



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC JUDICIAL REVIEW CASE NO. 6 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF KIAMBU.....1<sup>ST</sup> RESPONDENT**

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

**AND**

**KIAMBU FARMERS CHOICE LIMITED.....EX PARTE APPLICANT**

**RULING**

The matter for determination is the Notice of Motion Application dated 25<sup>th</sup> August 2020 by the 1<sup>st</sup> Respondent/ Applicant Seeking for orders that;

- 1. That upon hearing and determination of this present Application, the Honourable Court be pleased to grant a stay of Execution of the Orders issued by this Honourable Court of Certiorari to quash and remove the 2<sup>nd</sup> Respondent's decision and permanent Injunction and costs issued against the Applicant herein in its Judgment on 7<sup>th</sup> May 2020 in Judicial Review No. 6 of 2019.***
- 2. That costs of this Application be in the cause.***

The Application is premised on the grounds that on 7<sup>th</sup> May 2019, the Court delivered a positive Judgment in favour of the Ex Parte Applicant. That the present stay of Execution Application has been brought without delay after the High Court suspended the President's directive on ban of hiring Private Law Firms by public entities since the Law Firm was already on record, when the ban was announced by the President His Excellency Uhuru Muigai Kenyatta. That the Applicant preferred an Appeal on the whole Judgment and has an arguable Appeal with High chances of success and the same is not merely frivolous or vexatious..

Further that the Appeal raises serious issues that the Court of Appeal must consider in particular whether the mere questioning by the Ex Parte Applicant of the fact if the 1<sup>st</sup> Respondent acted ultra vires meets the threshold for orders of Judicial Review . That it was improper for the Judge to grant prayer No. 2 as it effectively blocked the 1<sup>st</sup> & 2<sup>nd</sup> Respondents from making further decisions with regards to the subject property, a mandate which should be left to the **National Land Commission** as a Constitutional Commission established under **Article 67** of the Constitution of Kenya and or an Appeal Court and not a Judicial Review Court.

That the Ex Parte Applicant obtained Judgment by concealment of material facts by leaving out the determination page of the National Land Committee, more specifically paragraph 15 of the determination which gave the Applicant another opportunity to lodge any claim on the subject land. That it was improper for the Learned Judge not to effectively deal with the question of whether a decision was made or a recommendation to the registrar by the Commission, since it was a live issue all through the Judicial Review process. That the said grounds raise fundamental legal issues that the Court of Appeal must rectify and pronounce itself accordingly. That unless the impugned decisions and orders are stayed, the 1<sup>st</sup> Respondent will proceed and execute its decision, which was subject of the proceedings before the High Court and in effect rendering the Intended Appeal nugatory and a mere academic exercise.

In his Supporting Affidavit, **Dr. Martin Mbugua**, the 1<sup>st</sup> Respondent's/ Applicants and County Secretary and Head of Public Service averred that the Applicant lodged a complaint with the 2<sup>nd</sup> Respondent under the Historical land justices claim and the 2<sup>nd</sup> Respondent

took up the matter for investigations. That on **26<sup>th</sup> September 2018**, the Ex Parte Applicant was invited to a hearing before the **NLC Committee**, but failed to turn up and the scheduled hearings took place, That the **2<sup>nd</sup> Respondent** then made recommendations dated **7<sup>th</sup> February 2019**, which were subsequently gazette on **1<sup>st</sup> March 2019**, which recommended that the suit property was public land that had been wrongly alienated to private owners and converted to private land.

That the Ex Parte Applicant then filed the instant Judicial Review proceedings and on **7<sup>th</sup> May 2020** and the Court delivered its Judgment and granted it prayers 1 & 2. That the Applicant has since preferred an Appeal and has lodged a Notice of Appeal dated **21<sup>st</sup> May 2020**, in readiness for preparing his Record of Appeal. That he has been advised by his Advocates on record, that the Court made a positive order, capable of execution. That he is further advised by his Advocates on record that the holding of the Learned Judge are demonstrative of errors that the Court of Appeal should rectify. That unless the impugned decision and orders are stayed, the Ex parte Applicant will proceed and execute the decision of this Court and in effect rendering the intended Appeal nugatory and it is thus in the interest of justice that the orders sought are granted.

The Application is opposed and the Ex Parte Applicant filed grounds of opposition dated **29<sup>th</sup> September 2020**, on the following grounds ;

- 1. The Applicant has failed to demonstrate the substantial loss that will, be occasioned to it if stay is not granted.**
- 2. The Applicant in failing to demonstrate the substantial Loss it will suffer if stay is not granted has failed to comply with a mandatory requirement of order 42 rule 6 of the civil procedure rules 2010 .**
- 3. There has been undue delay in filing the Application contrary to the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010.**
- 4. The Applicant has failed to provide any justifiable explanation for failing to file the Application timeously and at the opportune time that is immediately after delivery of this Honourable Court's Judgment on 7<sup>th</sup> May 2020.**
- 5. The Applicant has failed to provide a memorandum of Appeal and has not demonstrated that the intended Appeal is arguable.**
- 6. The Applicant has failed to demonstrate in what way the intended Appeal will be rendered nugatory if an order of stay Is not granted**
- 7. The Application is an abuse of the court process.**

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also read and considered, the instant Application, the affidavit in support, grounds of opposition and the relevant provisions of law, and finds that the issue for determination is **whether the Applicant has met the threshold for grant of stay of execution orders.**

The **1<sup>st</sup> Respondent** has sought for the grant of stay of execution pending Appeal as against the Orders of this Court that were issued on **7<sup>th</sup> May 2020**. It is the Applicant's contention that after the delivery of the Court's Judgment, they did file a **Notice of Appeal**, and further that they were unable to proceed to file the Memorandum of Appeal nor file the instant Application as the President had put a ban on the hiring of private Law Firms. It is thus not in doubt that no substantive Appeal has been filed so far and what is on record is only a Notice of Appeal. It is further not in doubt that the time within which the Applicant ought to file an Appeal had run out even by the time the instant Application was being filed time within which to file the Appeal had lapsed and no Application for extension to file the Appeal out of time has been filed.

Grant of stay of execution pending Appeal is provided for under **Order 42 Rule 6** of the Civil Procedure Rules, the relevant part of which states as follows:

**“(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except Appeal case of in so far as the court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court Appealed from, the court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) 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.**

**(3) ...**

**(4) For the purposes of this rule an Appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of Appeal has been given.**

**(5) ...**

**(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an Appeal from a subordinate court or tribunal has been complied with.”**

Further in the case of *James Wangalwa & Another ...Vs. Agnes Naliaka Cheseto [2012] eKLR*, the court held that ;

**“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the Appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”**

It is thus not in doubt that the main reason as to why a Court would grant a party stay of Execution pending Appeal would be so that the Appeal would not be rendered nugatory. To prevent substantial loss by preserving the status quo pending the hearing and determination of the Appeal. In this instant case, there is no substantive Appeal that has been filed by the Applicant, No Memorandum of Appeal has been filed . Without an Appeal and given that time within which to file the Appeal has run out and further given that the Applicant has not produced any evidence that it has sought for extension of time within which to file the Appeal, It is thus the Court’s considered view that the Application has no anchor within which it is to be held. Therefore, there would be no legal justification to grant any stay, even if the Court was to find that the Applicant had met the threshold for grant of stay of execution Orders. See the case of *James Mbatia Thuo & Ephantus Mwangi ....Vs... Kenya Railways Corporation & Attorney General of Kenya [2018] eKLR* where the Supreme Court held that ;

**“The Notice of Appeal was filed on 23<sup>rd</sup> December 2015, while the application for stay was lodged at the Supreme Court Registry on 15<sup>th</sup> May 2017; more than a year after the expiry of the statutory time provided for filing Appeals. The Applicants have not provided any reason for their failure to apply for an extension of time, which application, had it been granted, would have enabled them to file their Appeal and thereby provided legal grounding for the rejected application for stay.**

**[21] In the absence of an Appeal, or an application for extension of time, accompanied by a memorandum of Appeal, the rejected application had no legal basis. We therefore see no reason to interfere with, or upset the decision by the Honourable Registrar rejecting the application.”**

The Upshot of the foregoing is that the Court finds and holds that the Application for stay of execution pending Appeal has no legal basis as there is no Appeal on record and therefore no there is anchor upon which the stay will be grounded. Consequently the Court finds that the Notice of Motion Application dated **1<sup>st</sup> August 2020** is **not merited** and the same is dismissed entirely with costs to the Ex Parte Applicant/Respondent herein.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021**

**L. GACHERU**

**JUDGE**

**Court Assistant – Lucy**