



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC JUDICIAL REVIEW NO. 8 OF 2014

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF
MANDAMUS**

AND

IN THE MATTER OF THE ADJUDICATION ACT CAP 284 LAWS OF KENYA

AND

**IN THE MATTER OF MINISTER'S APPEAL CASE NO. 143 OF 1996, KIRIMA
ADJUDICATION SECTION**

AND

IN THE MATTER OF JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF REGISTRAR.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION AND

SETTLEMENT.....2ND RESPONDENT

THE DIRECTOR OF SURVEYS.....3RD RESPONDENT

THE DISTRICT SURVEYOR MBEERE.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

AND

NJIRU KITHUA.....EX-PARTE APPLICANT

AND

BERNARD NJAGI MUNY.....PROPOSED 1ST INTERESTED PARTY

AMBROSE NJIRU NTHIGA.....PROPOSED 2ND INTERESTED PARTY

RULING

Having obtained leave from **ONG’UDI J.** on 18th September 2012, the applicant herein **NJIRU KITHUA** filed the Substantive Notice of Motion on 2nd October 2012 seeking the main order of mandamus to compel the 1st, 2nd, 3rd and 4th respondents to discharge their statutory duty under **Section 29 of the Land Adjudication Act Chapter 284 Laws of Kenya** and specifically to implement the Minister’s decision in the Land Appeal Case No. 143 of 1996 plot No. 2244 Kirima Adjudication. The grounds of that application are not relevant for this ruling as the said Notice of Motion is yet to be canvassed and when it was last before **BWONWONGA J.** on 3rd December 2014, the Judge directed that submissions on it be filed and highlighting thereof be on 21st January 2015. Thereafter, the file was, as directed by the Judge, mentioned severally before the Deputy Registrar Embu to confirm the filing of submissions.

Meanwhile on 8th October 2015, the applicant filed a Notice of Motion citing **Article 159 of the Constitution** and sought the following orders:

- 1. That the application be certified as urgent and be heard ex-parte in the first instance.**
- 2. That BERNARD NJAGI MUNYI and AMBROSE NJIRU NYAGA be enjoined in this suit as interested parties.**
- 3. That this Honourable Court be pleased to stay implementation of Minister’s Appeal Case No. 141 of 1996 and 161 of 1996 (Kirima adjudication Section) pending the hearing of the application herein inter-parties.**
- 4. That costs of the application be provided for.**

That application which is the subject of this ruling is based on the grounds set out therein and supported by the affidavit of the applicant. The gravamen of the application is that it is equitable to enjoin the proposed interested parties since the applicants intend to apply for the stay of implementation of the awards issued by the Minister in their favour in appeal cases No. 141 of 1996 and 161 of 1996 and that the respondents are in the process of implementing the appeal cases No. 161 of 1996 and 141 of 1996 contrary to the Minister’s award.

In reply to that application, the proposed 1st interested party **BERNARD NJAGI MUNYI** filed a replying affidavit also on behalf of the 2nd interested party **AMBROSE NJIRU NTHIGA** in which he deponed, inter alia, that this application has been overtaken by events as the land parcels have already been excised and transferred to the rightful beneficiaries as per the copies of searches annexed thereto (annexture **BNM 1 – 65**).

The applicant filed a supplementary affidavit dated 5th April 2016 and paragraphs 3 and 4 thereof are important as I will reproduce the same:

3: “That it is clear from the replying affidavit sworn by the 1st interested parties (sic) that the respondents herein already implemented Minister’s appeal case No. 161 of 1996 and Minister’s appeal case No. 161 of 1996 (sic) and the original parcel of land No. MBEERE/KIRIMA/3362 has already been sub-divided into several numbers”.

4: “That the green cards in respect of the new numbers that (sic)

MBEERE/KIRIMA/4317, 4293, 4265, 4263, 4268, 4280, 4281, 4269, 4254, 4299, 4264, , 4290, 4288, 4289, 4287, 4294, 4307, 4306, 4305, 4779, 4780, 4262, 4272, 4312, 4271, 4282, 4255, 4313,

4304, 4303, 4266, 4267, 4310, 4309, 4253, 4259, 4260, 4261, 4314, 4257, 4258, 4274, 4273, 4311, 4301, 4300, 4298, 4297, 4315, 4291, 4308, 4251, 4270, 4292, 4279, 4278, 4283, 4316, 4277, 4296, 4295, 4302, 4286, 4285, 4284, 4276, and 4275 were opened on 11th July 2012 (annexed hereto and marked NK 1 is a bundle of green cards)”.

The record shows that on 16th October 2015, the applicant’s advocate **MS ROSE NJERU** appeared before the Deputy Registrar who granted prayer 2 and 3 of the said application pending hearing inter-partes. It is not clear how this Judicial Review case ended up before the Deputy Registrar who made those orders. What is clear to me however is that **BWONWONGA J.** must have downed his tools in the matter following the delivery of the judgment by the Court of Appeal in the case of **KARISA CHENGO & OTHERS VS REPUBLIC CRIMINAL APPEALS No. 44, 45 and 76 of 2014 (2015) e K.L.R** on 8th May 2015. The file was therefore placed before me on 9th December 2015 when I started sitting in Embu to handle Environment and Land cases. The application was canvassed by way of written submissions which have been filed by the firm of **ROSE NJERU & CO.** Advocates for the applicant and **RUGAITA & CO.** Advocates for the interested parties. The respondents did not file any reply to the application.

I have considered the applicant’s Notice of Motion dated 8th October 2015, the interested parties’ responses and the submissions by counsel.

It is clear to me that what is being sought in this application is a stay order pending the hearing of the main Notice of Motion. It is however not clear why such an order was not sought way back on 2nd October 2012 when the Notice of Motion was filed. It took the applicant exactly three years to file this application under certificate of urgency on 8th October 2015. Obviously by then, the damage sought to be prevented had already been done as is clear from paragraphs 7 and 8 of the replying affidavit of **BERNARD NJAGI MUNYI** the 1st interested party herein in which he has deponed that:

7: “That judgment in the above cases has already been executed”.

8: “That the said lands have since been excised and transferred to the rightful beneficiaries who are the clan members. (Annexed and marked BNM 1 - 65 are the copies of official searches)”.

That averment is confirmed by paragraphs 3 and 4 of the applicant’s own supplementary affidavit contents whereof I have already reproduced above.

No doubt a Court exercising Judicial Review jurisdiction has the power to order a stay. In **R.H.V. ASHWORTH HOSPITAL AUTHORITY (2003) WLR 127**, it was stated thus:

“The purpose of a stay in a Judicial Review Proceedings is clear. It is to suspend the proceedings that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the Judicial Review process and make it more effective. It will ensure that so far as possible, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success.

The administrative Court routinely grants stay to prevent the implementation of a decision that has been made but not yet carried out into effect or fully carried into effect”.

In **TAIB A. TAIB VS MINISTER FOR LOCAL GOVERNMENT & OTHERS H.C. MISC APPLICATION No. 158 of 2006 (MSA)**, **MARAGA J.** (as he then was) addressed that issue in the following words:

“As injunctions are not available against the Government and Public officers, a stay is a very important aspect of the Judicial Review jurisdiction. In Judicial Review application, the Court should always ensure that the ex-parte applicant’s application is not rendered nugatory by the act 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”.

As is clear from the applicant’s own affidavit, the orders sought to be stayed in the Minister’s appeal cases No. 141 of 1996 and 161 of 1996 have already been implemented. From the certificates of search annexed to the replying affidavit of the 1st interested party (annexture **BNM 1-65**), the land parcels have already been transferred to the rightful beneficiaries. Any stay orders would therefore not be efficacious and would be in vain. A stay order, it must be remembered, is similar to an injunction and as the Court of Appeal held in the case of ***ESSO KENYA LTD VS MARK MAKWATA C.A CIVIL APPEAL No. 69 of 1991*** “***an injunction cannot issue to restrain an event that has taken place***”. Clearly, this application was filed late and the orders sought ought to have been applied for as far back as September 2012 when the substantive Notice of Motion which is still pending was filed or at least soon thereafter. In the circumstances, the order of stay sought herein is not available to the applicant.

Secondly, it is instructive to note that the order of stay is completely at variance with the order sought in the substantive Notice of Motion dated 2nd October 2012. That Notice of Motion, as is now clear, seeks an order of mandamus to compel the 1st, 2nd, 3rd and 4th respondents to discharge their statutory duty under ***Section 29 of the Land Adjudication Act*** and specifically to implement the Minister’s decision in Land Appeal Case No. 143 of 1996 plot No. 2244 Kirimara adjudication. The application now before me seeks a stay of implementation of the Minister’s appeal cases No. 141 of 1996 and 161 of 1996. It is trite law that a temporary injunction, which is really what this stay order is all about, cannot be granted if it is at variance with the orders sought in the main application. That is the position in this case. The order of mandamus sought in the main Notice of Motion refers to one case while the stay orders refer to two other different cases. That would not be proper.

The up-shot of all the foregoing is that the applicant’s Notice of Motion dated 8th October 2015 is devoid of merit and is hereby dismissed with costs to the interested parties.

As the substantive Notice of Motion is still pending, I hereby direct that this matter be mentioned before Hon. **ANGIMA J.** on 30th May 2017 for directions on the Notice of Motion dated 2nd October 2012 so that it can be expedited.

It is so ordered.

JUDGE

19TH MAY, 2017

Ruling dated, delivered and signed in open Court this 19th day of May 2017

Mr. Magee for Ms Njeru for the Applicant present

Mr. Terrell for Mr. Githinji for the Respondents present.

B.N. OLAO

JUDGE

19TH MAY, 2017