



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC PETITION NO. 2 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 40, 47, 50 & 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 40, 47 & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE DECISION MADE BY THE DEPUTY COUNTY COMMISSIONER, MAKUENI IN LAND APPEAL TO THE MINISTER CASE NO.290 OF 2009

BETWEEN

JOHN MUTUKU KITUMA.....1ST PETITIONER

SAMUEL MAILU KITUMA2ND PETITIONER

SAMMY MUSAU KITUMA3RD PETITIONER

AND

JAMES MUTIE KIMUYA.....1ST RESPONDENT

KIAMBA KIMUYA.....2ND RESPONDENT

JOSIAH KIMUYA3RD RESPONDENT

LAND REGISTRAR – MAKUENI4TH RESPONDENT

RULING

1. What is before this Court today for ruling is the Petitioners’/Applicants’ notice of motion application dated 21st August, 2020 and filed in court on even date under certificate of urgency.

2. The application is expressed to be brought under Order 42 Rule 52, Order 51, Rule 1 of the Civil Procedure Rules, Sections 3, 3A of the Civil Procedure Act and all enabling powers and provisions of the law for orders: -

1) Spent.

2) Spent.

3) Spent.

4) THAT there be a stay of execution of the ruling, decree delivered on the 29th April, 2020 and its consequential orders issued by this Honourable Court pending the hearing and determination of the intended appeal.

5) THAT costs be in the cause.

3. The application is predicated on the grounds on its face and is supported by the affidavit of John Mutuku Kituma, the 1st Petitioner/Applicant herein.
4. The application is opposed by the 1st to 3rd Respondents vide the replying affidavit of James Mutie Kimuya, the 1st Respondent herein, sworn at Makueni on 14th September, 2020 and filed in court on 15th September, 2020.
5. The application was canvassed by way of oral submissions.
6. The submissions by Mr. Aunga for the Petitioners/Applicants were that when he filed the instant application on 21st August, 2020, he perused the court file and realized that the proceedings had been typed save for the order issued by the Court arising from the ruling sought to be appealed against. The Counsel pointed out that the proceedings had not been signed by the Deputy Registrar. He urged the Court to exercise its discretion and grant stay pending the intended appeal as they are yet to file the memorandum of appeal. The Counsel went on to submit that the Petitioners/Applicants have been on the suitland for over 40 years and that is where they have their homesteads and also earn their livelihood.
7. It was further submitted on behalf of the Petitioners/Applicants that in light of the eviction notice issued by the Respondents through their advocate, the Petitioners/Applicants believe that eviction is imminent and that the intended appeal might be rendered nugatory should it succeed.
8. The Petitioners/Applicants contend that they are not guilty of laches save for the failed communication as to whether the proceedings were ready. He pointed out that when he filed the application on the 21st August, 2020, they had laboured for around 2 months as there was a challenge of locating the court file due to misfiling.
9. Responding to paragraph 8 of the replying affidavit and with regard to security, Mr. Aunga submitted that the Petitioners/Applicants pray that if the Court is inclined to order for conditional stay, they are willing to abide by the Court's direction.
10. The Counsel concluded by urging the court to allow the application as it is merited.
11. In reply, the 1st Respondent on behalf of the 2nd and 3rd Respondents told the Court that they rely on their replying affidavit.
12. I wish to point out Order 42 that the Counsel for the Petitioners/Applicants cited does not have Rule 52. In total the Order has 35 Rules. For purposes of this application, I will assume that the Petitioners/Applicants intended to base their application on **Order 42 Rule 6(1)(2) of the Civil Procedure Rules**. This rule 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 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.”
13. It follows from the above that before this Court can proceed to make an order of stay of execution under **Rule 6(1)**, it must be satisfied that substantial loss may result to the Petitioners/Applicants herein unless the order is made and that the instant application has been made without unreasonable delay. The Petitioners/Applicants ought to give such security as the Court shall order for the due performance of decree or order as may be binding upon them.
14. With regard to the first principle, the Petitioners/Applicants have indicated in ground j of the application that they stand to suffer irreparable damage if they are evicted from the land that they have occupied for over 40 days. I am satisfied that should the Petitioners/Applicants be evicted from the suitland, they will suffer substantial loss as they will be forced to start their lives all over again. As for the second principle, the Court takes judicial notice of the fact that the ruling that led to the fling of this application was delivered at a time when the whole country was under lockdown due to the outbreak of covid-19 and that this resulted in people being unable to move from one area to another. This may explain the inability of the Petitioners/Applicants to file the instant application.
15. Given those circumstances, the period of 4 months that the Petitioners/Applicants took to file this application is in my view reasonable.
16. Regarding the security for costs, I do note that even though the Respondents have indicated in paragraph 8 of the replying affidavit that the Petitioner/Applicant has not offered the same, the Petitioners/Applicants have deposed in paragraph 11 of their supporting affidavit that

they are willing to abide with the Court's conditions regarding grant of stay. In my view therefore, the application has merits as the Petitioners/Applicants have satisfied the principles set out in Order 42 Rule 6(2)(a) and (b). Consequently, I order the Petitioners/Applicants to deposit in court letters of guarantee from any reputable bank in the sum of Kshs. 50,000/= within 45 days from the date hereof failure of which execution shall ensue.

Signed, dated and delivered at Makeni via email this 27th day of **October, 2020**.

MBOGO C.G.,

JUDGE.

Court Assistant: G. Kwemboi