



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**MISC. APPLICATION NO. 115 OF 2017**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING.....RESPONDENT**

**EXPARTE HEZBON ODHIAMBO ONGANY**

**AND**

**LUCAS OLOO OWITI.....INTERESTED PARTY**

**JUDGMENT**

The applicant has filed an application (under certificate of urgency) dated and filed on 21/09/20. The application is premised on Order 42 Rule 6(1) and Order 51 Rules 1 and 3 of the Civil Procedure Rules and Section 1A, 1B, 3 and 3A, of the Civil Procedure Act. The applicant seeks an order of Stay of the execution and/or enforcement of the Order of this Court dated 22<sup>nd</sup> May 2020 issued in favour of the Respondent and the interested while pending hearing and determination of the intended appeal in which a notice of appeal has already been filed. That costs of the application be in the cause. The application is supported by the affidavit of Moses Munuang'o, applicant's advocate sworn on 21/09/20. The application is based on grounds that the applicant had filed an application which was dismissed with costs on 22/05/20 and as such there is an order in force likely to be executed by the interested party at any time as the surveyors are set to visit the ground on 30/09/20 as per the letter dated 14/09/20 annexed as MM-1 in the supporting affidavit.

Unless an order for stay of execution is granted to stop the execution process, the interested party is likely to lose his only parcel of land and the intended appeal will also be rendered nugatory and of no use and would be a mere academic exercise of no value at all. That the applicant has high chances of success of the appeal. It is in the interest of justice to grant the reliefs sought so that the applicant's appeal can be determined with a fair chance preserving the status quo such that in the event of success of the appeal, the success would not be rendered useless. It appears that the application is unopposed. None of the Respondents has filed any response to the same despite service. Counsel for the respondent indicated to Court on 26/01/21 that they do not oppose the application.

This is an application for stay of execution pending appeal under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which sets out the conditions to be met before such an Order can be granted. In particular, Order 42 Rule 6(2) provides;

No order for stay of execution shall be made under subrule (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.

That notwithstanding, I have also noted that the application subject matter of the judgement delivered on the 22/05/20 was brought under Order 53 Rule 3 of the Civil Procedure Rules and sought for an order of certiorari in Prayer 1 thereof in the following terms;

**An Order of Certiorari be directed to the president, the cabinet secretary ministry of lands and physical planning to remove to the Court for purpose of being quashed the decision of the minister delivered on 28/3/17 awarding parcel of Land No. Kisumu/Nyamware/3411 to Alfred Nyateng Muga or his successors.**

I have looked at the judgement of this Court delivered on the 22/05/20 and the decree thereof which the applicant seeks to be stayed pending appeal. The order for which the applicant seeks to stay is;

**The Application dated 17<sup>th</sup> October 2017 is dismissed with costs to the respondent and the interested party.**

In light of the above, it is my view that before the Court delves into the issue as to whether or not the conditions set out in Order 42 have been met, the following issues should be determined;

- a) Whether the Court has powers to stay an Order of Certiorari
- b) Whether there is anything to be stayed in the order issued on 22/05/20

### **ANALYSIS**

#### **Whether there is anything to be stayed in the Order issued on 22/05/20**

It is my view that the Order of the Court issued on 22/05/20 is couched in negative terms and as such incapable of being stayed at this point in time. It is an order for dismissal of the application with costs. There is nothing which the Court has ordered to be done or to refrain from being done. An order for dismissal cannot be stayed.

The Court in *Catherine Njeri Maranga v Serah Chege & another [2017] eKLR* stated that the authorities on stay of execution pending appeal are clear that **for an order of stay of execution to lie, there must be positive requirements therein which would or could be affected or tampered by the stay.**

The Court further relied on the case of *Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR (referred to in Catherine Njeri Maranga v Serah Chege & another [2017] eKLR)*, where the Court of Appeal for East Africa stated as follows in respect of stay of execution:

***“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. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any 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 and application for stay, it is so ordered”***

The same principle was reiterated in the Court of Appeal cases of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] e KLR*, *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR* and *Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR*.

The applicant’s advocate has stated at paragraph 2 of the supporting affidavit that the order is likely to be executed by the interested party as the surveyors are set to visit the ground on 30/09/20 to execute the said order. I believe that if the surveyors are to visit the ground, then it would be in execution of the decision of the minister delivered on 28/3/17 awarding parcel of Land No. Kisumu/Nyamware/3411 to Alfred Nyateng Muga or his successors (which the applicant sought to be quashed by certiorari) and not the dismissal order of this Court delivered on 22/05/20.

. In any event, costs have not been determined and as such, execution to recover the same cannot also be stayed at this juncture.

In *Fulchand M. Shah v Panachand J Shah & 6 others [2010] eKLR* the Court dismissed an application seeking for orders of stay of execution and proceedings until the hearing and determination of an appeal on the basis that;

What is there to be stayed as a result of the order issued on 3rd July 2009 can only be costs. The costs payable by the plaintiff to the defendants are not yet ascertained. Accordingly, at this stage there is nothing to stay and there is nothing to show that the plaintiff will suffer irreparable loss if an order of stay is not granted.

On the above basis, the application should fail in its entirety and there is no need to delve into whether the applicant has met the conditions set out in Order 46 Rule 2. It is noteworthy that the order of certiorari sought by the applicant was not granted in this case. However, even if it had been granted, such order is not open the general jurisprudence is that Courts have no power to stay orders of certiorari, being that its nature is such that it is not capable of execution and can only be reversed upon hearing of appeal.

The Court of Appeal in *Republic v Public Procurement Administrative Review Board & 3 others Ex-parte Kenya Electricity Generating Company Ltd [2010] eKLR*, stated that;

**‘from its nature, an order of certiorari cannot be stayed pending appeal by interlocutory proceedings. Rather it can only be set aside in the appeal itself.**

In *Kuria Mbae vs. The Land Adjudication Officer, Chuka, High Court Miscellaneous Application No. 257 of 1987 (unreported)*, the High Court held:

“In our view therefore, it would appear that this court has no jurisdiction to stay, recall, review or set aside or quash an order of certiorari once it has been made .....

In *Republic vs. Municipal Council of Mombasa & 2 Others, Ex parte – Adopt – A – Light Ltd. Civil Application No. Nai. 15 of 2007 (unreported)*,

‘The order of certiorari granted by the superior court is not capable of execution as the superior court did not order any party to do anything or refrain from doing anything or to pay any sum (of money) other than costs.

Furthermore, the order of certiorari granted by the superior court quashing the resolutions of the Council and the Agreement is final and conclusive and took effect immediately. If the application is allowed the effect would be to reverse the decision of the superior court and legalize the resolution and the contract already nullified until the determination of the appeal. **This Court has no jurisdiction at this stage to undo what the superior court has done. It can only reverse the order of certiorari upon the hearing of the appeal**”

Further, Sections 8(1) (2), (3), (4) & (5) of The Law Reform Act provides:

*“8. (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari*

*(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.*

*(3) No return shall be made to any such order, ... but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.*

*(4) ...*

*(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.*

The Court of Appeal in *Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others [2015] eKLR* in interpreting the provisions of section 8 of the Law Reform Act stated;

The High Court could only grant these three prerogative orders. It could not in the judicial review under Section 8 of the Law Reform Act grant an order of injunction such as is sought in the motion before us for the simple reason that injunction is not authorized by and falls outside the amplitude of the reliefs available under Section 8 of the Law Reform Act. An injunction is also not exclusively within the amplitude of public law remedies.

**It is plain to see that in judicial review; the Court is concerned with public law remedies. and the fact that the respondents did not file their responses An injunction is a private law remedy, and it can also serve as a public law remedy. However, in the context of judicial review, it is not available either in the High Court or in this Court on appeal under the Law Reform Act.**

From the above, it is clear that the Environment and Land Court lacks the authority to stay judicial review orders.

The upshot of the above is that the application lacks merit and is dismissed with no orders as to costs as the respondents did not file their responses.

DATED AT KISUMU THIS 3<sup>rd</sup> DAY OF MAY, 2021

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.

ANTONY OMBWAYO

JUDGE