



REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA AT NYAHURURU

JUDICIAL REVIEW No 7 OF 2017

(FORMERLY JR 102 OF 2011)

IN THE MATTER: OF THE LANDS DISPUTES TRIBUNAL ACT No. 18 OF 1990 (Now repealed Chapter 303 Laws of Kenya)

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW RELIEF OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE LANDS DISPUTES TRIBUNAL KIPIPIRI DIVISION

IN THE MATTER OF: NYAHURURU SENIOR PRINCIPAL MAGISTRATE'S COURT

MISC. LAND CASE No. 13 OF 2011

JAMES MWANIKI NJUGUNA VS SAMWEL GACHAU MAINA

IN THE MATTER

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE LANDS DISPUTES TRIBUNAL KIPIPIRI.....1st INTERESTED PARTY

NYAHURURU SENIOR PRINCIPAL

MAGISTRATE'S COURT.....1st INTERESTED PARTY

LAND REGISTRAR NYANDARUA DISTRICT.....1st INTERESTED PARTY

AND

GRACE WANJIKU NJAU1st INTERESTED PARTY

JOHN MWANIKI NJUGUNA.....2nd INTERESTED PARTY

EX-PARTE

SAMUEL GACHAU MAINASUBJECT

RULING

1. JOHN MWANIKI NJUGUNA, the 2nd interested party herein filed a chamber summons dated the 23rd May 2016 pursuant to the provisions of Section 1A, 1B, 3A and 63(c) of the Civil Procedure Act and Order 42 Rule 6(1) & (2) of the Civil Procedure Rules and all other enabling provisions of the law where he sought for the following orders:

i. Spent

ii. Spent

iii. That pending the hearing and determination by the Court of Appeal of the 2nd interested party's appeal against the judgment delivered herein on 10th May 2016, there be a stay of execution of the order directing cancellation of the 2nd interested party's registration in respect of land parcel No. Nyandarua/Malewa/573.

iv. The costs of this application be provided for.

2. The application is supported by grounds on the face of it as well as the affidavit of John Mwaniki Njuguna sworn on the 23rd May 2016.
3. The Applicant, being dissatisfied with the judgment which was delivered by Hon. Justice Munyao Sila in this matter on the 10th May 2016, has filed an appeal to the Court of Appeal vide a Notice of Appeal dated 13th May, 2016 (a copy which is annexed to the affidavit and marked as JMN2').
4. The Applicant alleges that the judgment that was delivered before the Hon. Justice Munyao Sila inter alia cancelled the registration of his proprietorship to title No. Nyandarua/Malewa/573 and reverted it back to Samuel Gachau Maina (the subject herein) as proprietor thereof.
5. The Applicant's case is that if the orders sought are not granted, his title will be cancelled thus their appeal will be rendered nugatory.
6. That no prejudice will be suffered by the Subject herein in the event of granting the stay of execution.
7. **It is worth noting that whilst this matter was pending in court, the subject/ Respondent herein Samuel Gachau Maina passed away on the 30th July 2016, wherein he was substituted by his legal representative, Benson Gachau Mungai on the 20th June 2017.**
8. **The Substituted** subject/Respondent herein, in response to the Application and vide his replying affidavit dated the 27th June 2017 and filed on the 5th October 2017 stated that indeed the 1st interested party/Applicant herein had obtained title to the suit land without due process as there was no implied sale or contract of the suit land.
9. That the Applicant would not suffer any prejudice if his application was not granted as he has never been in possession of the said suit land which has always been in possession of the subject herein.
10. When the application came up for hearing on the 26th June 2018, parties by consent agreed to canvass the same by way of written submissions wherein the Applicant filed their submissions on the 17th October 2018 while the Respondent filed their written submissions on the 21st January 2019.

The 2nd interested Party/Applicant's Submission.

11. The 2nd interested Party/Applicant's submission was to the effect that the Substituted subject herein in his replying affidavit, did not raise any grounds that militated against granting the orders so sought in the present application. That the Application called for the exercise of the court's discretion principles upon which have been settled in a plethora of cases including the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417** and the case of **In Re Estate of the late Wambui Njeru (Deceased) [2018]eKLR** as well as under Order 42 Rule 6(2) of the Civil Procedure Rules
12. The Applicant submitted that going by the principles enumerated in the two cases herein above, the 2nd interested party's application had met the threshold set out and ought to be allowed.
13. That he was ready and willing to deposit the original title deed of the suit land in court as security for due performance of the decree or order that may be binding on him in the instant case should the Appeal fail.

Respondent's submission;

14. The application was opposed by the Respondent whose submission was to the effect that the Applicant/the 2nd interested party had not brought before the court any grounds upon which the court may exercise its discretion in his favour.
15. That the application was prejudicial to the Respondent/Subject herein since if allowed it would place a presumption of acts or omissions of irregularity of Kipipiri Land Tribunal to deal or give or pass ownership of the registered land.
16. That the 2nd Interested party had never been in possession of the suit land at any given time and therefore had nothing substantial to suffer as he had no structures on the land. That instead it was the Respondent who was suffering by being kept in court by application and continues to suffer since he cannot harvest commercial trees growing on the suit land.
17. That he was entitled to the fruits of the judgments and as such the application be dismissed with costs.

18. I have considered the submissions by Counsel to the respective parties in respect to the application by way of a Notice of Motion dated 23rd May 2016 wherein the Applicant sought for orders of stay of execution of the Judgment delivered on the 10th May 2016 in Judicial Review No. 102 of 2011, pending the hearing and determination of his intended Appeal.

19. I have also considered, the supporting affidavit and the replying affidavit as well as the written submissions made by Counsel to the parties

20. I find two issues for determination arising therein namely:

i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What orders this court should make.

21. On the issue of whether the applicant is deserving of the orders of stay of execution of decree pending the hearing and determination of the appeal herein, the law applicable is Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 sub rule (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.

22. There are three conditions for granting of stay order pending an Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

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

b) The application is brought without undue delay 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.

23. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**” which connotes that all three (3) conditions must be met simultaneously.

24. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the applicant to demonstrate what kind of substantial loss he will suffer if the stay order was not made in his favour.

25. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

26. In the application before me, the Applicant has not provided any evidence on the kind of irreparable loss he would suffer if the order of stay was not granted. Further it is not in dispute that the Applicant is not in possession of the suit land and further that there has been no evidence adduced that the Respondent is desirous of disposing the same off.

27. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

28. On the second condition, upon perusal of the court record, this Court finds that the delivery of the Judgment, in the matter being appealed against, was on the 10th May 2016 wherein the Applicant applied for stay of execution in the trial court on the 23rd May 2016. I find that the said application is brought without undue delay.

29. On the last condition as to provision of security, I find that the Applicant in the present application has not furnished and/or offered any security for a grant of the order for stay which was a mandatory legal requirement pursuant to the provisions of Order 42 Rule 6(2) (b) of the Civil Procedure Rules.

30. The provisions of Section 3A. provide as follows:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

31. Having considered this application, I am not satisfied that compelling reasons have been disclosed to warrant me granting the stay as sought.

32. In the circumstance, the Appellant/Applicants' Notice of Motion dated 23rd May 2016 is hereby denied and dismissed with costs to the Respondent.

Dated and delivered at Nyahururu this 5th day of March 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE