



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

JUDICIAL REVIEW NO. 5 OF 2017

**IN THE MATTER OF: JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI BY WILLIAM KIBERA
WAIGANJO**

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE LAND COMMISSION ACT

AND

IN THE MATTER OF: LR. NO.RUIRU/RUIRU EAST BLOCK 2/97 AND 98

BETWEEN

WILLIAM KIBERA WAIGANJO.....APPLICANT

(Suing as Legal Representative and

Guardian of Leah Wachu Waiganjo)

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

NJERI MUCHANGIRU..... INTERESTED PARTY

RULING

The matter for determination is the application dated **12th October 2017**, by the Applicant herein brought under Section 5(1) of the Judicature Act, Cap 8 Laws of Kenya, and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking for the following orders;

1. That the decision of the Respondent herein vide gazette notice dated 17th July 2017 at page 4277 that land parcel No.Ruiru/Ruiru East Block 2/97 & 98 lawfully belongs to the interested party, Njeri Muchangiru be stayed, pending the hearing of the Judicial Review proceedings.

2. The costs of this Application be provided for.

The Application is premised on the grounds stated on the face of the application being that;- the Court issued an order against the Respondents on the **3rd April 2017**, staying any further proceedings by the Respondents touching on the suit property and despite being served with the said order, the Respondents have failed to obey it.

In his **Supporting Affidavit**, the Applicant averred that he is the Legal Representative and guardian of **Leah Wachu Waiganjo**, the registered and lawful owner of the suit property. He averred that on the **3rd of April 2017**, the Court issued an order staying any further action by the **National Land Commission(NLC)** and from continuing to hear the matter pending the Judicial Review proceedings as evidenced by annexure B. However, the Respondent has failed to obey the order and went ahead and gazetted the **revocation** of title of the suit property and allocated it to the interested party as evidenced by **annexture E**. He further averred that he has been advised by his Advocates on record that failure to obey clear Court Order has undermined the authority and dignity of the Court and it is in the interest of Justice that the remedies sought be granted to protect and guarantee his fundamental rights in law and equity.

The Application is opposed and the Interested Party filed a **Replying Affidavit** sworn on **11th May 2018**, and averred that the title referred to by the Applicant was declared a forgery in Judgment dated **31st January 2003**, by **Hon. C.O Kanyangi, SPM in Thika Criminal Case No. 162 of 2002**, and that the order dated **4th April 2017**, has been overtaken by events as the same was served on the Respondent after it had completed hearing of the proceedings and made a determination in respect of the suit property and that the order was only enforceable till the Applicant had filed a substantive application.

She further alleged that the Applicant has come to court with unclean hands and urged the Court to affirm the Respondent's decision that the suit property is hers and allow her proceed to process a title document to the property.

The Respondent also in opposing the Application relied on the **Replying Affidavit** sworn on **8th September 2017**, by its **Director of Legal Affairs and Enforcement**, one **Brian Ikol**. He averred that the Commission received a complaint by the Interested Party and both the Applicant and the interested party claimed to be legal owners of the suit property purportedly allocated to them by **Nyakinyua Investment Limited**. He further alleged that both parties were requested to submit to the Review proceedings of the Commission, documentations in support of their claim and though there was a Court case between the parties, they submitted themselves to the jurisdiction of the Review Committee and the proceedings before the Commission had not been stayed by any Court orders before the Applicant was granted leave to file a Judicial Review application and they operate as stay.

He also averred that by then the Hearings before the commission

had been concluded and determination of the Commission was pending.

The Application was canvassed by way of written submissions which this Court has now read and carefully considered. The Court finds that the only issue for determination is **whether the Applicant is entitled to the Order of Stay against the Order of the Respondent pending the hearing and determination of the Judicial Review** application.

The Applicant has also applied or sought for committal to civil jail for contempt of the **Chairman of National Land Commission, Prof. Mohammed Swazuri**. This has been captured in the Application and submissions. However the Applicant on the **12th March 2018**, withdrew the said prayer and the Respondent withdrew their Preliminary Objection on the said date so that the Court is only left with the prayer for stay of the decision of **National Land Commission** for determination.

It is the Court's opinion that the only issue for determination herein is whether the Court should grant stay of the decision of the Respondent herein. The Court had initially granted the Applicant **Leave** to apply for **Judicial Review** and further stated that the said **Leave** should operate as stay. The said Order was made on **3rd April 2017** and served upon the Respondent. It is clear that the Order was served before the decision by the Commission was made and therefore whether or not the parties had subjected themselves to the jurisdiction of the Review Committee, the further decision after the order was served on the Commission and the subsequent gazettelement were illegal and therefore **void ab initio**.

The grant of direction that Leave operate as stay is an exercise of judicial discretion which must be based on the prevailing circumstances. It may be granted at any stage of the proceedings.

The Courts have held that in deciding on whether or not to grant a stay of the decision sought to be quashed, the Court ought to look at whether the decision sought to be quashed has been implemented or whether it is in the course of implementation. If the Court finds that the decision has already been implemented, then there would be nothing to stay. But if the decision is in the course of being implemented then the court is at liberty to grant Stay Order sought.

In this instant case the Interested party has averred in her **Replying Affidavit** that she is yet to be registered as the owner, The Respondent though in contravention of a clear Court Order went ahead and gazetted the Interested Party as the owner of the suit property. This is just a first process, as the interested party is yet to be registered as the proprietor of the suit property and it would be safe to say that the decision is still in the Course of implementation and therefore it can be stayed. See the case of **R (H)...Vs...Ashworth Special Hospital Authority (2003) 1WLR 127, as cited by the Court in the case of Sun Africa Hotels Limited & Ano.... VsK.R.A & 2 others (2018) eKLR**, where it was held that:-

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”

The purpose of staying the decision is to prevent the Judicial Review proceedings not to be rendered an academic process and therefore nugatory. It is to allow the parties to come to court and present their case so that the Court can make a determination without having to prejudice the other party. The Court herein is asked to Stay the decision to gazette the Interested Party as the proprietor of the suit property, until a proper determination has been arrived at. That means the decision would be in the meantime be suspended as an injunction is not allowed as against the Government. See the case of **Taib A. Taib...Vs....The Minister for Local Government & Others, Mombasa HCMISCA. No.158 of 2006**, where **Maraga J(as he then was)** expressed himself on this factor as follows:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of The Judicial Review Jurisdiction... In judicial Review applications, the Court should always ensure that the ex parte applicant's application is

not rendered nugatory by the acts of the Respondent, during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act. A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

Applying the above principles to the present application, the Court finds it prudent to Stay the decision of the Respondent herein. This is because the decision by the Respondent has not been fully implemented and it would be in order to temporarily suspended it and this can only be done by granting Stay Order sought.

The upshot of the foregoing is that the Application dated **12th October 2017** by the Applicant is found to be merited and it is allowed entirely in terms of prayer 2 with costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 5th day of April 2019.

L. GACHERU

JUDGE

5/4/2019

In the presence of

Mr. Mungai holding brief for Mr. Kimani for Applicant

Mr. Munyua holding brief for Mr. Wambugu for Respondent

Mr. Munyua holding brief for Mr. Njeru for the Interested Party

Lucy - Court clerk

L. GACHERU

JUDGE

5/4/2019