



**REPUBLIC OF KENYA**

**IN ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT AND LAND CASE NO. 351 OF 2015**

**JAMES KIGEN & JOHANA KIPKORIR KIGEN**

**(Suing as legal representatives of the estate of the late**

**ZAKAYO SAWE ARAP NGASURA) .....PLAINTIFFS**

**VERSUS**

**CHINA HANAN INTERNATIONAL CO-OPERATION**

**GROUP CO. LIMITED.....DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> INTERESTED PARTY**

**COUNTY OF UASIN-GISHU.....3<sup>RD</sup> INTERESTED PARTY**

**RULING:**

**Introduction:**

1. This is a ruling in respect of two applications. The first application is dated 8<sup>th</sup> February, 2022. It is brought by the Defendant/Applicant and it seeks the following orders:-

a) Spent.

b) The Officer Commanding Station (OCS) Segero Police Station be and is hereby directed to provide Security to the Defendants as they collect and or remove 30,000 tons of ballast from the suit land.

c) Costs be in the cause.

2. The second application is dated 9<sup>th</sup> February, 2022. It is brought by the Plaintiffs/Respondents and it seeks the following orders:-

a) Spent

b) Spent

c) THAT this Honorable Court be pleased to grant stay of Execution of the Judgment of the Court delivered on the 10<sup>th</sup> day of December, 2021 and the subsequent Decree issued on the 21<sup>st</sup> day January 2022, pending the hearing and final determination of the Appeal at the Court of Appeal.

d) THAT Costs be provided for.

Background:

3. On 30<sup>th</sup> October, 2014, China Hanan International Cooperation Group Co. Ltd, the 1<sup>st</sup> Defendant herein entered into a lease agreement with one Richard Bii and Johana Kigen in which it was agreed that the 1<sup>st</sup> Defendant was to excavate stones for purposes of extracting ballast from LR No. Moiben/Moiben Block 2 (Segero)172 for use in construction of various roads within the North Rift region.

4. LR No. Moiben/Moiben Block 2 (Segero)712 was registered in the name of Zakayo Sawe Ngasurai (Deceased). The 1<sup>st</sup> Defendant leased 1.5 acres of the property which was 6.475 hectares. The term of the lease was 2 years with effect from 30<sup>th</sup> October, 2014. As the lease went on, the Plaintiffs claim that the 1<sup>st</sup> Defendant intimated that it wished to lease more land but this did not happen. The 1<sup>st</sup> Defendant instead moved in to the other part of the land forcing the Plaintiffs to file this suit.

5. It later emerged that the Government had acquired a portion measuring 2.441 hectares from the 6.47 hectares in 1995. The Government authorized the 1<sup>st</sup> Defendant to move into the portion which had been acquired for which the deceased had been fully compensated.

6. The 3rd Interested party filed a counter claim in which it prayed for an order that 2.441 hectares out of Moiben/Moiben Block 2/712 did not form part of the Estate of the Deceased the same having been acquired by the Government. The suit was fully heard and in a judgment delivered on 10<sup>th</sup> December, 2021, the Plaintiffs' suit was dismissed and the counter claim by the 3<sup>rd</sup> Interested party was allowed. The Court directed that the Defendant do collect 30,000 tons of ballast from the suit land within 30 days.

7. When the Defendant went to collect the ballast in accordance with the orders in the judgment, the Plaintiffs prevented them. This is what prompted the Defendant to file the first application. It is after the filing of this application that the Plaintiffs filed the second application. The Plaintiffs had filed an application dated 17<sup>th</sup> January, 2022 in which they sought stay of execution. This Court did not certify the same urgent. The Applicants extracted the directions and couched the same as an order of Court and used the same to prevent the Defendant from collecting the ballast. This application has since been withdrawn.

The first application:

8. The Applicant in this application contends that its officials have attempted to remove the ballast from the suit property but have been prevented twice from collecting the ballast. The Defendant therefore states that it is important for the Court to direct that its officials be afforded security so as to remove the ballast.

9. The Respondents opposed the Applicant's application based on a replying affidavit sworn on 17<sup>th</sup> February, 2022. The Respondents contend that the 30,000 tons of ballast is the subject of this appeal which they have preferred to the Court of Appeal and that if the Applicant is allowed to remove the ballast, this will render the appeal nugatory.

10. The Respondents argue that the 30,000 tons belong to the Estate of the Deceased and that in any case, the Applicant had made a similar application in 2017 which application was dismissed. The Respondents state that they are ready to preserve the ballast until their appeal is determined. They further argue that the present application is meant to defeat their application for stay which is pending determination.

11. I have carefully considered the Applicant's application as well as the opposition to the same. I have also considered the oral submissions by the parties during the hearing of this application. The only issue for determination is whether there is need for Police to offer security during the removal of the ballast.

12. It is not contested that the Applicants were granted an order for removal of the ballast from the suit property. When the Respondent's learned of the judgment, they moved to Court and filed an application dated 17<sup>th</sup> January, 2022. When this application was placed before me on 18<sup>th</sup> January, 2022, I declined to certify the same as urgent. The Respondents mischievously extracted the directions and used the same to bar the Applicant from removing the ballast on the ground that the Court had made a finding that the 30 days given for removal of the ballast had lapsed.

13. When this Court clarified the position that it did not bar the Applicant from removing the ballast, the Respondents withdrew the said application and filed a fresh one. It is therefore clear that the Respondents have been trying to prevent the Applicant from removing the ballast by hook or crook. The Applicant has shown evidence of such prevention on the part of the Respondents.

14. I have looked at the ruling of the Court which was delivered on 18<sup>th</sup> September, 2017. The application which the Applicant had made was rejected because the issue of the ballast was one of the issues in the case which had already been set for hearing on 9<sup>th</sup> October, 2017. When the case was concluded, a judgment was delivered. One of the findings in the judgment was that the ballast had been extracted during the subsistence of the lease agreement and it did not form part of the residue contemplated in the lease agreement. This is why the Court allowed the Applicant to remove the ballast from the suit property.

15. As I have found that the Respondents have previously prevented the Applicant from removing the ballast within the time given, it is necessary that the Applicant be provided with security during the removal. I therefore find that the application dated 8<sup>th</sup> February 2022 is well merited. I allow the same in terms of prayers (b) and (c).

It is so ordered.

The Second application:

16. The Applicants in this application contend that they have preferred an appeal against the judgment delivered on 10<sup>th</sup> December, 2021 and that if stay of execution is not granted, the appeal will be rendered nugatory. They argue that the Judge granted the Respondent permissions to remove the ballast from the suit property and that in preparation of execution of the decree, the Respondent has hired ground in a neighbouring plot where it intends to store the ballast.

17. The Applicants further argues that the Respondent has moved its machinery to the vicinity of the suit property while under guard of Police in preparation for removal of the ballast. They argue that if this was to happen, it will be prejudicial to them and will render the appeal nugatory.

18. The Applicants' application is opposed by the Respondent through a replying affidavit sworn on 14<sup>th</sup> February, 2022. The Respondent contends that the Applicants' application has not met the threshold for grant of stay pending appeal; that there is no notice of appeal which has been filed and that the Respondent is an international company which is capable of refunding money worth 30,000 tons of ballast if the Applicants' appeal succeeds.

19. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the oral submissions made by the parties during the hearing as well as the written submissions of the applicant even though no order was given in respect of filing of written submissions. The only issue for determination is whether the Applicants have met the threshold for grant of stay pending appeal.

20. Under order 42 Rule 6(2) of the Civil Procedure Rules, no stay of execution should be granted unless the Court is satisfied that firstly, the application has been brought without unreasonable delay, secondly that the Applicant has demonstrated that he/she will suffer substantial loss if stay is not granted and thirdly that the applicant has given security for the due performance of the decree which will ultimately be binding upon him or her.

21. In the instant case, judgment was delivered on 10<sup>th</sup> December, 2021. This application was filed on 9<sup>th</sup> February, 2022. The Applicants had early on filed a similar application on 17<sup>th</sup> January, 2022 which was withdrawn before the present one was filed. I therefore find that there was no unreasonable delay in filing the application.

22. On whether the Applicants have demonstrated that they will suffer substantial loss if stay is not granted, it is important to note that the subject matter of this application is 30,000 tons of ballast. According to the documents filed in this file, a ton of ballast goes for Kshs 1000/-. Even if no stay is granted, removal of the ballast will not render the Appeal nugatory. If the Applicants succeed in their appeal, the Respondent which is a multinational company will refund the equivalent of the ballast in monetary terms. I therefore find that the Applicants will not suffer any substantial loss.

23. The Applicants have not even offered security which is a pre-condition for grant of stay. The cornerstone for grant of stay pending appeal is demonstration of substantial loss. As the Applicants have not demonstrated that they will suffer substantial loss, I find that their application lacks merit. The application dated 9<sup>th</sup> February, 2022 is dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF MARCH, 2022.**

**E. OBAGA**

**JUDGE**

Mr. Omondi for Defendant.

MS. Chumba for Plaintiff.

Court Assistant -Albert

**E. OBAGA**

**JUDGE**

**3<sup>RD</sup> MARCH, 2022**