



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 65 OF 2011

JAMES PETER KINYUNGU MBADI.....PLAINTIFF

VERSUS

NGUMBAO GODA DZOMBO & 72 OTHERS.....DEFENDANTS

AND

NGUMBAO GODA DZOMBO & 72 OTHERS.....PLAINTIFFS

BY WAY OF COUNTER-CLAIM

VERSUS

1. JAMES PETER KINYUNGU MBADI

2. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT

3. THE CHIEF LAND REGISTRAR

4. THE COMMISSIONER OF LANDS

5. THE ATTORNEY GENERAL

6. THE DISTRICT LAND REGISTRAR, KILIF.....DEFENDANTS

RULING

1. By this Notice of Motion dated 28th November 2019 as filed herein on 2nd December 2019, James Peter Kinyungu Mbadi (the Plaintiff/Applicant) prays for an order of stay of execution pending the determination of an Appeal- lodged in the Court of Appeal.

2. The application which is supported by an affidavit sworn by Silvester Maundu Mbandi on behalf of the Plaintiff is premised on the grounds that: -

(i) The Applicant has already lodged a Notice of Appeal and applied for certified copies of proceedings and Judgment;

(ii) The Applicant has raised an arguable Appeal as per the grounds set out in the Memorandum of Appeal attached to the application;

(iii) The dispute being a land matter it is proper and fair that a stay be granted so as to maintain the status quo pending the determination of the Appeal on merits;

(iv) That there are arguable points which include sanctity of title and the locus standii of the single witness for the Respondents and hence the Appeal is not frivolous; and

(v) Inference with the status quo and possible transfer to an innocent third party will render the Appeal nugatory.

3. The application is opposed. By a Replying Affidavit sworn on their behalf by Khamisi Havo Deche and filed herein on 31st January 2020, the 72 Defendants/Respondents aver that the application for stay has no merit and that the same does not meet the threshold for the grant of a stay of execution.

4. The Respondents further aver that the Applicant has never been a resident at the suit property and had illegally acquired the title deed thereof. They assert that the Memorandum of Appeal filed does not raise any arguable issues and urge the Court to dismiss the application.

5. I have perused and considered both the application and the response thereto. I have similarly perused and considered the rival submissions filed herein by the Learned Advocates for the parties.

6. 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:

“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.”

7. By his Plaint filed herein on 13th May 2011, the Applicant had sought orders of vacant possession and damages for loss of use as well as mesne profits from the 72 Respondents whom he accused of illegally entering and occupying all that parcel of land known as Kilifi/Kijipwa/96 which parcel of land is registered in the Applicant's name.

8. The Respondents on their part denied the accusation that they had illegally trespassed onto the land and further denied that the Applicant was the rightful owner of the suit property. By way of their Counterclaim, they asserted that the suit property is their ancestral land and sought a declaration that the suit property was part of the Kijipwa Settlement Scheme and was intended for their benefit.

9. The Respondents also sought a mandatory order of injunction to be issued directing the Plaintiff to forthwith surrender the Title Deed to the property to the Land Registrar Kilifi for cancellation and rectification of the Register. In default the Respondents sought to have the Land Registrar to proceed forthwith and cancel the title.

10. In my Judgment delivered herein on 22nd November 2019, I dismissed the Applicant's claim and allowed the Respondents' Counterclaim as prayed. The Applicant is dissatisfied with the said Judgment and proceeded some three days later to lodge a Notice of Appeal thereto.

11. As it were, the purpose of an application for stay pending appeal is to preserve the subject matter in dispute so that the rights of the appellants who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. In the matter before me, the Applicant has been the registered proprietor of the suit property which is in possession and occupation of the Respondents.

12. Taking the entire scenario into consideration, I think there is a possibility that if his title is cancelled and the Land Register is rectified in favour of the Respondents prior to the conclusion of the case, there is every likelihood that sections of the large suit property may be alienated to third parties thereby complicating the recovery thereof should the Applicant succeed in his Appeal.

13. In the result and to that extent, I hereby grant a stay of Prayer No. 'C' of the Respondents Counterclaim dated 1st August 2011.

14. The costs of this application shall be in the Appeal.

Dated, signed and delivered at Malindi this 19th day of February, 2021.

J.O. OLOLA

JUDGE