



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**JUDICIAL REVIEW APPLICATION NO 4. OF 2019**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**OF ORDERS OF PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 13(7) OF THE ENVIRONMENT AND LAND COURT ACT**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. THE DISTRICT LAND REGISTRAR, KISII COUNTY.....1<sup>ST</sup> RESPONDENT**

**2. DISTRICT SURVEYOR, KISII COUNTY.....2<sup>ND</sup> RESPONDENT**

**AND**

**1. RICHARD NYABANDO**

**2. NEN BITANGE OISERA**

**3. KEPHA OSUMU BWOMARI**

**4. LEWIS NYARIBO OBURU**

**5. JACQUELINE NYANGARISA BITANGE**

**6. JUDITH ASIKO RATEMO**

7. CAISIANO NYAMBANE NYABANDO

8. CASPER MORARA NYABANDO

9. MEROKA FAITH JUDITH

10. KEPHA OSEBE ABUYA

11. NANCY BOSIBORI ATONI

12. CECIALIA MOKEIRA NYARIEKO.....EX-PARTE APPLICANTS

AND

1. ELIJAH NYAGAMI GAI

2. KISII COUNTY GOVERNMENT

3. ERICK JANGANYA

4. JAMES NYAMWEYA MOINDI

5. JOEL ATUTI

6. ENOCK MOKUA.....INTERESTED PARTIES

### RULING

#### INTRODUCTION

1. This ruling is in respect of the Ex-parte Applicant's application dated 29<sup>th</sup> May 2020 seeking the following orders:

a. Spent

b. **THAT** pending hearing and determination of the Appeal there be an Order of stay of any transactions, dealings, sale, transfer or evictions on parcel **CENTRAL KITUTU/MWAMANWA/2227, 2228, 2229, 2230, 2231, 2232, 2233, 3404, 3429,3448, 3449 AND 3450.**

c. **THAT** in the alternative, pending hearing and determination of the Appeal there be an Order that the status quo be maintained in respect of parcels **CENTRAL KITUTU/MWAMANWA/2227, 2228, 2229, 2230, 2231, 2232, 2233, 3404, 3429,3448, 3449 AND 3450.**

d. **THAT** costs of this application do abide the Appeal.

2. On 20.12.2019 the Ex parte Applicants filed a Judicial Review application seeking *inter alia* orders of mandamus and prohibition prohibiting the Land Registrar Kisii County from carrying out any transactions dealings, or transfers on L.R NO CENTRALKITUTU/MWAMANWA/2037, 2038,2039,2040. They further sought an order of prohibition prohibiting the District Land Registrar and District Surveyor Kisii County from using two different maps being CENTRAL KITUTU/MWAMANWA sheet 5 and 7 over the same parcel of land title Nos. CENTRAL KITUTU/MWAMANWA/2037, 2038, 2039 and 2040 as sub-divisions of the original number CENTRAL KITUTU/MWAMANWA/558 and CENTRAL KITUTU/MWAMANWA/ 2227, 2228, 2229, 2230, 2231, 2232, 2233, 3404, 3419, 3448, 3449 and 3450 as sub-divisions of the original number CENTRAL KITUTU/MWAMANWA/557 thus resulting into different titles over the same parcel of land.

3. The 2<sup>nd</sup> Interested Party filed a Preliminary Objection citing several grounds one of which was that the suit was res judicata as the issues raised in the Judicial Review proceedings were heard and determined in Kisii E.L.C Case No. 120 of 2004 vide a judgment delivered on 17<sup>th</sup> June 2010 and a ruling delivered on 14<sup>th</sup> November 2014, where the court declared that Land Parcel No. CENTRALKITUTU/MWAMANWA/557 does not exist.

4. On 10<sup>th</sup> March 2020, this court delivered its ruling on the Preliminary Objection striking out the application for Judicial Review.

The Ex-parte Applicants filed a Notice of appeal against the said ruling and it is against this background that they now seek the orders of stay pending appeal.

5. The application is opposed by the Respondents through the Replying Affidavit of Elijah Nyangami Gai sworn on the 24<sup>th</sup> June 2020 in which he deposes that even before the suit was struck out, the parcels of land referred to in the pleadings had been cancelled by the Land

Registrar based on previous court decisions. He deposes further that once a matter has been struck out, the court becomes functus officio and litigation must come to an end. He contends that the Applicant has not met the conditions for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. He adds that Land Parcel No. CENTRAL KITUTU/MWAMANWA/2037 has since been sold and there is therefore nothing to stay and the application is merely intended to frustrate the 2<sup>nd</sup> Interested Party.

6. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

The central issue for determination is whether the court can stay execution in respect of a suit that has been struck out.

#### **ANALYSIS AND DETERMINATION**

7. It is not in dispute that the Applicant's suit for Judicial Review was struck out by this court's ruling dated 10<sup>th</sup> March 2020. Striking out is a negative order which does not require any of the parties to do or refrain from doing anything and is thus incapable of execution.

8. While considering a similar application in **Milcah Jeruto T/A Milcah Faith Enterprises v Fina Bank Limited & Another** the court relied on **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No NAI 79 of 2007 (unreported)** cited in the **Re Sonalux** case where the Court of Appeal had this to say:-

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”

9. The court further observes as follows:

“To further emphasize the point in the **Re Sonalux** case, the Court of Appeal stated that in the matter that was before it, Kasango J in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money.

Undoubtedly, the Plaintiff strongly feels that she has an arguable appeal at the Court of Appeal. I am, however, alive to the fact that this court cannot sit on an appeal in a matter that has been handled by a court of similar and competent jurisdiction and give the same orders that such a court had refused to grant and more so when the law does not provide that the same can be granted.

A close scrutiny of the Civil Procedure Rules 2010 does not reveal any provision that would allow this superior court to grant stay orders emanating from the dismissal of an application that had sought injunctive order in the same court. Order 42 Rule 6 of the Civil Procedure Rules 2010 under which the Plaintiff's application reads as follows:-

“ **No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or an order appealed from... the court appealed from may for sufficient cause order stay of execution of such decree or order...**”

10. Similarly, in the case of **National Cereals & Produce Board versus Errad Suppliers & General Contractors Limited, Nairobi civil Application No. Nai 48 of 2012 (UR) 33 of 2012**, the court held that no stay order is capable of being issued by a Court of law against a negative order (such as a dismissal or a striking out order).

11. In view of the foregoing, I find no merit in the application and I hereby dismiss it with costs to the Respondents.

**Dated, signed and delivered this 3<sup>rd</sup> day of December, 2020.**

**J.M ONYANGO**

**JUDGE**