



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AD LAND COURT AT NAIROBI

CIVIL SUIT NO. 167 OF 2007

**WESTEND BUTCHERY LIMITED.....
.....PLAINTIFF**

VERSUS

**ARTHI HIGHWAY DEVELOPERS LIMITED
....1ST DEFENDANT**

**SOLOMON MWINZI MWAU.....2ND
DEFENDANT**

**JOHN MICHENI MUSA.....3RD
DEFENDANT**

**ATTORNEY GENERAL.....4TH
DEFENDANT**

**KENYA MEDICAL ASSOCIATION COOPERATIVE SOCIETY LTD.....
.....5TH DEFENDANT**

**YAMIN CONSTRUCTION CO. LTD.....
....6TH DEFENDANT**

**GACHONI ENTERPRISES LTD.....7TH
DEFENDANT**

RULING

The 1st Defendant herein has made an application in a Notice of Motion dated 1st February 2013, seeking orders that the execution of the judgment delivered herein on 20th December 2012 be stayed pending the lodging, hearing and determination of its intended Appeal. The 1st Defendant’s Director, Franklin Kamau Kamathi elaborated on the grounds for the application in a supporting affidavit sworn on the same date. The principal grounds are that the 1st Defendant is aggrieved by this Court’s judgment and has since filed a Notice of Appeal against the whole judgment and decree, and that unless the order sought is granted their intended appeal will be rendered nugatory if the Plaintiff executes the decree. Further, that as the subject matter of this suit is land that is still available, the Plaintiff will not be prejudiced by the orders sought.

The 1st Defendant alleges that it will suffer enormous losses as the said judgment declared its transfer, proprietorship and subdivision of the suit property known as LR 7149/10 unlawful and reinstated it back to the Plaintiffs, and as it was condemned to pay costs to the Plaintiff, 5th, 6th and 7th Defendants, and to indemnify the 5th and 6th Defendants of the damage they suffered.

The Plaintiff opposed the 1st Defendant's application in a replying affidavit sworn by its director, Mohamed Asif on 13th February 2013. The deponent gave a detailed account of the proceedings herein and findings of the court in its judgment. He averred that an order for stay of execution of the judgment of 20th December 2012 would amount to perpetuating the fraud committed by the 1st Defendant, and continue to deny the Plaintiff the use and possession of the suit property which it has been denied since 2004. The Plaintiff also stated that the 1st Defendant having sold and relinquished all titles to the suit property to amongst others the 5th, 6th and 7th Defendants, it cannot allege that it will suffer any loss of title.

The 7th Defendant also filed grounds of opposition to the 1st Defendant's application on the grounds that the 1st Defendant was not deserving of an equitable relief as it had not come to court with clean hands, having fraudulently received money from innocent purchasers on the pretext that they owned the suit property. Further, that despite numerous reminders and court orders, the 1st Defendant had refused to refund the 7th Defendant Kshs 5,500,000/= paid to it in February 2010.

In the course of hearing the 1st Defendant's application, the 1st Defendant filed a supplementary affidavit sworn on 26th February 2013 by its director, Franklin Kamau Kamathi, wherein it was alleged that it had new evidence which seems to give credence to their reservations that the title held by the Plaintiff was a forgery, since the Plaintiff had now published in the Kenya Gazette a Notice No. 2246 on 22nd February 2013 claiming that the Certificate of Title is lost, yet the same was available during trial. He attached a copy of the said Gazette Notice.

The Plaintiff's Director Mohammed Akram Khan in a Further Affidavit sworn on 22nd March 2013 in Reply to the 1st Defendant's Supplementary Affidavit denied that the Plaintiff had made any application to the Lands Registry requesting for a provisional title, and stated that the original title to the suit property was still in their custody in a bank safe and was not lost. Further, that the publication in the Kenya Gazette was done fraudulently and unlawfully, and he attached a letter to the Principal Registrar of Titles dated 7th March 2013 requesting that the said publication be investigated.

The court thereupon upon application by the Plaintiff, summoned the Registrar of Titles who was purported to have issued the said Gazette Notice to give evidence in court. Upon examination by both the Plaintiff's and 1st Defendant's advocates, the said Registrar of Titles, Ms. C.N. Kituyi, stated that she left the Registration Unit in the Lands Registry in April 2011 and moved to the Stamp Duty Unit, and that she had not issued any Gazette Notice since April 2011. Further, that she had not sent any Gazette Notice to the Government Printers on 22nd February 2013, and stated that the said Gazette Notice was probably fraudulent and a nullity, and was being investigated.

The parties were subsequently directed to file written submissions. The 1st Defendant's counsel in his submissions dated 26th February 2013 argued that the 1st Defendant had fulfilled the conditions stated in Order 42 Rule 6 of the Civil Procedure Rules as firstly it had made its application without delay, and relied on the decision in **Milton Njuki vs Edward Ileri Mugo (2005) e KLR** in this respect. Further, that in a disputed land case, the land itself was enough security, and counsel relied on the Court of Appeal decision in **Kalonde Mbusya v Martin Kimwele Kikoi and 10 Others (2005) e KLR** in this respect.

The Plaintiff's counsel filed submissions dated 3rd April 2013. He argued, relying on the decision in **Mukuma vs Abuoga (1988) KLR 645**, that the conditions in Order 42 Rule 6 of the Civil Procedure Rules are not severable, and the absence of any one of the conditions would have the effect of disentitling

an applicant to the court's discretion. The counsel in this respect argued that the 1st Defendant has suffered no substantial loss as he has sold and parted possession with the suit property, and has received over Kshs 300 million being the proceeds of the sale of subdivisions of the suit property. However, that the Plaintiff on the other hand continues to be denied the use and enjoyment of its property.

The counsel further argued that the court delivered its judgment on 20th December 2012, yet the 1st Defendant waited until February 2013 to lodge a formal application for stay of execution. Lastly, it was argued that the requirement to furnish security under Order 42 Rule 6 of the Civil Procedure Rules is not optional, and that the 1st Defendant cannot offer the suit property as security as the judgment makes it clear the suit property belongs to the Plaintiff.

The main issue to be decided in the Notice of Motion before the court is whether the 1st Defendant has met the conditions for stay of execution pending appeal. The applicable provisions are Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provide as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

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

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

Upon perusal of the court record, the court finds that the 1st Defendant did make an oral application for stay of execution pending the filing of a formal application immediately after delivery of the judgement herein on 20th December 2012, and interim orders were granted which have been extended since then. He is therefore cannot be said to be guilty of delay in making the application.

On the other applicable conditions for stay of execution pending appeal, the 1st Defendant argues that it stands to suffer substantial loss in terms of the loss of title to the suit property, and payment of indemnity to the 5th and 6th Defendants. The 1st Defendant further argues that the land that is the subject matter of this suit is sufficient security as it is still in existence. It is the finding of this court that while it is indeed the position that the 1st Defendant may suffer substantial financial loss in terms of the indemnity costs it will incur, this court has already found in its judgment that the land that is the subject matter of this suit was fraudulently subdivided, sold and transferred by the 1st Defendant to the 5th, 6th and 7th Defendants. Further, that the proprietorship of the said land should revert back to the Plaintiff. The said land is therefore no longer in the 1st Defendant's proprietorship or possession, and the 1st Defendant cannot therefore offer it as security.

The Court also notes that the payments received by the 1st Defendant upon the sale and transfer of the suit property were Kshs 117,520,000/= from the 5th Defendant, Kshs 60,000,000/= from the 6th Defendant and a deposit of Kshs 5,500,000/= from the 7th Defendant. The least security that the 1st Defendant could therefore have offered in the circumstances of this case, is the amount it received as proceeds of the sale of the suit property. I agree with the arguments by the Plaintiff's counsel that provision of security is mandatory under Order 42 Rule 6 of the Civil Procedure Rules, and that all the conditions stated in the

said order must be met by an applicant.

I wish to address the Court of Appeal's decision in **Kalonde Mbusya v Martin Kimwele Kikoi and 10 Others (2005) eKLR** that was relied upon by the 1st Defendant, and find that it is distinguished on the ground that the circumstances therein were different from those obtaining in the present case. The Court of Appeal firstly held that security has to be relevant and consonant with the circumstances of a case, and there was no holding in that case that a monetary security cannot be ordered in all land disputes. Secondly, the circumstances of that case were that the parties were members of one family fighting over family land, and the applicant stood to be evicted from the said land. These circumstances are clearly very different from those in the present application, which have been elucidated in the foregoing, with the key differences being that the 1st Defendant is not in possession of the suit property, and has in addition sold the said property, and received proceeds of sale from third parties.

This court is therefore not inclined to grant the stay of execution sought, as the 1st Defendant has not offered any security as required by Order 42 Rule 6 of the Civil Procedure Rules. It also appears to the court that there is still the risk of further fraudulent dealings with the suit property as shown by the publication of Gazette Notice No. 2246 in the Kenya Gazette of 22nd February 2013, wherein the Plaintiff herein is purported to have applied for a provisional title to the suit property. Both the Plaintiff and the concerned Registrar of Titles have denied making or publishing the said application, and in the view of the court that the said application could therefore only have been made to facilitate further fraudulent dealings with the suit property. This court in the circumstances exercises its discretion to refuse the stay of execution sought.

The 1st Defendant's Notice of Motion dated 1st February 2013 is therefore denied and the 1st Defendant shall meet the costs of the said Notice of Motion

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this _____22nd____ day of _____October____, 2013.

P. NYAMWEYA

JUDGE