



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

LAND CASE NO. HCCC NO. 162 OF 2011

(FORMALLY NAIROBI H.C.C.C NO. 2173 OF 1994)

JAMES KANYITA NDERITU.....1ST PLAINTIFF

HELLEN NJERI NDERITU.....2ND PLAINTIFF

=VERSUS=

MARIOS PHILOTA GHIKAS.....1ST DEFENDANT

MOHAMMED SWALEH ATHMAN.....2ND DEFENDANT

R U L I N G

Introduction

1. On 19th December 2013, I allowed the Defendants' Application and the Interested Party's Application by setting aside the ex-parte Judgment, decree and vesting orders that had been entered by the court in favour of the Plaintiff.
2. The Plaintiff has now filed the Notice of Motion dated 13th January 2014 seeking for the following orders:

(a) That there be a stay of execution of the Orders of this Honourable court given on 19th December 2013 pending the hearing and determination of the Appeal by the Plaintiff/Applicant.

(b) THAT the status quo on the position of the title of the suit property LR NO. MN/III/2720 be maintained pending the hearing and determination of the Plaintiff's appeal or any further orders of this Honourable Court.

(c) THAT the costs of this Application be provided for in any event.

3. The Application is premised on the grounds that the Applicant being aggrieved by the Order of this Court has filed a Notice of Appeal; that due to the competing interest of several parties in this suit and other proceedings consolidated herein by virtue of the Ruling of J. B. Ojwang J, as he then was, there was an order for maintenance of status quo in respect to the suit property pending the hearing and determination of the consolidated suits and that it is in the interest of justice that an order of stay and preservation of the suit property be made to avoid any alienation pending the

- hearing of the Plaintiff's Appeal.
4. The Applicant has deponed that the Plaintiff has an arguable Appeal in view of the several legal issues raised in this matter and that the Application has been made without undue delay.
 5. On the issue of security, the Applicant has averred that that issue is not applicable in this case because it is the Plaintiff who stand to be prejudiced if the order of stay is not granted.
 6. The Defendant's advocate filed his Grounds of Opposition and averred that the Applicant has not met the principles of law for grant of stay of execution pending the hearing and determination of the appeal and that the application is frivolous, vexatious and amounts to an abuse of the process of the court.
 7. Mr. K'opera, counsel for the Applicant appeared before me on 27th February 2014 and submitted that after the Ruling of this court of 19th December 2013, there have been attempts to have the vesting orders removed from the register in respect of the suit property, whose effect would be that the property shall revert to the mother of the Defendant. Such a scenario, it was submitted, will allow the Defendant's administrator to transfer the suit property to third parties.
 8. The Defendant's counsel reiterated the averments in his Grounds of Opposition. Counsel submitted that there was no evidence that the Defendant (now deceased) has attempted to deal with the suit property.
 9. The law relating to stay of execution pending the hearing and determination of appeal is set out in order 42 Rule 6(2) of the Civil Procedure Rules. For an order of stay of execution pending appeal to issue, an Applicant has to satisfy the court that substantial loss may result to the Applicant unless the order is made and the Application must have been filed without unreasonable delay. The Applicant is also supposed to give security for the due performance of the decree or order.
 10. The effect of my orders of 19th December 2013 is to have the suit property revert back to the Defendant at an interlocutory stage. In addition to this suit, there are other suits which were consolidated with this suit by J. B. Ojwang J, as he was then, on 15th April 2011. Indeed, while consolidating the suits, the judge directed that all parties should maintain the status quo prevailing on plot number 181/III/MN until the hearing and determination of the suits.
 11. Any further dealings in the suit property will therefore compound the issue of proprietorship not only for the Plaintiff in this suit but also in respect to the parties in Mombasa HCCC NO. 315 of 1997, Mombasa HCCC No. 108 of 2008 (os), Mombasa HCCC No.137 of 2009, Mombasa HCCC No.236 of 2009, Mombasa HCCC No. 1162 of 2009, Mombasa HCCC No.4 of 2006 (os) and Malindi HCCC No. 11 of 2009.
 12. The Plaintiffs are therefore likely to lose the land which they claim to have purchased from the Defendant before the Appeal or the entire suit is heard and determined, which act will be prejudicial to the Plaintiff's interest in the suit property. The Plaintiff has therefore shown that he is likely to suffer substantial loss unless the order of stay of execution is granted.
 13. The current Application was filed on 14th January 2014, a few days after I delivered my Ruling on 19th December 2013. The Plaintiffs therefore filed the Application without unreasonable delay.
 14. Security for costs is only ordered by the court in situations where the documents before the court or from the conduct of the Applicant, it is manifestly clear that the Applicant might not satisfy the decree in the event they lose the Appeal. My Ruling of 19th December 2013 simply set aside the ex parte judgment and the vesting order. The said Ruling did not in any way declare the lawful owner of the suit property. The parties will have to go through a full trial for the court to determine the owner of the suit property. Consequently, the issue of security does not arise at this stage in view of the fact that a determination as to the lawful owner of the property has not been made by the court.
 15. In the circumstance and for the reasons I have given above, I allow the Plaintiffs' Application dated 13th January 2014 as prayed.

Dated, signed and delivered in Malindi this **11th** Day of **April, 2014**.

O. A. Angote

Judge