



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

JUDICIAL REVIEW APPLICATION NO. 31 OF 2016

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

AND

IN THE MATTER OF AN APPEAL TO THE MINISTER IN LAND APPEAL CASE NO. 35 OF 1989 MARINGA MURANGA (DECEASED) REPRESENTED BY DOMINIC MIKE KAMINJA AGAINST NGIRI IKUA REPRESENTED BY AGOSTINO NDARU MUITANJAU

AND

IN THE MATTER OF OBJECTION NO. 430 OF 1980 MARINGA MURANGA (DECEASED) AGAINST NGIRI IKUA

AND IN THE MATTER OF MAVURIA LAND ADJUDICATION SECTION

NGIRI IKUA (REPRESENTED BY AGOSTINO NDARU MUITANJAU.....)APPLICANT

VERSUS

MINISTER FOR LANDS.....RESPONDENT

DOMINIC MIKE KAMINJA.....1ST INTERESTED PARTY

THE LAND REGISTRAR MBEERE DISTRICT.....2ND INTERESTED PARTY

RULING

1. By a notice of motion dated 14th June 2018 brought under the provisions of **Articles 23 (3) (b) & (c), 48, 50 (1) and 159 (2) (a) of the Constitution of Kenya, 2010, section 13 (7) (a) of the Environment and Land Court Act, 2011; sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (Cap 21) Order 22 Rule 25; Order 40 Rule 6; Order 42 Rule 6(2) and Order 51 Rule 1, 3, 4, 8 & 13 (2) of the Civil Procedure Rules, the doctrine of *lis pendens* and all other enabling provisions of the law**, the 1st interested party sought a stay of execution of the orders or decree made on 23rd April 2013 pending the hearing and determination of a pending appeal in the Court of Appeal.
2. The said application was based upon the several grounds set out on the face of the motion. It was contended that this court had vide its ruling dated 28th June 2017 declined to set aside the High Court orders of 17th April 2013 in consequence whereof the 1st interested party lodged the said appeal. It was also contended that the said appeal had high chances of success and that the application had been filed without undue delay.
3. The application was supported by an affidavit sworn by the 1st interested party on 14th June 2018 in which he reiterated and expounded upon the grounds set out in the motion. It was contended that the *ex-parte* Applicant had commenced execution of the order dated 17th April 2013 and that such execution would cause his clan irreparable loss as the land in dispute may not be recoverable.
4. The only party who filed a response to the application was the *ex-parte* Applicant who filed a replying affidavit sworn on 3rd September 2018 in opposition to the said application. It was contended that the instant application for stay was an abuse of the court process since the 1st interested party should have filed it before the Court of Appeal where his appeal was pending. It was also contended that the application had not been filed without unreasonable delay.
5. When the said application was listed for hearing on 15th October 2018, it was directed that the same be canvassed through written submissions. The parties were consequently granted 60 days within which to file and exchange their respective submissions. By the time of

preparation of the ruling, however, none of the parties had filed submissions.

6. The court has considered the 1st interested party's said application and the *ex-parte* Applicant's response in opposition thereto. The court has also perused the order dated 17th April 2013 whose stay was sought. By the said orders the High Court (Ong'udi J) allowed the *ex-parte* Applicant's application for judicial review in the following terms;

- a. That an order of *certiorari* be issued bringing into this court and quashing the decision of the Respondent dated 30th August 2011 in Appeal No. 35 of 1989.
- b. That an order of *certiorari* be issued bringing into this court and quashing the decision of the Respondent dated 30th August 2011 in Appeal No. 35 of 1989 depriving the Applicant of his property without a reasonable cause.
- c. That an order of *prohibition*, prohibiting the Land Registrar Mbeere District from registering the disputed portion of land to wit; 363, 380, 381, 410, 379, 382, 383, 378, 377 and 364 to the interested party herein.
- d. That each party to bear his own costs.

7. It is thus evident that the High Court granted an order of *certiorari* quashing a certain decision of the Respondent dated 30th August 2011 in the Minister's Appeal Case No. 35 of 1989. The High Court also granted an order of *prohibition* preventing the Land Registrar Mbeere from registering certain portions of land in the name of the 1st interested party.

8. The nature and purpose of the prerogative orders of *certiorari* and *prohibition* were extensively discussed by the Court of Appeal in the case of **Republic Vs Kenya National Examinations Council ex-parte Geoffrey Gathenji Njoroge & Others [1997] eKLR**. There is no dispute that those orders were granted on 17th April 2013 which is nearly six (6) years ago. So, if the decision of the Respondent was quashed in 2013 what useful purpose would be served by an order of stay? If the decision dated 30th August 2011 was quashed in 2013, what is there to be stayed? Those are the issues which were never addressed by the 1st interested party either in his application or written submissions.

9. The order of *prohibition* prohibited the Land Registrar Mbeere from registering the disputed parcels in the name of the 1st interested party. So, what would be the effect of "staying" such an order? Would it mean that the 1st interested party should now be registered as proprietor of those parcels? And why would he want to be so registered pending the hearing and determination of his appeal? It is not clear why the 1st interested party cannot wait for determination of his appeal so that he may be registered as proprietor if the appeal succeeds.

10. Assuming that it were possible to stay those prerogative orders the court is far from satisfied that the 1st interested party has demonstrated a case for the grant of a stay. The 1st interested party has not demonstrated what substantial loss, if any, he or his clan may suffer unless the stay is granted. It has also not been demonstrated that the pending appeal, if successful, may be rendered nugatory.

11. The court has also observed that the application for stay was not filed without unreasonable delay. The record shows that the 1st interested party was aware of the orders of 17th April 2013 as far back as the 4th February 2016 when he filed his notice of motion seeking setting aside of those orders in the first instance. That application was determined vide a ruling dated 28th June 2017. The interested party did not move the court for a stay until 14th June 2018 which is nearly one year later.

12. The court does not accept as a valid explanation for the delay the fact that the 1st interested party was undergoing routine medical treatment. The bundle of medical records he exhibited only showed that he was admitted at Consolata Hospital in Kyeni for two days i.e. between 1st and 3rd November 2017. It was not demonstrated how routine medical attention could have prevented him from giving instructions to his advocate to file an application for stay pending appeal.

13. The upshot of the foregoing is that the court finds no merit whatsoever in the 1st interested party's notice of motion dated 14th June 2018. Accordingly, the same is hereby dismissed with costs to the *ex-parte* Applicant.

14. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **13TH** day of **MARCH 2019**.

In the presence of Ms. Kung'u holding brief for Mr. Kamunda for the Ex parte Applicant, Ms. Kiai holding brief for Mr. Gachuba for the 1st Interested Party and in the absence of the AG for the Respondent and the 2nd Interested Party.

Court clerk: Muinde

Y.M. ANGIMA

JUDGE

13/3/2019