costs of this application be provided for.

2. The application is premised on the grounds on the face of it and on the supporting affidavit dated 26/11/2020 of Lydia Kaunanku Njoroge, the applicant, who avers that she had sought judicial review orders before this court of which her suit was dismissed on 30.9.2020. She states that the interested parties are in actual possession of and occupation of her land where her parents cultivated and are buried, that her appeal has merits and if the orders sought are not granted, she stands to suffer substantial and irreparable injury which cannot be atoned by damages.

3. She further avers that the interested parties continue to benefit from harvesting her agricultural crops and she is apprehensive that they may at any time transfer the disputed parcels of land. She is ready and willing to offer such security as the court orders for the due performance of such decree.

4. The application is opposed via the replying affidavit of David Kobia Mucheke the 2nd interested party dated 16.11.2020 sworn on behalf of himself and the 1st, 3rd and 5th interested parties. He avers that the applicant has not been truthful as her parent's graves are located next to her house on her own parcel of land. That she has not cultivated any crops like miraa, nappier grass or coffee on respondents' farm lands. Further, it is stated that the interested parties have no intention of selling their parcels of land as they have resided on them for 40 years and know no other homes hence they seek the dismissal of the application.

5. The application is also opposed by the respondent vide grounds of opposition dated 21/1/2021, where it is averred that the court did not create a positive order capable of being executed by any party and the application herein only constitutes a delaying tactic and prays that the same be dismissed with costs.

6. The application was heard orally on 21/1/2021. It was submitted for the applicant that despite there being no positive orders, there is something capable of being executed. That going by the replying affidavit of David Kobia at paragraph 8, it is stated that the orders sought are meant to prevent the issuance of titles to the interested parties. This happens to be the action which the applicant seeks to stay. She had challenged the respondent's decision of dismissing her claim relating to certain portions of her land being occupied by the interested parties.

7. To this end, it was submitted that jurisprudence has changed especially where there are orders capable of being executed.

8. Much emphasize was also laid on the indefeasibility of title, where the applicant stated that a title can only be challenged on the basis of fraud. Thus If the order is not granted, then the intended appeal shall be rendered an academic exercise and the applicant will suffer irreparable harm as she may never recover those portions and grave injustice shall be visited upon her.

9. On the issue of error of names, it was submitted that this was an inadvertence mistake which ought to be corrected. That even the court had noted this error.

10. Finally, it was submitted that the respondents shall suffer no prejudice if the application is allowed.

11. In support of the case of the applicant, the following authorities were proffered;

1. S.M Mwenesi vs Shirley Luckhurst & Another (2000) eKLR

2. Republic vs Director of Criminal Investigation Department & 3 others Ex parte Edwin Harold Dayan Dande & 4 others (2016) eKLR.

3. Wangui Kathryn Kimani vs Disciplinary Tribunal of Law Society of Kenya & Another (2017) eKLR.

4. The Centre for Human Rights and Democracy & 2 Others vs The Judges and Magistrates Vetting Board & 2 Others (2012) eKLR.

5. Republic vs University of Nairobi Civil Application No. Nai 73 of 2001 (CAK) (2002) 2 EA 572.

12. The respondent associated itself with the averments made in the affidavit of David Kobia (the 2nd interested party). It was submitted that there is nothing capable of being executed, that the application was basically a new application to stop performance of statutory duties under Section 26 and 29 of Cap 283. That the applicant is expected to demonstrate the harm she stands to suffer, yet at the hearing of the objection, she was not in occupation of the land and as such, there is nothing she would gain even if the application was allowed as the land is registered in the names of the interested parties.

13. It was further submitted that the applicant's prayers are in respect of the interested parties and not the respondent hence the application would serve no purpose as the respondent, has a statutory duty to perform and failure to do so would be prejudicial to others in the same adjudication section.

14. David Kobia on behalf of himself, the 1st, 3rd and 5th interested parties submitted that he wished to rely on his replying affidavit, adding that stopping the issuance of titles is wrong and that no reason has been advanced as to why applicant has not filed her appeal as they are yet to be served with any documents to that effect.

Determination

15. I have considered all the issues raised herein as well as the submissions of the parties. In **Antoine Ndiaye vs. African Virtual University [20151eKLR**, Gikonyo J. opined as follows;

"The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) 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".

16. I do opine that there was no delay herein as Judgment was delivered on 30/09/2020 and the application was filed less than a month thereafter on 27/10/2020. The applicant is also willing to abide by any orders the court may give.

17. However, the applicant is still required to sufficiently demonstrate that she stands to suffer substantial loss if the orders are not granted. In the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2)(2002) KLR 63**, it was held as follows;

> **"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."**

18. In this case the court dismissed the Judicial Review suit. This is a negative decision and therefore the question is whether a negative decision can be stayed. In **Lucia Abaja Otieno & 2 others v Filgona Omogo Okoth [2018] eKLR,** the court cited the case of **Nairobi Metropolitan Psv Saccos Union Limited & 25 Others Vs County Of Nairobi Government & 3 Others [2014] eKLR, George Ole Sangui & 12 Others Vs Kedong Ranch Limited [2015] eKLR** where the Court of Appeal made it clear that a negative order is not capable of being stayed, save for costs.

19. Still in **Lucia Abaja Otieno case (supra),** the court also cited the case of **Republic Vs Kenya Wildlife Service & 2 Others (CA NO. NAI 12 OF 2007)** , where the Court of Appeal held as follows:

> **"It would appear to us that we have no jurisdiction to grant any order for injunction or stay on the terms sought or at all, for the reason that Aluoch J. neither granted or refused the application for stay. The Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay"**

20. The applicant contends that jurisprudence on this issue has changed such that where there are orders capable of being executed, then the stay should be granted. I have perused the authorities availed by the applicant where by the said cases are distinguishable from the instant suit. In the 1st authority of **S.M. Mwenesi vs. Shirley Luckhurst** (**supra)**, there was certainly an order capable of being executed, where the High Court had ordered Mr. Mwenesi to refund some monies to the claimant in the originating summons.

21. In the second case of **R vs Director of Criminal Investigations (supra),** the court in paragraph 36 stated as follows;

> **"It is therefore my view that where the orders granted by the High Court be it in Judicial Review proceedings or civil proceedings are capable of being executed, the same are amenable to stay of execution. (Emphasize added).** ***I gather support for this position from the decision of the Court of Appeal in Republic Vs University of Nairobi Civil Application No. Nai, 73 of 2001 (CAK) (2000) 2 EA 572, where the Court of Appeal granted a stay in respect of a matter that arose from a Judicial Review application. In that case the High Court ordered the university to "***convene the necessary Disciplinary Committees where the students concerned shall be tried, paying attention to the matters raised in this ruling". **The Court of Appeal noted that there was no prayer before the court for an order of mandamus to warrant the grant of the said order. The Court recognised that whereas the High Court could properly quash the decision of the University whether it could direct the University in the manner of proceedings thereafter was an arguable point and unless the stay was granted the students risked being expelled or suspended at the hands of the university acting in obedience to the said order. Emphasize added. It is therefore my view that where the order being appealed from is capable of being executed over and above the order for costs, stay of execution may be granted".** This was the same holding in the 3rd case of **Wangui Kathryn Kimani vs Disciplinary Tribunal of Law Society of Kenya (supra).**

22. The 5th Authority, **Republic vs University of Nairobi civil application no. Nai 73 of 2001 (CAK) (2000) 2 EA 572** cited in the 2nd authority is also very distinct from the instant suit as the High Court had even granted a prayer which had not been sought for and the students risked being expelled or suspended from the university.

23. In the 4th case of **Centre for Human rights and Democracy (supra),** it was stated that the High Court has powers to grant appropriate reliefs so that an aggrieved party is not rendered helpless or hopeless in the eyes of a legal wrong or a legal injury visited or about to be visited upon such a party.

24. The aforementioned cases make reference to orders capable of being executed. However, in the instant suit, the court dismissed the suit. Likewise the objection cases filed by the applicant culminating in the decision of the 1st respondent dated 21.11.2016 were also dismissed. Which order can then be termed as emanating from this court's judgment or from the 1st respondent? None.

25. The Judicial Review suit before this court had nothing to do with who owned the land, hence the court cannot halt the process of issuance of titles. The suit concerned the decision making process which culminated in the decision of 21.11.2016. I am in agreement with the submissions of the respondent that the process of issuance of title deeds is anchored in the statues where under the adjudication statutes, the rights and interests in land transition from a customary tenure system to individual tenure system. There are bodies set up under the adjudication statutes who are mandated to shepherd this process from its infancy to maturity. This is actually the process which the applicant seeks to halt. However, the issue of issuance of titles does not flow from a determination of this court.

26. I am also in agreement with the submissions of the respondent that halting the issuance of titles would be prejudicial to other non-parties in the relevant adjudication section. This is because the process of compiling the final adjudication register and forwarding the entire data to the Director of Adjudication and Settlement is one that encompasses a whole section.

27. Further, I take note that the legal landscape on indefeasibility of title has changed. **Article 40 (6) of the Constitution of Kenya 2010** provides that:

"The rights under this Article do not extend to any property that has been found to have been unlawfully acquired".

Thus nothing turns on the argument by the applicant that the appeal may be rendered an academic exercise.

28. I conclude that the orders of stay of the Judgment are not merited.

29. On prayer 4 in the application relating to the amendment, correction and rectification of the 3rd and 5th interested parties names, I find that this is a post judgment prayer. The applicant avers that the court has powers to correct its own mistake. The question is, which mistake did the court make? The applicant is the one who initiated this suit vide the application for leave dated 24.2.2017 where she identified 3rd interested party as CHARLES MWONGERA and this name was maintained in the Substantive Motion as well as throughout the trial. It is therefore not correct for the applicant to state that the title of the Judgment had an error where it identified the 3rd interested party as CHARLES instead of JOHN.

30. The applicant also claims that the title of the Judgment of this court referred to 5th interested party as JUDA NJOROGE instead of JUDAH NJOROGE. However, the Judgment in the court file does not have such a discrepancy. It is not lost to this court that the applicant appears to have an affinity to distortion of identification of the parties, whereby she is now identifying the 1st to 6th interested parties as 2nd - 7th respondents!

31.In the final analysis, I find that the application dated 26.10.2020 is not merited. The same is hereby dismissed with costs to respondent and the interested parties.

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF MARCH, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 21.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to 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.

HON. LUCY N. MBUGUA

ELC JUDGE