



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

PETITION NO. 11 OF 2019

DAVID KANDIE.....PETITIONER

AND

LAND REGISTRAR, KWALE.....1ST RESPONDENT

KADHI'S COURT KWALE.....2ND RESPONDENT

ALI HAMISI CHANDE.....3RD RESPONDENT

RUTUNE LIMITED.....1ST INTERESTED PARTY

NASRA SHARIFF MOHAMED.....2ND INTERESTED PARTY

RULING

(Applications for stay pending appeal; applications allowed)

1. There are two applications before me, that dated 20 May 2020 filed by the 1st interested party, and that dated 21 May 2020 filed by the 3rd respondent and the 2nd interested party. Both applications seek stay of execution of the judgment delivered on 12 May 2020 pending appeal to the Court of Appeal.

2. To put matters into context, the petitioner filed this petition on 13 March 2019 over the properties Kwale/Diani/2845, 2846, 2847 and 2848 (the suit properties) which he claimed belong to him. He complained that the 3rd respondent proceeded to the Kadhi's Court in Kwale and filed Succession Cause No. 155 of 2018 in respect of the estate of Mwanajuma Hamisi Chande (deceased) and listed the suit properties as belonging to the estate of the deceased. The petitioner avers that he was not a party to the proceedings before the Kadhi's Court nor was he aware of the suit. Following that cause, the Kadhi's Court (sued as 2nd respondent herein) vested ownership of the suit properties to the 3rd respondent. When the petitioner realized this, he filed a summons for revocation of grant before the Kadhi's Court, but a preliminary objection was raised, that he cannot be heard at the Kadhi's Court because he does not profess the muslim faith. That preliminary objection was upheld. In the petition he contended that this decision deprived him of his fundamental right to property. He sought a declaration that the decision of the Kadhi's Court which vested the suit properties upon the 3rd respondent was unconstitutional and unlawful. He also sought a declaration that he is the owner of the suit properties and cancellation of the titles issued to the 3rd respondent. Subsequently, the two interested parties, filed applications to be enjoined, which were allowed, with Rutune Limited (1st interested party) stating that it is now the proprietor of the land parcel Kwale/ Diani SS/2848 and Nasra Sharif Mohamed (2nd interested party) the proprietor of the Plot No. 2845, having purchased them from the 3rd respondent.

3. The matter proceeded before Omollo J, my predecessor in this station, and she delivered judgment on 12 May 2020. She allowed the petition and inter alia declared that the 2nd respondent failed to observe the rule of law when hearing the petitioner's objection before that Court and further declared its decision unconstitutional and unlawful. The court proceeded to direct a cancellation of the titles so as to have them re-registered in the name of the petitioner.

4. The 1st and 2nd respondents, represented by the State Law Office, filed a Notice of Appeal on 22 May 2020. The 1st interested party, and the 3rd respondent and 2nd interested party, similarly filed separate Notices of Appeal on the same date. They also filed the two applications subject of this ruling. I have already mentioned that they are applications for stay pending appeal. The applicants believe that they have an arguable appeal and fear that they may suffer substantial loss if the stay orders are not issued.

5. The petitioner (as respondent) has opposed the applications. He has deposed that he was served with the Notices of Appeal on 2 June 2020 outside the provisions of Rule 76 (1) of the Court of Appeal Rules, and because of that, there is no appeal at the Court of Appeal as the same was served late without leave. He is also of opinion that the applicants do not have an arguable appeal. A supplementary affidavit was filed to demonstrate that service of the Notice of Appeal on 2 June 2020 was within time. It was deposed that the Notice of Appeal was lodged on 22 May 2020, a Friday, and thus service on 2 June 2020 was within time.

6. I have considered the application alongside the filed submissions of counsel.

7. It is trite that before a court entertains an application for stay pending appeal, it first needs to be satisfied that there is actually an appeal filed, for issuing a stay pending appeal, when there is no appeal, would be vain. For purposes of an application for stay pending appeal, it is good enough that a Notice of Appeal has been filed, following Order 42 Rule 6 (4). The Notices of Appeal herein were filed on 22 May 2020, which is within 14 days of the judgment as required by Rule 75 (2) of the Court of Appeal Rules. There is therefore nothing untoward with the Notices of Appeal. The respondent however submits that the Notices of Appeal were served late and therefore there is no appeal. Under Rule 77 (1) of the Court of Appeal the Notices of Appeal are to be served within 7 days. The respondent may have a point, but I think that is an issue to be taken up before the Court of Appeal, and the Court of Appeal will decide that issue. On my part, since there is a Notice of Appeal, filed within time, the process of initiating an appeal has commenced, and therefore I can entertain this application.

8. I stand guided by the principles set out in Order 42 Rule 6 (2) which is drawn as follows :-

(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 orders as my ultimately be binding on him has been given by the applicant.

From the above, three principles stand out being :-

(i) Substantial loss;

(ii) Security;

(iii) Delay.

9. I do not think anyone can argue that the applications have delayed for they were filed within 10 days of the judgment. On substantial loss, if stay is not granted, the petitioner will be at liberty to execute the decree, and if he does so, and the applicants succeed on appeal, they may very well be left holding a paper judgment. The only issue left is security. The applicants already hold title to the suit properties. The judgment in favour of the petitioner was to the effect that their titles be cancelled. At the moment therefore, the status is that the applicants still hold titles. I think it will be adequate security, if this position is maintained, pending the hearing of the appeal. I will also issue an order of injunction stopping all parties herein from entering into any dealings over the suit properties. I will further issue an order of inhibition, restricting the registration of any disposition in the register of the suit properties. Those orders to me will preserve the suit properties pending the hearing of the appeal and constitute ample security to the parties. On occupation of the properties, the status quo prior to the judgment be maintained, and there should not be any development of any structures on the suit properties.

10. The costs of this application will be costs in the appeal.

11. Orders accordingly.

DATED AND DELIVERED THIS 17TH DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA