REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 61 OF 2018

MARTIN LOKITE KORWA *On behalf of*

KABOYI MERIKOR (Deceased).....PLAINTIFF/RESPONDENT

VERSUS

LOMUTE PUSIKWANG.....1ST DEFENDANT/RESPONDENT

THE COUNTY LAND ADJUDICATION &

SETTLEMENT OFFICER, WEST POKOT.....2ND DEFENDANT/RESPONDENT

COUNTY LAND SURVEY, WEST POKOT COUNTY.....3RD DEFENDANT/RESPONDENT

COUNTY LAND REGISTRAR, WEST POKOT COUNTY.....4TH DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL OF THE

REPUBLIC OF KENYA.....5TH DEFENDANT/RESPONDENT

RULING

(On stay of proceedings pending Appeal)

Background

1. The Plaintiff herein brought this Application dated **17/11/2021** following the delivery of a Ruling by my brother judge on **14/5/2021**. The said ruling was on two Applications, one dated **21/11/2019** which had been brought by the Applicant on **21/11/2019** and the other dated **6/12/2019** which had been brought by the 1st Respondent on **9/12/2019**. Both earlier Applications had sought leave of the Court, in **prayers 1**, to be granted to the respective Applicants to file further lists of documents before proceeding with the matter, except that the one filed by the 1st Respondent also sought leave of the Court for him to file a further list of witnesses.

2. Incidentally, the respective Applicants had filed the documents referred to in the prayers by the time they made the Applications. In the Applications they then included **prayer 2** which sought also the leave of court to deem the documents duly filed and served. By the said ruling of **14/5/2020**, the Court allowed **prayers 1** and **2** of the Applications. Aggrieved by part of the Ruling, the Applicant herein lodged a Notice of Appeal in this Registry on **19/5/2020**. The Notice states that the Applicant intends to appeal "against party (*sic*) of the said Ruling and Orders thereof".

3. It turns out that on **30/5/2020** the then Plaintiff, one **Kaboyi Merkor**, died. The heirs to the estate embarked on his substitution with the administrator of the estate. On **12/10/2020** the High Court in Kitale granted Limited Grant of Letters of Administration (Ad Litem) to one **Martin Lokita Korwa** in **HC P&A No. E001 of 2020.** Thereafter, on **5/11/2020** the Administrator, with the limited rights of filing suit, brought an Application dated **3/11/2020** seeking orders that his name be substituted to that of the deceased and another order for leave to amend the Plaint to reflect his name as the Plaintiff. The Application was allowed on **28/01/2021**.

4. The Court then fixed the matter for mention on **4/2/2021** to fix a hearing date. On that day nothing took place in Court but on **9/02/2021** the Applicant's Advocate together with that of the 1st Respondent appeared before the judge for the mention of the matter. Another mention

date was taken when the matter was not mentioned but on **15/6/2021** the matter came for a further mention before the judge to fix a hearing date. The Applicant's Advocate was absent. The suit was fixed for hearing on **21/9/2021**, and the Plaintiff was served with a hearing notice thereto. It was on that hearing date that the Advocate for the Applicant informed the Court that he had filed the instant Application.

The Application

5. The instant Application was filed on **20/9/2021**. It is a Notice of Motion brought under **Section 1A, 1B, 3, 3A** and **63 (e)** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The provisions above citied have nothing to do with Applications for stay of proceedings except that they invoke the jurisdiction of the Court to do the ends of justice by making various orders. Actually, **Section 63(e)** provides that "*In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed-make such other interlocutory orders as may appear to the court to be just and convenient."* However, the relevant provision of the law applicable is **Order 42 Rule 6 (2)** of the **Civil Procedure Rules.** The Applicant sought for orders as follows:-

1. …spent

2. THAT pending the hearing and determination of this Application and this suit, there be stay of proceedings herein.

3. THAT costs of this Application be in the Cause.

6. The Application is based on the grounds that the Applicant has lodged an Appeal in the Court of Appeal, namely **Eldoret Appeal No. E127 of 2021**; that the appeal challenges the Ruling of the Court delivered on **14/5/2021**; that if stay of proceedings herein in not granted the said appeal shall be rendered nugatory; the disputed surveyor's report confined the Plaintiff to **6** acres of the suit land while the Government Surveyor had already made a finding that he was occupying **62.8** acres while the Defendant was occupying **65** acres; that if the Court finds that the Plaintiff occupies **6** acres he is likely to lose a junk of land he has been in occupation for over **50** years; the 1st Defendant may not suffer loss if the stay of proceedings is granted since he occupies **65** acres on the upper side; that it would be in the interest of justice if the suit is stayed to allow the appeal to be heard and that the appeal has high chances of success.

7. The Application is supported by an affidavit sworn by one **Martin Lokite Korwa -** the **Applicant** on **17/9/2021**. A scrutiny of the Affidavit shows that it largely repeats the contents of the grounds in support of the application. The only additional information is the set of **Annextures** marked **MLK 1 (a), (b), (c)**, which are the Notice of Appeal, Memorandum of Appeal and the Record of Appeal respectively, but what is annexed as the Record of Appeal are only two pages of copies of what is titled "Record of Appeal", dated **28/7/2021**.

8. The application is opposed by the 1st Respondent. This was done through the Grounds of Opposition dated **25/9/2021** and filed by the Respondent on **27/9/2021**. He responded that the application is misconceived and bad in law; it has not legal basis; and was made with inordinate delay and is prejudicial (to him).

Submissions

9. The parties filed their submissions as directed by the court. The Applicant filed his on **12/10/2021** whereas the 1st Respondent did so on **7/10/2021.** The **4th** and **5th** Defendants did not file any submissions. There is no evidence that the Applicant ever served them with either the Application or the directions of the court and a mention notice for the date for fixing a ruling date. The Applicant only raised the issue of service in **paragraph 5** of his submissions to the effect that he served the **5th** Defendant with the Application but it did not reply. If service was effected on the counsel for the other Defendants, the least the Applicant should done was to file an Affidavit of service to prove that fact. He did not explain to the Court as to why that was not done. But I notice that on **15/6/2021** when the matter came up for fixing a hearing date, counsel, Mr. Odongo, for the other Defendants indicated to Court that since the parcel of land in issue is private, his clients' participation in such matters is minimal. Nevertheless, that does not mean that the parties he represents were to be excluded from the proceedings, unless they are struck out or removed officially by order of the Court.

Determination

10. I have carefully read through the Application and the Affidavit in support thereof, the grounds of opposition, and the submissions thereto. I have also considered the law applicable and the case law relied on by the 1st Respondent and other relevant case law generally. I find that the issues for determination are:

i. Whether the Applicant has satisfied the requirements for grant of an order for stay of proceedings pending appeal.

ii. Whether the Application is misconceived and bad in law.

11. On the one hand, the Applicant's four-page submission was mainly a recapitulation of the history of this matter. They summarized how the Application dated **17/9/2021** was filed; how the suit was to be heard on **21/9/2021** but did not because the Court was compelled to give directions on the Application; how and when submissions were filed; how the Attorney General did not file a response to the Application; why the Application was filed and that was that an Appeal has been preferred against the orders of **14/5/2021**; they then go into attacking the survey report and issues thereon which are to be shown how the said report was defective or wrongly made; how the report purports to excise some acreage that is not in tandem with the Government Surveyor's Report; and then they state how the appeal will be rendered nugatory if stay of proceedings is not granted and that it has high chances of success. Counsel relies, in the submissions, on **Article 159** of the **Constitution of Kenya** by saying that the said Clause did away with technicalities in the law hence the court should not look at any such in determining this Application.

12. On the other hand, the **1st** respondent's submissions repeated the prayers on the face of the Application and the grounds of opposition that he relies on in challenging the Application. Through counsel, he too summarized the history of the filing of the instant Application up to the time of writing the submissions that are under consideration. He states that the Application is misconceived since it is "*praying for stay of proceedings pending the hearing and determination of the application and the main suit*" (emphasis mine). Furthermore, he submits that no reasons have been advanced for staying the proceedings. Again, he submits that the provisions under which the Application is brought, that is to say, **Sections 1A, 1B, 3, 3A,** and **63(e)** of the **Civil Procedure Act**, invoke the inherent jurisdiction of the Court yet there are specific provisions which deal with the issues at hand. He relies on the case of ***Taparu v. Roitei [1968] EA, 618***. He then cited the proper provisions, being **Order 42 Rule 6** of the **Civil Procedure Rules**. He then sums up that the Court can only grant prayers that have been sought and no other, and neither can it amend an application without an application thereto being brought by a party.

13. This honourable Court has wide discretion to order for stay of proceedings pending appeal. Even so, that should be exercised judiciously. Therefore, the circumstances of each case have to be weighed carefully and balanced against the interest of justice for the parties.

14. To begin with, I agree with counsel for the Respondent that it would be wiser for counsel and any other party to always cite the proper provisions of the law relied on in any application where they exist. This guides the Court to go to the issues between the parties fast enough, although the Court knows the law. Resorting to invoking the inherent jurisdiction of the court under the Sections of the Civil Procedure Act as cited above, by a party, is only evidence of lack of seriousness on the part of an Applicant. This Court has stated in adasds that if parties resorted to the use of IRAC, it would make everything easier to discern and clearer to them.

15. That said, the grounds for the grant of an order for stay of proceedings pending appeal are to be found in **Order 42 Rule 6(1).** The provision states, at the relevant part, 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, ..."**

16. The provision places an obligation on a party seeking orders as herein sought to satisfy only one requirement in order to be granted the order. First of all, I note here that the provision is to the effect that the fact that a party has filed an Appeal against a judgment or decree or ruling or order of a court that does not entitle him to automatic stay of proceedings in the matter. Such a stay is not a matter of right. Thus, second, the Applicant ought to show sufficient cause to the court in order for it to grant the orders sought.

17. The question to settle then is: what is sufficient cause? **Sufficient cause** has been explained to mean *bona fide* and more than inaction on the part of a party. In ***Parimal v. Veena, (2011) 3 SCC 545,*** the Supreme Court of India tried to define the terms by stating that:-

> **"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".**

18. The definition imports the idea that there has to be enough or adequate reason given by a party in order to avail himself, by Court, of the grant of the orders sought. That should be borne out of good faith, honesty, blamelessness and diligence in action. None has been demonstrated in the present Application. All that was made was an attack on the private surveyor's report from the Bar before the maker thereof takes to the witness stand.

19. In the case of ***Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR*** the Court of Appeal has held that:

> **The application must of course, be made without unreasonable delay.**
>
> **In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows:**
>
> **"In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory."**
>
> **These two principles go hand in hand and failure to prove one dislodges the other."**

20. This court is alive to fact that the intention and purpose of stay of proceedings pending appeal is ensure that the subject matter of the Appeal is not rendered nugatory in the long-run. That being the case, it is not for this court to evaluate the merits of the Appeal. All the Applicants needs to show is that he has filed an appeal and it is arguable. That he may do by exhibiting a Notice of Appeal or a Memorandum of Appeal to that effect. He has done so here.

21. However, before the Plaintiff sits pretty that the Application has succeeded, this Court has to decide the merits of the Application. This calls on the court to analyze first the prayers sought and consider whether the Applicant has satisfied the condition for granting them. In

prayer 2 the Applicant prays for an order for stay of proceedings herein "…**pending the hearing and determination of this Application and this suit."** From the plain grammatical reading and import of the prayer, this court is being asked to grant stay of proceedings (1) before this Application is heard and determined and (2) before this suit is heard. I have separated the phrases and risked repetition so that it can be clear to the Applicant and any reader what the Applicant sought in the Motion.

22. I have rearranged the two limbs bought out by my dissection of the phrase of the prayer and started with the first paraphrased line. This is so in order to show and make a finding that to the extent that no other proceedings or steps have been taken in this suit since the time the Application was filed until delivery of this ruling, that part of the phrase has been spent. The second limb of the phrase remains to be considered. By it, the stay of proceedings herein is to be granted until the hearing of this suit. This prayer does not make sense to any reasonable mind at all. How is that to be? That this court stays proceedings herein and hears the suit at the same time is absurd, a mystery and impossibility. Had the Applicant prayed for stay of proceedings pending the Appeal which was referred to in the supporting Affidavit and whose copy of the front page was annexed thereto this Court would have considered in detail (not in passing as done elsewhere in this ruling) the merits of the arguments. I would have compared the facts raised in the Affidavit with whether the Applicant has demonstrated if the Appeal is arguable or not or will be rendered nugatory or otherwise. This is not one of those instances where **Article 159** of the **Constitution, 2010** (as relied on in the Applicant's submissions) can be used to cure the error. This is not a mere technicality. Moreover, not all of **Article 159** would have been applicable in the instant case if the Court would have been persuaded by the Applicant's argument. Counsel should have been specific. Perhaps he had in mind **Article 159(2) (d)**. But that Sub-Article would not still have aided him. It was stated by the Court of Appeal in ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR*** as follows: "*We do not consider **Article 159 (2) (d)** to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation."* I am prepared to agree with that view. I am of the view that the framers of the Constitution did not intend to give a provision that would rubbish all legal procedures in the land of Kenya. Shall Courts rely on the Constitution to solve all issues? What of the laws that actualize the various Articles of the Supreme Law? What happens when such legislation lays down procedures? Does the Court ignore them as mere technicalities? Let the Applicant reason with me. The **Elections Act, Act No. 24** of **2011** of the **Laws of Kenya** and the **Rules** made thereunder (both of which are to actualize **Article 82 (1) (d)** of the **2010 Constitution** provide for where and the manner in which voting shall be done. Supposing, Kenya is having a General Election, a voter goes to a polling station, he is issued with a ballot papers and rather than going to the booth to mark them and insert them in the ballot boxes he starts going out of the room/station. On being stopped by the officials he answers them, "I am going home to mark these papers and bring them back, marking them at that booth is a mere technicality. Remember and apply **Article 159(2) (d)** of our Constitution." Will that be acceptable? The Applicant has an answer to this. Thus, **Article 159 (2) (d)** is not a cleansing detergent of all and sundry errors in the law and practice. It is not hyssop working against an unclean heart (*See* Psalms 51:7). For this reason, the prayer fails in its nascent stage.

23. This wrong **prayer 2** as has been dissected is the problem of poor drafting. But this court cannot and shall not participate leading and guiding parties on how they present their clients' matters. It is just but an impartial arbiter. It will decide cases as parties present them to it. It will not assist parties to refine their cases, pleadings or prayers lest it be taken to mean that it shall have taken sides. I pity the Applicant, but that is all I can do. Counsel for the 1st Respondent submitted on this point by indicating somewhat similar argument as I have expounded above and stated that the Application is misconceived and bad in law. I agree.

24. Regarding demonstrating that the appeal shall be rendered nugatory unless the Application is allowed as prayed, I note that the appellant has lodged in this court a Notice of Appeal dated **8/7/2021** on **23/7/2021**. It is annexed to the Application. That notwithstanding, this court is called upon to determine whether the applicant has satisfied the conditions to be satisfied as set out by **Order 42 Rule 6** of the **Civil Procedure Rules**. This is because the provision is clear in **Rule 6(1)** that no "*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…"* In order for the Court to make an order of stay of execution, it has then to consider whether or not the Applicants have met the requirements for the grant of such an Order.

25. Although the Applicant avers that the delay in bringing the Application herein was caused by the fact that the Plaintiff died and substitution had to be done, I find the reason not satisfactory in so far as it does not explain why the Applicant took time between when the amended Plaint was filed and served and when he finally filed the Application. It is noteworthy that the Plaintiff died on **30/5/2020**. Substitution of his name was ordered by the Court on **28/1/2021** and an Amended Plaint was filed on **2/2/2021**. Then the Plaintiff waited until the eve of the hearing the suit on **21/9/2021** to file this Application on **20/9/2021**. This was an **eight (8)** months' period. This delay is not explained at all, and is inordinate.

26. More so, the Applicant has not explained the nature of substantial loss he will suffer in the event that stay the suit proceeds to hearing. A mere clashing of opposing evidence does not constitute substantial loss to the parties. In the adversarial system wherein our legal system thrives, this is actually the purpose of parties to matter moving courts for hearings. There is not a case that I know of where the adverse party maintains a suit against the other where both have evidence which is similar and "agreeing" and they do not settle it out of court. In such a case they would gladly and swiftly compromise the case.

27. I have stated above that my role is to balance the interests of the parties. In this matter the Plaintiff is intent on proceeding with the hearing of the Appeal. The 1st Defendant is keen on proceeding with the main suit. The Plaintiff argues that a survey report which was deemed duly filed and served will be prejudicial to his client if left to form part of the documents the 1st Defendant will rely on in his case if stay of proceedings herein is not granted. He bases his argument on the fact that a government surveyor has done another report which is contrary to the one which was deemed as properly filed. One thing is clear: that neither of the reports have been admitted in evidence for the parties. Both makers of the two documents, if their qualifications are anything to go by, are experts in the area of survey of land. It can only be at the hearing when the reports are to be produced in evidence that their veracity can be challenged and the contents thereof proved, and the differences thereof interrogated. By the Court deeming them properly filed or placed on record does not make them part of the record of the court, and they are of no avail to the parties at this stage of the proceedings. In ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR,*** the Court of Appeal held as follows: *"Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document*."

28. I agree with their Lordships regarding the procedure of how documents sought to be relied on by parties in court finally get to become part of the parties' evidence and are proven. What is clear from the above is that the step that the Court took on **14/05/2021** was only to permit the document to be on the record, in waiting for production and proof. There is no prejudice done by that to any party herein. The Applicant herein shall have the chance to test the truthfulness, import and validity of the report at the hearing. For the above reasons, I find no reason why the stay of proceedings herein should be granted as prayed.

29. In conclusion, the application dated **17/9/2021** lacks of merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 16TH DAY OF NOVEMBER, 2021

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.