



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 119 OF 2016**

**(ORIGINAL ELC NO. 272 OF 2014 MOMBASA)**

**KALUME KARISA MBITHA.....PLAINTIFF**

**VERSUS**

**BROMINE INVESTMENT.....DEFENDANT**

**AS CONSOLIDATED WITH ELC NO. 51 OF 2015**

**(ORIGINAL CROSS-PETITION NO. 57 OF 2011)**

**BETWEEN**

**BROMINE INVESTMENT LIMITED.....PLAINTIFF**

**BY WAY OF CROSS PETITION**

**1. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT**

**2. DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER-KILIFI**

**3. DIRECTOR OF SURVEY**

**4. DIRECTOR OF SURVEYOR-KILIFI**

**5. THE DISTRICT LAND REGISTRAR- KILIFI**

**6. KALUME KARISA MBITHA.....DEFENDANTS**

**RULING**

1. By the Notice of Motion dated and filed herein on 19<sup>th</sup> May 2020, Kalume Karisa Mbitha (the Plaintiff) prays for an order of stay of execution of the Judgment delivered herein on 6<sup>th</sup> May 2020 pending the hearing and determination of an intended Appeal.

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

*i) That this suit was instituted by the Plaintiff against the Defendant who also counterclaimed against the Plaintiff by Cross Petition;*

*ii) That the matter was heard and the Plaintiff's suit was dismissed with costs and Judgment entered for the Defendant in the Cross-Petition;*

*iii) That being aggrieved by the Judgment the Plaintiff lodged a Notice of Appeal to the Court of Appeal against the whole of the said Judgment and decree and also applied for copies of proceedings and Judgment;*

*iv) That during the pendency of the suit the Court had issued injunctive orders against the Defendant restraining the Defendants from evicting the Plaintiff from the suit property;*

*v) That the dismissal of the Plaintiff's suit and revocation of his title means that the Defendant can now proceed to execute the Judgment and decree by evicting the Plaintiff from the suit property;*

*vi) That the Plaintiff shall suffer substantial loss unless the stay is granted; and*

*vii) That the Plaintiff is ready and willing to provide reasonable security as the Court may direct.*

3. The Defendant- Bromine Investment Ltd is opposed to the application. In their Grounds of Opposition dated and filed herein on 22<sup>nd</sup> June 2020, the Defendant asserts that: -

*1. The Orders sought if granted amount to overturning of the Court of Appeal's Judgment in Malindi Civil Appeal No. 26 of 2013 between the same parties;*

*2. It shall be contrary to the Constitution for the High Court to grant a stay on the basis of purported rights that have been declined by the Court of Appeal in Civil Appeal No. 26 of 2013;*

*3. It is an abuse of the Court process to seek orders herein that are in conflict with a final decree in the same parties in HCCC No. 606 of 2001 between the same parties over the same subject matter;*

*4. The final decree in HCCC No. 6060 of 2001 that was upheld by the Court of Appeal in Malindi Civil Appeal No. 26 of 2013 between the same parties directed eviction and demolition of all structures from the suit land as clearly noted in paragraph 55 of the Court's Judgment herein of 6<sup>th</sup> May 2020;*

*5. The Orders sought if granted shall bring about Judicial absurdity in view of the Orders in HCCC No. 606 of 2001 and Court of Appeal Case No. 26 of 2013; and*

*6. The Application is for dismissal.*

4. I have perused and considered both the application and the Grounds of Opposition thereto. I have similarly perused and considered the rival submissions placed before me by the Learned Advocates for the parties.

5. The conditions to be met before an order of stay is granted are provided by Rule 6(2) of Order 42 of the Civil Procedure Rules as follows:  
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***“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 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.”***

6. This suit was initially instituted at Mombasa on 31<sup>st</sup> October 2014 by the Plaintiff who sought a declaration that he is not in occupation of Plot No. Kilifi/Mtondia/61 and that instead he is in occupation of Plot No. Kilifi/Mtondia/48. The Plaintiff also sought an order of injunction restraining the Defendant from evicting him from the said Plot No. Kilifi/Mtondia/48.

7. The Defendant on its part filed a Cross Petition on 9<sup>th</sup> December 2014 accusing the Director of Surveys and the Land Registrar Kilifi of colluding with the Plaintiff to clandestinely amend the map layout for Mtondia area to reflect and exchange the location of Plot No. 61 with Plot No. 48 to justify the unlawful allotment and registration of the same in favour of the Plaintiff.

8. In that respect, the Defendant sought for a declaration that the Respondents actions were unlawful, unconstitutional and null and void. In addition, the Defendant/Cross-Petitioner sought an order nullifying the amendments of the Kilifi/Mtondia Map and land records and for an order to be issued instead directing the reinstatement of the records as they were before.

9. In my Judgment delivered herein on 6<sup>th</sup> May 2020, this Court found as a matter of fact that the Plaintiff had earlier on, on 4<sup>th</sup> December 2001 been sued by the Defendant herein in ***Mombasa High Court Civil Case No. 606 of 2001***. In that very case, the Plaintiff filed a Counterclaim raising the same issues that were raised in this case.

10. By a Judgment delivered on 11<sup>th</sup> December 2012, the Honourable Justice John W. Mwera (as he then was) found in favour of the Defendant herein and dismissed the Plaintiff's suit. The Learned Judge further declared that the Plaintiff herein had no right to remain on the property which is the same subject in dispute herein.

11. It was also evident that the Plaintiff herein being aggrieved with the said decision then lodged ***Civil Appeal No. 26 of 2013*** which he lost

on 17<sup>th</sup> July 2014 to the Defendant herein.

12. On losing the case at the Court of Appeal, the Plaintiff came to this Court seeking a declaration that the Plot he occupies is now Kilifi/Mtondia/48 and not Kilifi/Mtondia/61 which was the subject of the ***Mombasa High Court Civil Case No. 606 of 2001***. Having considered all the issues herein, this Court came to the conclusion that this suit was filed in abuse of the Court process.

13. That being the case and taking into consideration all the circumstances herein, I am in agreement with the submissions of the Defendant that to grant an order of stay herein on the guise that the Plaintiff intends to prosecute an appeal is tantamount to overturning the decision of the Court of Appeal in ***Civil Appeal No. 26 of 2013***.

14. Such an Order would lead to judicial absurdity and this Court has a duty to protect its processes from being abused by those like the Plaintiff who think they can ridicule the system and get away with anything. The Court of Appeal where he wants to go had already heard him and dismissed his case and I therefore find no basis to grant an order of stay.

15. The application dated 19<sup>th</sup> May 2020 is accordingly hereby dismissed with costs to the Defendant.

**Dated, signed and delivered at Malindi this 29<sup>th</sup> day of January, 2021.**

**J.O. OLOLA**

**JUDGE**