



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISII**

**APPEAL NO. 44 OF 2010**

**MORAA MASARE.....1<sup>ST</sup> APPELLANT**

**JEMIMAH MASARE.....2<sup>ND</sup> APPELLANT**

**BWARI MASARE.....3<sup>RD</sup> APPELLANT**

**EVANS SAMWEL MOCHACHE MASARE.....4<sup>TH</sup> APPELLANT**

**PETER MOKEBO MIENCHA.....5<sup>TH</sup> APPELLANT**

**VERSUS**

**GEOFFREY MATOKE.....RESPONDENT**

**RULING**

1. This matter has had a rather long history. It has travelled from the subordinate courts, to the High Court, to the Court of Appeal and back and it is now destined back to the Court of Appeal. Following the striking out of the appeal by the Court of Appeal, the battleground has been in the execution of this Court's Judgment awarding the Respondent 25 acres out of **Plot No. 38 Keneni Ranch** (now **Isoge/Kineni/Block I/49**).

2. On 21<sup>st</sup> June 2013, Okong'o, J. rendered a judgment on an appeal arising from a ruling of the Chief Magistrate's Court made in furtherance of an application for execution. The learned judge even though he set aside the ruling/decision of the Chief Magistrate allowed execution of the decree of the High Court to proceed albeit on terms. The Appellants filed a Notice of Appeal dated 25<sup>th</sup> June 2013 signifying their intention to appeal to the Court of Appeal against the Judgment and decree of Okong'o J. delivered on 21<sup>st</sup> June 2013 and at the same time filed an application for stay of execution dated 25<sup>th</sup> June 2013. The application for stay of execution was granted on 19<sup>th</sup> February 2014 on terms that:-

**(i) The Appellants were to deposit in Court within 30 days a sum of kshs. 500,000/= as security;**

**(ii) There was to be an inhibition, inhibiting any dealing with LR No's Isoge/Kineni/Block I/260, 161, 296, 297, 298, 299, 300 and 301 pending the hearing and determination of the intended appeal by the Appellants.**

**(ii) The status quo as concerns the Respondent's occupation of the disputed parcels of land as at the date of the ruling was to be maintained pending the hearing and determination of the intended appeal.**

**(iv) In the event of default on the part of the Appellants to deposit the sum of kshs. 500,000/= in court as security on due date, the stay granted shall stand discharged without any further reference to the Court.**

3. The court record shows that the Appellants on 13<sup>th</sup> March 2014 deposited vide receipt No. 0042756 a sum of kshs.500,000/= in compliance with the order requiring the amount to be placed as security.

4. I have given the foregoing background to contextualize the Respondent/Applicant's Notice of Motion dated 22<sup>nd</sup> March 2019 which is the subject of this ruling. The application is expressed to be brought under Section 34 of the Civil Procedure Act Cap 21 Laws of Kenya. Inter alia the application seeks the following orders:-

(1) Spent.

(2) THAT this Honourable Court be pleased to discharge, vary and/or set aside orders of stay of execution given on 19<sup>th</sup> day of February, 2014.

(3) THAT the decree in appeal given by this court on 21<sup>st</sup> day of June, 2013 be executed and enforced accordingly and the Deputy Registrar of this Court be authorized to execute all documents necessary to effect transfer of the 25 acres adjudged in favour of the Applicant.

(4) THAT this Honourable Court be pleased to award reasonable compensation to the Respondent/Applicant herein for loss and damage suffered.

(5) THAT the sum of kshs.500,000/= deposited in court as security be released to the Respondent/Applicant as part of the compensation.

(6) THAT the costs of and incidental to this application be provided for.

5. The application is premised on the grounds set out on the body of the application and on the affidavit sworn in support thereof by the Respondent/ Applicant. The main ground that the Respondent/Applicant relies upon is that the Appellants have not lodged the appeal as required under the law even though they have been furnished with the necessary court proceedings.

6. The Appellants through their advocate Joseph Mboya Oguttu filed a replying affidavit in opposition to the application. The Appellants advocate has explained that they have not been furnished with the typed proceedings to enable them to lodge the appeal. Besides, the Appellants aver the stay was to last until the intended appeal was heard and determined and was only conditioned upon the security deposit being placed.

7. I have considered the Respondent/Applicant's application and the affidavit in support and I have also considered the replying affidavit sworn in opposition to the application. It is evident that the Appellants were granted stay of execution of the decree arising from the judgment of Okongo, J. delivered on 21<sup>st</sup> June 2013. The stay of execution was on the terms and conditions set out earlier in this ruling. Primarily, the stay of execution was conditioned on the payment of a deposit of kshs. 500,000/= as security deposit; an inhibition being placed against the affected parcels of land; and the parties observing and maintaining the status quo as regards the occupancies until the intended appeal was heard and determined. It was only if the security deposit was not placed would the stay be discharged before the intended appeal was heard and determined. As the deposit for security was placed, the stay of execution had to last until the intended appeal was heard and determined and/or the appeal was otherwise dealt with.

8. The Respondent/Applicant has contended that the Appellants have not filed the record of appeal and/or have delayed in filing the appeal in spite of the proceedings being available. On their part, the Appellants have averred the copies of the proceedings have never been availed to them to enable them to prepare and file the record of appeal. While there could be unexplained delay on the part of the Appellants in preparing and filing the record of appeal, my view is that it is beyond the competency of this court to adjudicate on the issue as that would be the preserve of the Court of Appeal to determine whether to admit the appeal once it is filed.

9. When this court made its determination on the application for stay of execution, it became *functus officio* in the matter and any further dealings in regard to the matter were to be handled by the Court of Appeal. The terms/conditions set by the court while granting stay of execution were met and it follows that jurisdiction in the matter henceforth rested with the Court of Appeal.

10. Under Order 46 Rule (4) of the Civil Procedure Rules, 2010 a Notice of Appeal to the Court of Appeal is deemed to constitute an appeal and thus unless it is struck out, an appeal is deemed to be pending in the Court of Appeal notwithstanding that no Record of Appeal has been filed. Order 46 Rule (4) provides:-

**42(6)(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court Notice of Appeal has been given.**

11. In the present case, as the Respondent/Applicant contends that the Appellants are guilty of inordinate delay in lodging the appeal, perhaps his recourse ought to have been to apply under Rule 83 or 84 of the Court of Appeal Rules for appropriate orders relating to default in instituting the appeal and/or striking out the Notice of Appeal or the Appeal as the case may be.

Rule 83 and 84 of the Court of Appeal Rules provides as follows:

**83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.**

**84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.**

**Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.**

12. In the premises, it is my view that presently it is the Court of Appeal that is seized of this matter following the order of stay granted by this Court and consequently this Court lacks the jurisdiction to deal with the matter until the pending appeal is disposed of. Accordingly, I find no merit in the application by the Respondent/Applicant dated 22<sup>nd</sup> March 2019. I order the same dismissed with costs to the Appellant/ Respondents.

13. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 26<sup>TH</sup> DAY OF JULY 2019.**

**J. M. MUTUNGI**

**JUDGE**