



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 296 OF 2016 (OS)

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CHAPTER 22

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF AN APPLICATION BY CATHOLIC DIOCESE OF

MALINDI DIOCESE OF MALINDI REGISTERED TRUSTEES WORKING

AS KIPINI ROMAN CATHOLIC CHURCH THAT IT HAS OBTAINED TITLE

TO FOUR (4) ACRES IN ALL THE PARCEL OF LAND KNOWN AS PLOT NO. 272

KIPINI CR NO. 6290 REGISTER BOOK NO. 7482 BY WAY OF ADVERSE POSSESSION

BETWEEN

CATHOLIC DIOCESE OF MALINDI REGISTERED TRUSTEES O/A

KIPINI ROMAN CATHOLIC CHURCH.....PLAINTIFF

-VERSUS-

MOHAMED BIN ALI DHIYEBI.....DEFENDANT

RULING

1. By the Notice of Motion dated 13th April 2021, Ali Mohamed Ali (*the Defendant*) prays for an order of stay of execution of the Judgment and decree dated 22nd January, 2021 pending the hearing and determination of his Appeal

2. The application which is supported by an affidavit sworn by the Defendant is premised on the grounds:

- (i) That the Judgment upheld the Plaintiff's claim while dismissing the Defendant's Counter-claim;
- (ii) That being aggrieved by the Judgment, the Defendant lodged a Notice of Appeal to the Court of Appeal against the whole of the said Judgment and Decree.
- (iii) That with the dismissal of the Defendant's Counter-claim, 4 acres of the land within the suit property may be sub-divided and registered in favour of the Plaintiff before the Appeal is heard and determined;
- (iv) The Plaintiff has extracted the decree and may proceed to execute the same at any moment from now;
- (v) That upon sub-division of the 4 acres and registration thereof in the name of the plaintiff, the substratum of the Appeal shall cease to exist;
- (vi) That the Defendant stands to suffer substantial loss unless stay is granted;
- (vii) That the application has been made without undue delay; and
- (viii) That the Defendant is ready and willing to provide reasonable security as may be directed by this Court.

3. The application is opposed by the Catholic Diocese of Malindi Registered Trustees operating as Kipini Roman Catholic Church (*the Plaintiff*). In a Replying Affidavit sworn and filed herein on its behalf on 21st May, 2021 by one of its Trustees Father Antony Mwanzia Kitema, the Plaintiff avers that it is the sole body mandated to run and operate all Catholic Churches, projects and institutions within the Diocese of Malindi.

4. The Plaintiff avers that the Defendant's application does not meet any of the requirements for the grant of an order of stay under **Order 42 of the Civil Procedure Rules** and urges that it be dismissed with costs. The Plaintiff asserts that the Defendant has not offered any security as a pre-condition in the application and hence the same is unmerited.

5. The Plaintiff further avers that the Defendant has failed to demonstrate that he will suffer any irreparable loss which cannot be compensated in the event the Appeal succeeds. The Plaintiff asserts further that the application has been overtaken by events as the decree has since been extracted and registered on the title and the process of sub-division has commenced.

6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. The Defendant herein prays for an order of stay of execution pending the hearing and determination of an Appeal arising from the Judgment of this Court rendered on 22nd January, 2021. In that respect, **Order 42 Rule 6(2) of the Civil Procedure Rules** pursuant to which the application is brought herein provides as follows:

“No order for stay of execution shall be made under sub-rule (1) unless-

(a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and

(b) Such security as the Court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant.”

8. At it were the power of the Court to grant or refuse an application for stay of execution is a discretionary one. It is apparent from the wording of **Order 42 of the Civil Procedure Rules** cited hereinabove that before the Court proceeds to exercise that discretion, it must be satisfied that substantial loss may result to the Applicant.

9. In the matter before me, the Defendant contends that since the Plaintiff has extracted the decree, there is now imminent danger that execution shall ensue and that upon registration of the 4 acres of land awarded in the name of the Plaintiff, the substratum of the Appeal shall cease to exist.

10. As was stated in **James Wangalwa & Another -vs- Agnes Naliaka Cheseto (2012) eKLR:**

“... the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. In the matter before me, there was no doubt that the Plaintiff has been in occupation of the suit property since the year 2001. The Plaintiff has since that year erected on the suit land a permanent church building for worship by its members and put up four (4) houses for use by its priests and staff.

12. The Defendant on the other hand admitted at the trial herein that ever since his father the late Mohamed Bin Ali Dhiyebi was registered as proprietor of the 64 acre parcel of land, he had not occupied the same until his death in 1982. Indeed it was his evidence that even after he was issued with a Grant of Letters of Administration for the Estate of his father in 2006, he had not known the location and boundaries of the suit property. He went on to concede that other than the Kipini Catholic Church, there were other squatters on the land which they have never used since its acquisition.

13. In the circumstances, it did not look to me like the Plaintiff has any intention of disposing off the land to third parties. The Defendant has not made any mention of any attempt by the Plaintiff to use the premises other than its current use as Church premises and I am not persuaded that any loss may occur which may not be compensated by an award of damages.

14. Dealing with a similar scenario in **Richard Nyongesa Mayamba -vs- Jane Namono Meru (2021) eKLR**, Olao J observed as follows:

“The Plaintiff must go further and show what loss he will suffer and that it will indeed be substantial loss; This Court has already found that it is the Defendant and not the Plaintiff, who has always been in occupation and possession of the suit land. There is nothing to suggest that the Defendant intends to dispose of the suit property once it is registered in her names in compliance with this Judgment.”

15. Similarly in the matter before are, the Plaintiff Church has been in occupation of the portion measuring 4 acres of the suit property for about 21 years now. The Defendant/Applicant has never occupied the land and he has not mentioned in his application how that prevailing situation is likely to change merely because the Plaintiff stands to be registered as the owner of the 4 acres.

16. In the circumstances herein, I am not persuaded that the Defendant stands to suffer any prejudice if the orders of stay are not granted.

17. It was also apparent to me that while the impugned Judgment was rendered on 22nd January, 2021 in the presence of the Advocates for both parties, the present application was not filed until the 13th day of April, 2021. That is almost 3 months after the delivery of Judgment. No explanation has been given whatsoever as to why the Defendant waited for 3 months until after the decree was extracted and execution commenced before instituting this application. The application was certainly not filed timeously as envisaged under the Rules.

18. The upshot is that the application does not meet the conditions for the grant of the discretionary powers of stay. It is dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 17TH DAY OF MARCH, 2022

In the presence of:

Ms Thuku for the Plaintiff/Respondent

No appearance for Mr. Shujan for the Defendant/Applicant

Court assistant - Kendi

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J. O. OLOLA

JUDGE