



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KITALE**

**ELC PETITION NO. 2 OF 2014**

CHRISTOPHER KURUTYON LONYALA.....	1 <sup>ST</sup> PETITIONER
MUSA TINYANG.....	2 <sup>ND</sup> PETITIONER
LONYANGAREN LOKORRIONKOR.....	3 <sup>RD</sup> PETITIONER
ROBERT MATANDA.....	4 <sup>TH</sup> PETITIONER
JOHN MATANDA.....	5 <sup>TH</sup> PETITIONER
JOSEPH KANTICH.....	6 <sup>TH</sup> PETITIONER
ELIZABETH CHEPSERET NDURURU.....	7 <sup>TH</sup> PETITIONER
PAMELA CHEPKEMOI NGEINWA.....	8 <sup>TH</sup> PETITIONER
ISAAC ATODO SIRE.....	9 <sup>TH</sup> PETITIONER
TEGLA LOROUPE.....	10 <sup>TH</sup> PETITIONER
MARKO CHEMASWET KAPSANDUI.....	11 <sup>TH</sup> PETITIONER
MOSES KABURU.....	12 <sup>TH</sup> PETITIONER
LOKALE.....	13 <sup>TH</sup> PETITIONER
RAMANYANG PRECH BIWOTT.....	14 <sup>TH</sup> PETITIONER
ABRAHAM MARIAH KAMAKU.....	15 <sup>TH</sup> PETITIONER
KAKUTO YARANGOLE ALUKUNYANG.....	16 <sup>TH</sup> PETITIONER
STEPHEN K.N. NGEIYWA.....	17 <sup>TH</sup> PETITIONER
ALEXANDER M. T. SIYWET.....	18 <sup>TH</sup> PETITIONER
BEN M. NGEIYWA.....	19 <sup>TH</sup> PETITIONER
MNANGAR RITENYANG SEPITOI.....	20 <sup>TH</sup> PETITIONER
BOAZ NAIYWA.....	21 <sup>ST</sup> PETITIONER
LOWGUROPUS LOKORKOU.....	22 <sup>ND</sup> PETITIONER

SAMWEL K. KAPAILEL.....23<sup>RD</sup> PETITIONER  
LOTANY LOTILIMAT.....24<sup>TH</sup> PETITIONER  
JAMES KABURU.....25<sup>TH</sup> PETITIONER  
BENJAMIN URIO.....26<sup>TH</sup> PETITIONER  
LORNAL EWOL.....27<sup>TH</sup> PETITIONER

AND

EKITALE EKAL LODIO.....1<sup>ST</sup> INTERESTED PARTY  
MARGARET LONGELESH.....2<sup>ND</sup> INTERESTED PARTY  
MICHAEL NGOLESH.....3<sup>RD</sup> INTERESTED PARTY  
CLAY MADARA OCHIENG.....4<sup>TH</sup> INTERESTED PARTY  
WILSON OTIENO OBURE.....5<sup>TH</sup> INTERESTED PARTY  
BENJAMIN ORIA.....6<sup>TH</sup> INTERESTED PARTY  
JAMES K. KABURU.....7<sup>TH</sup> INTERESTED PARTY  
MARY SIMON LOKAMAR.....8<sup>TH</sup> INTERESTED PARTY  
KENETH ESINYEN.....9<sup>TH</sup> INTERESTED PARTY  
EPEYON NKURUKA ETABO.....10<sup>TH</sup> INTERESTED PARTY  
WILFRED OGUTU.....11<sup>TH</sup> INTERESTED PARTY  
SYLUS ODONGO WERE.....12<sup>TH</sup> INTERESTED PARTY

VERSUS

CABINET SECRETARY

MINISTRY OF LANDS AND SETTLEMENT.....1<sup>ST</sup> RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....2<sup>ND</sup> RESPONDENT

DISTRICT LAND ADJUDICATION

TRANS-NZOIA.....3<sup>RD</sup> RESPONDENT

COUNTY COMMISSIONERTRANS-NZOIA.....4<sup>TH</sup> RESPONDENT

DEPUTY COUNTY

COMMISSIONER KWANZA.....5<sup>TH</sup> RESPONDENT

POLICE COUNTY COMMANDANT

TRANS-NZOIA.....6<sup>TH</sup> RESPONDENT

ADMINISTRATION POLICY COUNTY

COMMANDANT-TRANS NZOIA.....	7 <sup>TH</sup> RESPONDENT
INSPECTOR GENERAL OF POLICE.....	8 <sup>TH</sup> RESPONDENT
HON. ATTORNEY GENERAL.....	9 <sup>TH</sup> RESPONDENT
FRANCIS KAPCHANGA.....	10 <sup>TH</sup> RESPONDENT
PETER CHAKALI.....	11 <sup>TH</sup> RESPONDENT

### RULING

1. This ruling is in respect of an application by way of Notice of Motion dated 23/6/2020 brought under **Section 3, 3A and 63(e)** of the **Civil Procedure Act** and **Order 22 Rule 51**, of the **Civil Procedure Rules 2010**. The applicants who were the interested parties in the main petition seek the following orders:

**(1) ...spent**

**(2) That stay of execution of the whole judgment and decision of this court delivered on 29/5/2020 be issued to restrain the respondents' actions pending the hearing and determination of the impending intended appeal in the Court of Appeal.**

**(3) That the OCS Endeess Police Station be ordered to ensure the compliance of the orders granted.**

**(4) The stay of execution of the whole judgment and decision of this court delivered on 29/5/2020 do operate till the substantive appeal is heard and determined to finality by the Court of Appeal.**

**(5) That there be made such other and/or further order(s) as the ends of justice may demand.**

**(6) That costs be in the cause.**

2. The application is premised on the grounds set out in the notice of motion and is supported by a sworn affidavit of **Wilfred Ogutu** dated **23/6/2020** on his own behalf and on behalf of interested parties in this matter.

3. The grounds are that settlers on the land in the Chepchoina Settlement Scheme run the risk of being evicted in execution of the judgment of this court delivered on **29/5/2020** and that a stay of execution order would protect them from such eviction pending the hearing and determination of their intended appeal to the Court of Appeal. The applicants state that the respondents have a history of taking the law into their own hands and disobeying court orders, and in the same breath, state that unless a stay order is granted the applicant's case and the suit property would be prejudiced.

4. **Peter Barasa Chakali**, the 11<sup>th</sup> respondent filed a replying affidavit sworn on his own behalf and on behalf of the 10<sup>th</sup> respondent on **13/7/2020** in which he stated that there are no orders issued in the petition capable of being stayed as the petition was simply dismissed for lack of merit. He maintains that the applicants are simply seeking an injunction through the back door. He further states that the applicants failed to ventilate their case at the hearing and instead opted to support the respondents and that they had no precise claim in the matter in contrast to the petitioners who were the main claimants. Finally he posits that the applicants have failed to demonstrate that they would suffer any injury or damage. He seeks that the application be dismissed with costs.

5. The 1<sup>st</sup> - 9<sup>th</sup> respondents filed grounds of opposition and raised the following grounds:

**(1) That the application is incurably defective, misconceived, untenable and devoid of substance and the affidavit is full of misrepresentations of facts tailored to hoodwink this court.**

**(2) That the notice of motion is bad in law and the court lacks jurisdiction to grant the prayers sought.**

**(3) That the application fails the test in *Abdulrahman C. Kirao & 3 Other -vs- Said Seif & 3 Others [2019] eKLR***

**(4) That the notice of motion is an abuse of the court process as it attempts to stay orders which are of negative nature; they are incapable of being stayed.**

6. The interested parties' written submissions were filed on **11/8/2020**. The 1<sup>st</sup> - 11<sup>th</sup> respondents filed their submissions on **31/8/2020**. I have perused through the court record and I have found no submissions filed by the petitioners. I have considered the application as well as the responses including the submissions of the parties.

### Determination

7. The issues arising for determination in the instant matter are as follows:

*(a) Whether an order of stay of execution pending appeal should issue;*

*(b) Who should bear the costs of the application?*

8. The issues are discussed as hereunder:

*(a) Whether an order of stay of execution pending appeal should issue*

9. The respondents have argued that no orders of stay of execution can issue since the court simply dismissed the petition and there are no orders that can be stayed. This is correct. In the case of **Kanwal Sarjit Singh Dhiman -Vs- Keshavji Jivraj Shah [2008] eKLR**, the Court of Appeal held as follows:

**“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C.*)”**

10. In the case of **Shade Manufacturers and Hotel Limited v Serah Mweru Mutuu & 3 others [2018] eKLR** which is cited in **Abdulrahman C. Kirao & 3 others v Said Seif & 3 others [2019] eKLR** the latter case which is relied on by the 1<sup>st</sup> - 9<sup>th</sup> respondents the Court of Appeal stated as follows:

**“16. In *Raymond M. Omboga vs. Austine Pyan Maranga Kisii HCCA No 15 of 2010*, it was held that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:**

**“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”**

**17. In the instant case, the applicant is seeking stay of a negative order. The jurisprudence of this Court in such an application is that no stay can be granted from a negative order. It follows that the present application is misconceived. For the reasons stated above, the Notice of Motion dated 16th July 2018 be and is hereby dismissed with costs.”**

11. It is the correct position in this case that the petition was simply dismissed and the court did not issue orders compelling or restraining the doing of any act by any of the parties. Only an injunction order sought in the proper court vested with jurisdiction should have been sought in the circumstances and on sound grounds. That was not done. The remedy of stay that the applicants seek can not therefore be granted.

12. Apart from whether there is a positive order amenable to a stay order, the conditions for a grant of stay of execution are contained in **Order 42 rule 6** of the **Civil Procedure Rules**. It provides as follows:-

**“6.(1) 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 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) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(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) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in sub-rule (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.”.**

13. There are therefore **4 conditions** that a court must consider in an application for stay under **Order 42 Rule 6** as follows:

**(i) Whether there is an appeal in place;**

**(ii) Whether the application was made without unreasonable delay;**

**(iii) Satisfaction by the court that substantial loss may result unless the order is made; and**

**(iii) Whether the Applicant is prepared to offer security.**

14. Regarding the first of the conditions listed above, this court has noted that there is a notice of appeal filed in the record and therefore there is deemed to be an appeal for the purposes of this application.

15. As to whether the application was made without unreasonable delay I note that the judgment was delivered on **29/5/2020** and the application before me was lodged on **24/6/2020**. In my view the delay of less than one month in filing the stay application in the instant suit does not amount to inordinate delay for the purposes of a stay of execution application.

16. Regarding the allegation that there would be prejudice occasioned if the orders sought are not granted it is to be observed that the supporting affidavit has failed to outline the prejudice that the applicants would suffer if no orders are issued as sought. Instead the supporting affidavit states that “...*the settlers on the ground in the suit property are in danger of being evicted by the respondents*” from the suit property and that that action is likely to occasion the said settlers “*substantial damage and loss*”. The supporting affidavit is bare of any annexures evidencing loss. The applicants have not specifically put themselves in the category of persons who may suffer loss sufficiently to convince this court to issue a stay order. In any event this court notes that the applicants are interested parties and not petitioners and, as the respondents stated in their reply, the interested parties had not formulated their own specific case but hung on and supported the petitioner’s case. I therefore find that the applicants have failed to demonstrate any possible loss that they would sustain even if the orders sought were not issued, had that been otherwise possible.

17. As to security this court is capable of ordering security even where an applicant has not offered any if all the other criteria for a stay of execution order have been established. However all the other more substantive criteria set out in **Order 42 Rule 6(2)** must be construed conjunctively and not disjunctively for the orders of stay to issue, and before those criteria are established security can not be considered.

18. In the case of **Dismas Ombongi T/A Kamili Dog Farm v Inter Security Services Limited [2018] eKLR** the court observed as follows regarding whether the conditions in **Order 42 rule 6(2)** should be construed conjunctively or disjunctively:

**“20. Indeed, both the Respondent and Appellant were in agreement that an order under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 could only be granted if the Appellant demonstrates the following:-**

**a. THAT substantial loss may result if an order for stay of execution is not granted; and**

**b. THAT the application has been made without unreasonable delay.**

**c. THAT the applicant furnishes security.**

**21. Notably, all the conditions must be met because the key word is “and”.**

19. Addressing the same issue in the case of **Charles Mithika v Joseph Mureithi & Equity Bank Limited [2019] eKLR**, the court observed as follows:

**“15. Having said so, the court must be satisfied that the Appellant had met the other two (2) remaining conditions because the conditions are conjunctive and not disjunctive before being granted the order.”**

20. The same issue was addressed in the case of **Zahir Habib Jiwan & another v Jubilee Insurance Company of Kenya Ltd [2015] eKLR** where the court stated as follows:

**“In the case before me the duty to prove substantial loss has not been discharged and since the requirements are cumulative and not disjunctive, this finding alone is enough for me to disallow the application.”**

21. The implication is that where one or two of the conditions have not been shown to exist in a stay application the court must dismiss the applications for stay. That is the case here. The applicants have failed to demonstrate the existence of the first three criteria and the application before me has no merit and it should be dismissed.

**(b) Who should bear the costs of the application?**

22. In the light of the foregoing this court has no option other than dismiss the application. I therefore dismiss the application dated 23/6/2020. Each party shall bear their own costs of the application.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 25<sup>th</sup> day of September, 2020.**

**MWANGI NJORGE**

**JUDGE, ELC, KITALE**