



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC PETITION NO. 28 OF 2013**

**M'MUGAINE M'NAINGABU.....PETITIONER**

**VERSUS**

**KARUTA MBERIA.....1<sup>ST</sup> RESPONDENT**

**FRIDA KAMBANJA MBERIA.....2<sup>ND</sup> RESPONDENT**

**THE LAND ADJUDICATION OFFICER**

**TIGANIA EAST/WEST DISTRICT.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Notice of Motion dated **24<sup>th</sup> September, 2018** which has been filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents seek the following orders:
  - (a) **That this application be certified as urgent and the same be heard urgently.**
  - (b) **That there be a stay of execution of the judgment delivered on 29/8/2018, pending the hearing and determination of the intended appeal to the court of appeal.**
  - (c) **Costs be provided for.**
2. The application cites no law under which it has been brought but it is premised on the grounds on the face of the motion and supported by the affidavit of Karuta Mberia sworn on **24<sup>th</sup> September, 2018**. In that affidavit it is deponed that a notice of appeal has been filed; that the petitioner has never used, farmed, entered occupied or dealt in any manner whatsoever with the land parcels **1417** and **3241**; that the said land parcels have been the property of the 1<sup>st</sup> and 2<sup>nd</sup> applicants for over **20** years; that the intended appeal will be based on the fact that the petitioner's **Objection No. 649** against parcel number **1417 Kitharene Adjudication Section** was heard and dismissed on **21/4/1998**, which proceedings the trial court never considered, and the results entered into the necessary adjudication records; that there is no provision for a second hearing; that there are therefore serious issues to be settled at the appeal level and certified copies of the proceedings and judgement have been requested.
3. The petitioner filed grounds of opposition dated **22<sup>nd</sup> October, 2018** which state that the application before me does not satisfy the threshold set out in **Order 42 Rule 6** of the **Civil Procedure Rules 2010** and therefore lacks merit.
4. The applicants filed their submissions on **8<sup>th</sup> January, 2019**. I have perused the court record and found no submissions filed on behalf of the petitioner in respect of the instant application as at the time of the writing of this ruling.
5. **Order 42 rule 6(2)** of **Civil Procedure Rules** provides 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.”*

6. Before the court delves into any other issue in an application of this nature the court must first make an inquiry as to whether the application has been brought without unreasonable delay.
7. The judgment in this suit was delivered on **29<sup>th</sup> August 2018** and the instant application was filed on **24/9/2018**. That is a period of less than one month. In my view that period does not amount to unreasonable delay.
8. Next, an examination of the issue as to whether an appeal has been filed is necessary. I have examined the record and I am satisfied that there is an appeal in place. A valid notice of appeal is in practice considered to be an appeal for the purpose of an application for stay of execution. That is the import of **Rule 42 (4)** of the **Court of Appeal** rules.
9. The next stop is an inquiry as to whether the applicant may suffer substantial loss. In my view the supporting affidavit does not specify any potential loss. It merely alleges that the land has been in the hands of the applicants for over **20** years. On this issue the application should fail.
10. Lastly, there is no offer of security from the applicants. Considering that they would, perchance their application were allowed, continue to be in possession of the suit land while the applicant who currently holds a decree in his favour was kept from enjoying the fruits of the decree that he holds. Without any offer of security this court would not find such an application meritorious. Of course the court may order security to be deposited but the willingness by the applicants is normally a starting point in that direction, and is expressed in the application.
11. In this case, even if this court were consider the issue of security favourable and impose it upon the applicants, it has already found that there is no proof of potential loss to be sustained by the applicants in the event the orders sought were not issued.
12. I consider that all the conditions set out in **Order 42 rule 6(2)** of Civil Procedure Rules must exist at the same time in order for the applicant to qualify for a stay of execution order. Where one of them, has not been satisfied, and in this case the applicants have failed to establish two, then the stay of execution orders may not be granted.
13. In the final analysis I find that the application has no merit and the same is dismissed with costs to the respondent.

**Dated, signed and delivered at Meru this 1<sup>st</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**