



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 26 OF 2015

1. CHARO MANYULE MANGI

2. BAYA YAA MANGI.....PLAINTIFFS

VERSUS

1. TROPICAL TREASURE LIMITED

2. P.M OMWENGA

3. THE LAND REGISTRAR MOMBASA.....DEFENDANTS

RULING

1. By this Notice of Motion dated 20th November 2019, Tropical Treasure Ltd (the Defendant) urges the Court to grant a stay of execution of the Judgment, decree and all consequential orders herein until the hearing and determination of their Appeal.

2. The application which is supported by an affidavit sworn by a director of the 1st Defendant company Abdulswamad Abeid Said is premised on the grounds that: -

i) The 1st Defendant is aggrieved by the Judgment delivered herein on 24th October 2019 and has filed a Notice of Appeal against the same;

ii) The 1st Defendant is apprehensive that unless a stay of execution is granted, the Plaintiffs will proceed with execution to the grave detriment of the 1st Defendant;

iii) The 1st Defendant will suffer irreparable loss, damage and prejudice that may not be adequately compensated by an award of costs since the subject matter is land;

iv) That no prejudice will be suffered by the Plaintiffs if stay of execution is granted and it is in the interest of justice that the 1st Defendant herein is given a chance to be heard on appeal;

v) That the right of Appeal is a Constitutional right that actualises the right to access to justice, protection and benefit of the law, whose essential substance encapsulates that the appeal should not be rendered nugatory;

vi) That the Court has inherent powers to order a stay of execution pending the hearing and determination of the Appeal; and

vii) That the application has been made without unreasonable delay and the 1st Defendant is willing to give security if so required by this Honourable Court.

3. The application is opposed. In a Replying Affidavit sworn on behalf of the Plaintiffs by their Advocates on record Joseph Karanja Kanyi they aver that the Applicant has not exhibited either an order or decree legally capable of being executed to warrant the issuance of the orders sought.

4. The Plaintiffs' Counsel further avers that filing of an Appeal is no ground for the issuance of orders of stay and asserts that the Appeal in itself is not ground enough for the Applicant not to satisfy the Judgment of the Court.

5. I have perused and considered the application and the response thereto. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

6. The conditions to be met before a stay of execution is granted are provided at Order 42 Rules 6 (2) of the Civil Procedure Rules 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 that the application has been made without unreasonable delay; and

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

7. As was stated by Warsame J (as he then was) in *Samvir Trustees Ltd –vs- Guardian Bank Ltd Nairobi Milimani HCCC No. 795 of 1997*: -

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the Defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the Court.....The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exists any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his Judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his Judgment; hence the consequence of a Judgment is that it has defined the rights of a party with definitive conclusion. The Respondent is asserting that matured right against the Applicant/Defendant...

For the applicant to attain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.... At the stage of the application for stay of execution pending appeal, the Court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the Court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the Court.”

8. Commenting on a similar application in *Kenya Shell Ltd –vs- Kibiru (1986) KLR 410*, Platt Ag J.A (as he then was) expressed himself thus: -

“It is usually a good rule to see if Order XL1 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money.”

9. In the matter before me, it is not disputed that the suitland is currently registered in the name of the 1st Defendant/Applicant. In this respect, the Applicant submits that it paid some money towards the purchase of the suit property which sums have not been denied by the Respondents. The Applicants further submits that unless the stay is granted that title stands to be extinguished any time from now and that such an occurrence would render the appeal already lodged nugatory.

10. I am however not persuaded by the Applicants arguments. As it were, the Applicant acquired the registration of the suit property in its name on the basis of a Sale Agreement dated 10th June 2010. That Sale Agreement puts the purchase price for the 33.6 Ha suitland at Kshs 41,500,000/-. The sums which the Applicant asserts to have paid and which have not been denied by the Respondents/Plaintiffs is the sum of Kshs 2,020,000/-.

11. The 1st Defendant/Applicant has not stated anywhere that if his Appeal was to succeed, the Respondents would be unable to refund the sum of Kshs 2,020,000/- to itself. As Gachuhi, Ag JA (as he then was) stated in the *Kenya Shell Ltd Case (Supra at 417)*: -

“It is not sufficient by merely stating that the sum of Kshs 20,280.00/- is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would it this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that the status quo should remain as it were before Judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the suits of his Judgment.”

12. Taking the totality of the circumstances of the case before me into consideration, I was not persuaded that the 1st Defendant stands to suffer substantial loss unless the order of stay is made.

13. Accordingly, I did not find merit in the Motion dated 20th November 2019. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE