



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 30 OF 2011**

**SOFT WHITE BEACH LIMITED.....PLAINTIFF**

**VERSUS**

**1. JOSEPH KASHURU MUMBA**

**2. MASUMBUKO YERRY KOMBE**

**3. THE HON. ATTORNEY GENERAL**

**4. THE CHIEF LAND REGISTRAR**

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

**RULING**

1. By the Notice of Motion dated and filed herein on 22<sup>nd</sup> May 2020, Soft White Beach Ltd (the Plaintiff) prays for a stay of execution of the Judgment of this Court delivered on 13<sup>th</sup> May 2020 pending the hearing of an intended Appeal.

2. The application which is supported by an affidavit sworn by the Plaintiff's director Zipporah Nyaguthii Gitonga is based on the grounds that: -

*i) The said Judgment dismissed the Plaintiff's case and allowed a Counterclaim by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff is aggrieved by the decision and wishes to lodge an appeal to the Court of Appeal;*

*ii) The effect of the Judgment is that Plot Nos. Chembe/Kibabamshe/651 and 652 are nullified and Plot Nos Chembe/Kibabamshe/393 is declared the valid one. There is also an order restraining the Plaintiff, its servants and/or agents from entering the said Plot No. 393;*

*iii) Unless the orders sought are issued the Plaintiff stands to suffer substantial loss having purchased the suit property for a valuable consideration way back in the year 2000. The value of the suit properties has remarkably increased since.*

*iv) There is a possibility that the 2<sup>nd</sup> Defendant can sell, lease, charge or dispose off the title validated in his name to a third party during the pendency of the proposed Appeal; and*

*v) The application has been brought expeditiously and the Plaintiff is ready to provide security should the Court so direct.*

3. Masumbuko Yerry Kombe (the 2<sup>nd</sup> Defendant) is opposed to the application. In a Replying Affidavit sworn on 1<sup>st</sup> July 2020 and filed herein on 6<sup>th</sup> July 2020, he avers that it is wrong and misconceived for the Plaintiff to selfishly use the normal appreciative nature of a piece of land as the basis for an application meant to deny him the same investment of a huge magnitude which it had illegally acquired.

4. The 2<sup>nd</sup> Defendant further avers that his proprietary interest cannot be put into trial as a ground of assessing whether he is going to dispose off his property rights and interests in the suit property. He further asserts that the Plaintiff has not demonstrated in any manner or form that it has a prima facie case with any likelihood of success, but is only seeking to prolong the unending litigation in order to deny him the fruits of his Judgment.

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

6. The conditions to be met before an order of stay of execution 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 its Plaint filed herein on 14<sup>th</sup> April 2011, the Plaintiff sought a declaration that the title deed for Plot No. Chembe/Kibabamshe/393 is illegal, null and void and that the title deeds for Plot Nos. Chembe/Kibabamshe/651 and 652 are valid. It also sought a declaration that it is the absolute proprietor of the two valid titles and a permanent injunction restraining the Defendants from dealing in any manner with Plot No. Chembe/Kibabamshe/393.

8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants on their part denied that they procured the registration of the said Plot No. 393 illegally or fraudulently and asserted that the title thereto was valid. It was further the Defendants case that the Plot Nos. 651 and 652 claimed by the Plaintiff did not exist. By way of their Counterclaim, they urged the Court to find that the title deed for Plot No. 393 is valid and that the 2<sup>nd</sup> Defendant is the bona fide and/or lawful owner thereof. They also sought an order of injunction restraining the Plaintiff, its agents or servants from invading, trespassing or in any manner interfering with their quiet possession of the said Plot No. 393.

9. In my Judgment delivered herein on 13<sup>th</sup> May 2020, I dismissed the Plaintiff’s case and proceeded to enter Judgment for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as prayed in the Counterclaim. The Plaintiff is dissatisfied with the said Judgment and proceeded some nine days later to lodge a Notice of Appeal thereto.

10. As it were, the purpose of an application for stay pending appeals is to preserve the subject matter in dispute so that the rights of the appellants who are exercising their undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. In the matter before me, the Plaintiff has been in possession of the suit property measuring approximately ten acres. His title thereto has been invalidated by the Judgment which he has appealed.

11. Taking the totality of the circumstances into consideration, I think, there is a likelihood, in the absence of an order of stay being granted, of the property being taken away from the Plaintiff with the attendant possibility of alienation to third parties thereby complicating the recovery thereof should the Plaintiff succeed in his Appeal.

12. In the result, I do find merit in the Motion dated 22<sup>nd</sup> May 2020 and do allow the same in terms of Prayer No. ‘C’ thereof.

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

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of February, 2021.**

**J.O. OLOLA**

**JUDGE**