

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ELC CASE NO. 266 OF 2017 (O.S)**

**DINA MATINDE NYAISARA.....INTERESTED**  
**PARTY/APPLICANT**

**-VERSUS-**

**CELLAH ONSINGI .....**  
**APPLICANT/RESPONDENT**  
**MAGABE MWITA NGWEINA.....**  
**RESPONDENT**

**RULING**

1. By Notice of Motion dated 20<sup>th</sup> February, 2023, the Respondent/Applicant sought for the following orders: -

**a) Spent.**

**b) This Honourable Court be pleased to grant an Order of Stay of Execution of the Decree/ Judgment herein together with all the consequential orders therefrom dated 7<sup>th</sup> June 2022 pending the hearing and determination of this Application.**

**c) This Honourable Court be pleased to review the Decree herein and vacate the Judgment and allow the interested Party to adduce material evidence which was not adduced due to an error.**

**d) Costs of this application be provided for.**

2. The application is premised on the 8 grounds on its face and on the Applicant's Supporting Affidavit sworn on 20<sup>th</sup> February 2023, and further supported with annexures marked "DMN 1-5".

3. The applicant contends that the title to the suit land has been deposited as security for bond in Kehancha SRMC criminal case No. 987 of 2010 in which the court ordered forfeiture of the title upon

the disappearance of the accused person and consequently, the Interested Party, became the successful bidder who became the registered owner of the land

4. That despite the Interested Party having supplied all such evidence relating to the said land to her counsel, the Interested Parties case was closed without calling any witness and/or producing any evidence.
5. The Applicant further contends that the forfeiture of the suit land to the state and the subsequent sale by the state overrides the claim of adverse possession as the same cannot operate against the state.
6. The Applicant contends that it shall serve the interests of justice if the Interested Party is allowed to present this material evidence to the court.
7. The application was served on the Respondents but they did not file any response to the same.
8. It is my considered opinion that the sole issue arising for determination includes;
  - i. *Whether an Order for Stay of Execution can issue against the judgment and decree dated 7/06/2022*
  - ii. *Whether the judgement dated 7th June 2022 is to be set aside and or varied.*
9. The principles guiding the grant of an Order for Stay of Execution are provided under Order 42 6(2) which states as follows: -
  - (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. (emphasis mine.)

10. The first element to be proved is whether substantial loss may result to the Applicant unless an order for stay of execution is granted. Substantial loss was explained in **Kenya Shell Limited vs Kibiru [1986] KLR 410**, where it was held as follows: -

***“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other events. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money....”***

(See also **Silverstein vs Chesoni [2002] 1 KLR 867**)

11. An Applicant seeking an order for stay of execution is duty bound to demonstrate the loss he is likely to suffer in the event that the same is not granted and give sufficient cause to enable the court exercise its discretion in his favor. The Applicant herein contends that they purchase the suit land through an auction and they stand to suffer irreparable loss and risk being rendered homeless and destitute if they are not allowed to participate in this case.

12. I have referred to the judgment of this court and I note that this court had entered judgment without the Interested Party being heard. It is trite law that no party shall be condemned unheard a fact that goes to the root of the administration of justice and from the foregoing. I therefore find that the Applicant has sufficiently demonstrated the substantial loss that he is likely to suffer.

13. In view of the foregoing; I find that the Applicant has sufficiently proved all the grounds as provided under Order 42 Rule 6(2) above, to the required threshold and is therefore entitled to the reliefs sought.

### **CONCLUSION**

14. In the upshot, I accordingly find that the Application dated 20<sup>th</sup> February, 2023 is **merited** and I proceed to allow the same on the following terms: -

- a) An Order for Stay of Execution of the Decree and Judgment dated 7<sup>th</sup> June 2022 together with all consequential orders arising therefrom.**
- b) THAT the judgment of this court dated 7<sup>th</sup> June 2022 be and is hereby set aside and the matter be heard afresh with the full participation of the Interested Party.**
- c) Each party shall bear their own costs.**

**DATED, SIGNED and DELIVERED** virtually at **NAIROBI** on this **31<sup>ST</sup> day** of **OCTOBER, 2025.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of: -**

..... for the Plaintiff/ Applicant

..... for the 1<sup>st</sup> and

Philomena Court Assistant