



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**JUDICIAL REVIEW NO. 2 OF 2013**

**EVANS KALEKA**

**SOGOMI.....PLAINTIFF/APPLICANT**

**VERSUS**

**DISTRICT LAND REGISTRAR, UASIN GISHU.....  
DEFENDANT/RESPONDENT**

**AND**

**JOHN MWANGI NJUGUNA.....1<sup>ST</sup> INTERESTED  
PARTY**

**JAMES MUASYA MUTUNGA.....2<sup>ND</sup> INTERESTED  
PARTY**

**WENDANI SELF HELP GROUP.....3<sup>RD</sup> INTERESTED  
PARTY**

**FRANCIS KARANJA KANDA.....4<sup>TH</sup> INTERESTED  
PARTY**

**GEOFFREY NGUGI KIBE.....5<sup>TH</sup> INTERESTED  
PARTY**

**JAMES KAMAU MUCHIRI.....6<sup>TH</sup> INTERESTED  
PARTY**

**RULING**

On the 11<sup>th</sup> December, 2015, this court issued an order of *Certiorari* quashing entries number 4 and 5 in the register in respect of *Eldoret Municipality Block 21 (Kigongo)/3734* and further issued an order of *Certiorari* quashing the decision of the Land Registrar, Uasin Gishu cancelling the registration of the ex-parte-applicant as the registered proprietor of the suit property. Last but not least, the court issued an order of *Mandamus* to the Land Registrar, Uasin Gishu compelling him to reinstate the ex-parte-applicant as the registered proprietor of the suit property.

On the 8<sup>th</sup> April, 2016, the court issued an order that the 1<sup>st</sup> respondent to file and serve a replying affidavit showing the current record of the suit parcel as kept by the County Land Registrar, Uasin Gishu.

On 26.5.2016, the court issued an order to the interested party extending time within which to file a notice of appeal and that the Notice of Appeal filed on 17.3.2016 was deemed to be duly filed. The court further issued an order that there be no further dealings in respect of the suit property until the determination of the court of appeal of the envisaged appeal. The order for stay was to lapse at the expiry of 100 days but subject to the applicant's liberty to apply for further orders.

The interested party, has not filed the record of appeal in the Court of Appeal as envisaged. The interested party now comes to court with a prayer that the court be pleased to grant a further stay of execution pending appeal in this cause. That the court be pleased to extend the orders of stay granted on 17.3.2016 beyond the 100 days to such time as would be necessary to procure proceedings and judgment and prepare record of appeal sub registry. Costs of this application be provided for and be borne by the respondents in any event.

The application is based on grounds that the interested parties/applicants are aggrieved by the decision of this court in Judicial Review No. 2 of 2013 delivered on 4.12.2017 and that the interested parties/applicants sought and obtained stay of execution pending appeal of the decree of court on 17.3.2016 vide orders made on 26.5.2016. That the orders of stay of execution were meant to last for 100 days from 26.5.2016 and to last up to 6.9.2016. That the interested parties/applicants duly sought for certified copies of proceedings and judgment on 11.3.2016 and made the necessary payment for it promptly. That ever since the above steps were made, the registry has never released the proceedings and judgment that will facilitate the applicants to move further. That the applicants' lawyers and paralegal have been literally camping at the registry all this time without any success. That the time reserved to process the appeal has lapsed and there is need to extend the same and afford the appellants stay of execution of the decree sought to be appealed against. That the appellants are still keen to appeal to the court of appeal. That there is real danger that unless the application stay of execution is granted and extended, they could be evicted and displaced from their dwellings and their appeal rendered nugatory.

The application is supported by the affidavit of James Muasya Mutunga who states that the judgment was rendered without the knowledge of the interested parties. The applicants (Interested Parties) has failed to file a record of appeal due to the unavailability of the record of proceedings and judgment. He has been following up proceedings and judgment but the Registrar has been telling them to check proceedings every after two weeks. The interested party is likely to be evicted if stay of execution is not granted.

Evans Kaloka Sogomi filed a replying affidavit stating that the applicants have not been vigilant in pursuing the proceedings as the proceedings were ready typed and certified as at 4.10.2016. He further states that the letter requesting for proceedings was neither copied nor served upon their advocates. Moreover, that the applicant is guilty of inordinate delay and that the respondent is being denied the fruits of judgment. Last but not least, the respondent prays that the applicant deposits security of Kshs.4,000,000 for due performance of the decree in the joint interest earning account of the advocates on record or in the alternative in court.

Mr. Mbugua, learned advocate for the applicant submits that his client intends to appeal and has filed the notice of appeal and has applied for proceedings, however, the complete record of proceedings and judgment has not been availed despite the letter to the Deputy Registrar and numerous trips to the registry. He submits that the argument that under the Law Reform Act, Cap. 26, Laws of Kenya, section 8 and 9, once the court has made a decision under judicial review, no return can be made, is no longer tenable.

Mr. Korir, learned counsel for the respondent argues that this court has no jurisdiction under section 8 and 9 of the Law Reform Act to entertain our applicants for stay of execution of an order of Judicial Review. He argues that stay of execution pending appeal is provided for by Order 42 (6) of the Civil Procedure Rules, 2010 that do not apply to Judicial Review. Even if the application was available under Order 42(6) of the Civil Procedure Rules, 2010, the applicant should demonstrate substantial loss and should come to court without inordinate delay. He submits that the application is made 22 months (2 years) after judgment and therefore, there is inordinate delay.

I have considered the application, supporting affidavit, replying affidavit and rival submissions and do find that the first issue to be determined is whether this court has jurisdiction to entertain an application for stay of execution pending appeal under Order 42, Rule 6 of the Civil Procedure Rules, 2010. This court finds Judicial Review proceedings are special proceedings that are neither criminal nor civil in nature. It follows that section 1A, 1B, 3, 3A, 63(c) and 95 of the Civil Procedure Act, Cap. 21, Laws of Kenya do not apply to Judicial Review and by extension, Order 42, Rule 6-7 and Order 50, Rule 1 of the Civil Procedure Rules do not apply. In ***Commissioner of Lands Vs Kunste Hotel Ltd [E&L] 249***, it was held by the Court of Appeal that when dealing with an application for prerogative orders, the court is not exercising a civil jurisdiction.

Does this mean that the court can close its eyes on any likely injustice in view of the limited nature of provision on Judicial Review, prayers of ***Mandamus, Certiorari and Prohibition?*** For example, if an application for Judicial Review is dismissed for non-attendance of ex parte-applicant or proceeds in the absence of the respondent and it is found that the applicant or respondent did not attend court due to some hardship such as accident, will the court close its eyes in view of the provisions of the Law Reform Act and find that it has no jurisdiction to entertain an application for review or stay of execution. In ***Nakumatt Holdings Ltd Vs Commissioner of Value Added Tax (2011 eKLR)***, it was held that the superior court has residual power to correct its own mistake. The superior court has inherent jurisdiction to correct a mistake or to do justice especially where the law is silent.

The question is whether the court can apply its residual power in this matter and whether the court can apply its inherent power to grant the orders sought. In answer to the above question I do find that this court has inherent powers not created by any law to do justice. The injustice in the matter before me is that the applicant has not been availed the proceedings in this matter to enable him file a record of appeal. He wrote a letter requesting for the same and filed it in the registry and copied the same to the Attorney General and Bundotich Korir Advocate and has been visiting the registry to obtain the proceedings. However, the information has been that the same is not ready.

I have perused the record herein and do find that the proceedings were ready and certified on 4.10.2016 but there is no letter forwarding the same to the applicant. Though Mr. Bundotich has obtained a copy of the proceedings, he does not explain how he received the same and did not apply for the same, did not pay for the same and yet the applicant who applied for the same did not receive the proceedings. This court finds that though there is an inordinate delay, the same has been explained satisfactorily by the applicant as he did not have the proceedings.

This is not a case to be determined on substantial loss or payment of security as the provision of the Civil Procedure Rules, 2010 do not apply. I do find that this is a case for grant of stay of execution pending appeal under the courts inherent power to do justice and therefore the court grants a further stay of execution of 90 days pending the filing and serving of a record of appeal. Orders accordingly.

**Dated and delivered at Eldoret this 18<sup>th</sup> day of December, 2017.**

**A. OMBWAYO**

**JUDGE**