



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC PETITION NO. 22 OF 2016**

**IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT;**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA;**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS**

**AND FREEDOMS IN ARTICLES 2, 3, 10, 19(1) & (2), 20(1) &(2), 21, 22, 23, 29, 40(1),**

**42, 43, 44, 47, 48 & 50(1) & 50(1) & (2), 69, 70, 258(1) & 259(1) OF THE**

**CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE**

**PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT NO. 33 OF 2015**

**BETWEEN**

**JAMES KIONGI MWAURA.....1<sup>ST</sup> PETITIONER**

**JEREMY KIONGI MWDAURA.....2<sup>ND</sup> PETITIONER**

**GODFREY KIONGI MWAURA.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE CABINET SECRETARY FOR**

**ENVIRONMENT AND FORESTRY.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**RULING**

Through the application dated 21/2/2019, the Petitioners seek an order of stay of execution pending hearing and determination of **Environment Land Court Civil Suit Number 16 of 2019 – James Kiongi Mwaura and 2 Others v the Cabinet Secretary for Environment and Forestry and 2 Others**. The application is made on the grounds that this court delivered a judgement in this petition on 26/3/2018 in which it held that the filing of a civil suit would be the appropriate way of seeking redress for the alleged breaches of contract

by both parties; and the court directed the Petitioners to deposit the sum of Kshs. 24,500,000/= which had been paid to them as a deposit of the purchase price by the Ministry of Environment. This sum was to be deposited in court or in an interest earning account in the joint names of the advocates for the Petitioners and the Respondents.

The Petitioners contend that that deposit which was paid to the Petitioners is at the heart of the litigation in ELC Suit No. 16 of 2019 and the court's order to the effect that this sum be deposited in an interest earning account is akin to the court rendering a determination before hearing the parties.

Further, the Petitioners contend that they have already appropriated the deposit sum of Kshs. 24,500,000/= in view of the fact that they had performed their obligation under the contract and are unable to raise this sum unless they sell the land in dispute to another buyer. The Petitioners have filed ELC Suit No. 16 of 2019 to ventilate the issue of breach of contract as directed by court. The application is supported by affidavit of Godfrey Kiongi Mwaura in which he deponed that the Petitioners stand to suffer irreparable and substantial loss and will face great difficulty in reimbursing the deposit sum which has been appropriated for other uses such as medication and school fees.

Dr. Ibrahim M. Mohammed, the Principal Secretary in the Ministry of Environment and Forestry, swore the replying affidavit in opposition to Petitioners' application. He averred that in utter disregard of the court orders and in conduct amounting to contempt of the court, the Petitioners have refused or failed to abide by the orders of the court. Further, that there was inordinate delay in filing this application. The Respondent further contended that the deposit in any land transaction is deemed to be held in trust until the finalisation of the transaction and should not be appropriated before the transfer of the title. He averred that the government stands to suffer loss if the deposit sum that was paid to the Petitioners is not secured as ordered by the court and relied on the fact that the Petitioners had conceded that they are not in a position to refund the sum. The Respondents faulted the Petitioners for partially executing the court's judgement by filing the civil suit for breach of contract but failing to comply with the part of the judgement that required them to deposit Kshs. 24,500,000/= in a joint interest earning account. The Respondents contended that the Petitioners have not provided any compelling reasons as to why execution of the judgement should be stayed.

Godfrey Kiongi Mwaura swore the further affidavit in response to the Respondents' replying affidavit in which he averred that the land in question is sufficient security in the event that the trial court determines the new suit against the Petitioners.

The Petitioners filed submissions which the court has considered together with the oral submissions made by the parties. The Petitioners submit that they have a *prima facie* case with a high probability of success and that they are likely to suffer prejudice as the suit they have filed on the breach of contract will be rendered nugatory if the orders are not granted. The Petitioners submitted that they have already appropriated the deposit of Kshs. 24,500,000/= and can only deposit the sum in court if they sell the land in dispute.

The court is of the view that the Petitioners ought to deposit the sum of Kshs. 24,500,000/= to preserve this sum which forms the substratum of the suit. In the event that the Petitioners succeed in **ELC Civil Suit Number 16 of 2019 – James Kiongi Mwaura and 2 others v the Cabinet Secretary for Environment and Forestry and 2 Others**, the funds will be released to them. If the Petitioners do not succeed in that suit, the funds will be released to the Respondents. The suit property would not be sufficient security as the Petitioners contend and they ought to have held the deposit of the purchase price until the sale transaction was concluded.

The court declines to grant the orders sought in the application dated 21/2/2019. Each party will bear its own costs.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of July 2019.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. M. Ogada for the Petitioners

Mr. O. Eredi for the Respondents

Mr. V. Owuor- Court Assistant