



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT KISUMU

PETITION NO. 8 OF 2019

JOHANNES AKELO OMBOTO.....1ST PETITIONER

GRADUCE OMBOTO AKELO.....2ND PETITIONER

AND

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTER OF

INTERIOR & COORDINATION OF NATIONAL SECURITY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE KENYA PORTS AUTHORITY.....4TH RESPONDENT

NATIONAL LANDS COMMISSION.....5TH RESPONDENT

RULING

A. INTRODUCTION

In this matter there three applications on record to be determined by the court. The first application was filed by Johannes Akelo Omboto and Graduce Omboto Akelo (hereinafter referred to as the applicants) who seek this court's determination of Notice of Motion application dated 8th May 2020; In the Notice of Motion, the Petitioner seeks orders that this Honourable court be pleased to review the last paragraph of its Judgment by allowing the Petition in its entirety and dismissing the 1st Respondents' cross petition with costs to the Petitioners and that costs of this Application be provided for.

APPLICANT'S CASE

The Applicant contends that the gist of the courts finding was based on the allegation by the 1st Respondent that the land where the suit property is situate was never surrendered by the 1st Respondent to the Government of Kenya hence the 1st Respondent was not involved in the transfer of the suit property to Hodima Construction Company Limited who later transferred the same property to the Applicants via a legal sale. The Applicant further avers that the 1st Respondent's Cross Petition was basically against Hodima Construction Company Limited who were condemned unheard and as a consequence their title was affected and that was unfair. When the Applicant confronted Hodima following Judgment, they availed the following documentation to demonstrate that the 1st Respondent indeed surrendered the land to the Government of Kenya who eventually allocated the same to Hodima Construction Company Limited;

a) Letter dated 30th April, 1998 from the commissioner of lands to the 1st Respondent's Managing Director seeking the 1st Respondent's consent for the Government of Kenya to legally acquire and allocate a number of plots which included the suit property.

b) Letter dated 21st September 1998 from the 1st Respondent's Managing Director giving its consent and no objection to the acquisition and subsequent allocation of the suit property amongst others.

c) Letter of allotment dated 12th October 1998.

d) Lease of the suit property dated 18th August, 1999 issued to Hodima Construction Company Limited by the Government of Kenya.

e) Letter dated 20th December 1999 from the commissioner of Lands to Hodima Construction Company Limited inviting them to pay an additional standard premium of Kshs. 20,000/= for the property.

f) Letter dated 15th December 1999 from the Commissioner of Lands to Kisumu Land Registrar forwarding the lease for purposes of registration.

g) Cheque dated 20th December 1999 paying the additional standard premium as advised.

RESPONDENTS CASE

The 1st Respondent opposes the application through a replying Affidavit of Geoffrey Wekesa, a senior Cartographer at the 1st Respondent who avers that the 1st Respondent has searched for the said letters referenced OP.4/1/1A (SUB) of 30th April 1998 on allocation of parcels No's 9/98/04-08 and a copy of KR letter (copy ref GL.2/12A dated 21st September 1998 on Kisumu Municipality part development plan – PDP for the above parcels referred to as No. 9/98/04-08 and do not have the letters the Petitioner sought to rely on. Further the 1st Respondent avers that the letter of 21st September 1998 relates to Block 9 which is in Nyalenda and not in respect of Block 7 and states that if the PDP in relation thereto can be availed then they would be able to relate it with the alleged subdivision. He Further avers that if at all there was alienation of the suit properties with the involvement and consent of Kenya Railways, that would have been effected on the asset register which was not the case here.

The 4th Respondent opposes the application by filing grounds of opposition on the grounds that the application has no merit and warrants dismissal, it has failed to establish the essential requirements for granting of the orders sought, it is vexatious, clearly an afterthought and manifest of abuse of court process, the applicants have not demonstrated the alleged discovery as new and important matter of evidence and after the exercise of due diligence, the said documents were not within their knowledge, that the said documents could not be produced by them during trial, there is no basis for the application made and the applicants have not established how they will suffer substantial loss unless the stay order is made pending review and there is no positive and enforceable order and therefore there is nothing for this court to stay or enforce by a restraining order. **The 2nd, 3rd and 5th Respondents did not file their reply or grounds of opposition to the application.**

In the 2nd Notice of Motion application dated 20th May 2020 and filed on 22nd May 2020, the 3rd Respondent to the Cross Petition (Hodima Construction Ltd) who was not a party in the petition, seeks orders that the Judgment entered against the Respondent to the Cross-Petition and all consequential decrees and effects be set aside upon such terms as are just. In the alternative and without prejudice the prayers 2 and 3 hereinabove the judgment entered herein against the 3rd Respondent to the Cross –Petition/ Applicant and all consequential decrees be set aside upon such terms as are just.

Upon setting aside the judgment and any consequential decrees herein as prayed in prayers 2, 3 and 4 above leave be granted the 3rd Respondent to the Cross-Petition/Applicant to file its responses to the Cross-Petition and an affidavit in reply to that of Stanley Gitari and thereafter the Cross-Petition be set down for hearing on its merits. The costs of this application be provided for.

APPLICANT'S CASE

The Application is premised on the grounds that the Applicant has never been served with the cross-petition or other processes pertaining to the Cross-Petition, he has been condemned unheard in contravention of the rules of natural Justice, the Proceedings being constitutional petition is inimical to conscience that the Applicant has not been accorded natural Justice and the Applicants fundamental right to fair hearing enshrined in Article 50(1) of the Constitution has been grossly violated. The Applicant being the first registered sub-lessee before he transferred to the 1st and 2nd Respondent to the Cross petition the effect of the Judgment sought to be set aside is to deprive the Applicant its right to own property and not to be deprived thereof arbitrarily in violation of Article 40(1) and 40(2)(a) of the Constitution and that the Cross Petitioner has obtained the judgment by concealment of material facts which facts have at all material times been within its knowledge.

The Applicant filed a supporting Affidavit of Tom Okoko, who avers that the suit property was excised from the larger parcel of land that belonged to the Cross Petitioner, however before such excision the Applicants followed due process and involved the Cross Petitioner in the creation of the title to the suit property and its eventual registration in the name of the Applicant. That the subsequent allotment to the Applicant as a private was a result of, the decision and/or approval by the Cabinet of the Government of the Republic of Kenya in 1998. He further avers that by a letter dated 30th April 1998 the then P.S, Secretary to the Cabinet and Head of Public service, F. M. Kuindwa wrote to the MD of the Cross Petitioner Mr. E. Nyamunga communicating to the latter that the Government had approved the allocation of among the suit property for alternative usage. The MD of the Cross Petitioner thereafter forwarded to the then Commissioner of Lands W. Gachanja a copy of the letter from the Secretary to the Cabinet and asked the Commissioner of Lands to **proceed and implement as directed**. Consequently, by a letter of allotment dated 12th October 1998, the commissioner of lands allotted the Applicant the suit land and then a lease dated 18th August 1999.

RESPONDENTS CASE

The 1st Respondent/Cross –Petitioner opposes the application via grounds of opposition on the grounds that the application is fatally defective and the affidavit in support violates the mandatory provisions of the Civil Procedure Rules, the Applicants have not produced the part development plan (PDP) to prove their allegations by which one can relate the shapes and sizes of the parcels born out of the PDP. The

Applicants have not annexed a resolution by the Kenya Railways Board and/ or Directors approving the excision of plot number 530 by the commissioner of Lands and the application does not meet the minimum requirements for grant of the orders sought.

In the Notice of Motion application dated 11th June 2020, the 1st Respondent seeks for the following orders that Pending the hearing and determination of the appeal filed in the Court of Appeal, this Honourable Court be pleased to order stay of execution of the Judgment dated 5th May 2020 and the decree issued on the 8th of May 2020 and all other consequential orders arising therefrom.

APPLICANT'S CASE

The Application is premised on the grounds that the Applicant has filed and served notice of Appeal and intends to Appeal wholly as against the said judgment, they have an arguable appeal with a high probability of success and unless stay is granted, there is a high likelihood that the petitioner/Respondent will move with speed and execute the decree issued on 08/05/2020 and the appeal will be rendered nugatory and the Applicant will suffer irreparable loss and damage. The Applicants are willing and able to give security and abide by the orders issued by this court and the application has been made without delay. The application and Grounds are further supported by the supporting Affidavit of Stanley Gitari whose contents are similar to the grounds.

RESPONDENTS CASE

The 1st Respondent opposed the application by filing grounds of opposition on the grounds that the application is fatally defective and the affidavit in support violates the mandatory provisions of the Civil Procedure Rules, the Applicant has not offered any form of security to warrant stay pending appeal and no arguable issues have been raised in the purported appeal and grounds furnished to warrant stay. The Petitioners did not oppose this application.

B. ISSUES FOR DETERMINATION

i. Whether the application dated 08/06/2020 is merited?

Section 80 of the Civil Procedure Act provides as follows with regards to review:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

“ (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The information contained in the said letters above, being annexures JAO-4 a-g to Applicants Supporting Affidavit is new and important matter of evidence which was not within the knowledge of the Applicant or could not be produced with the exercise of due diligence when the judgment and decree of the Honorable Court was passed. The Applicant has therefore satisfied the conditions for the grant of the orders sought under Section 80 CPA as read with Order 45 Rule 1 CPR, **However**, it is evident from the above provisions that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred against an order then the door is closed on review of the same and for good reason, as the Appellant is on appeal seeking a re-examination of the affected order on its merits, and the court whose order is appealed from cannot further interfere with the said order as such action is likely to affect the outcome of the appeal. The 1st and 3rd Respondents have since preferred Appeals which and if a review were to be granted it would render the Appeal Nugatory. Therefore, the Notice of Motion application dated 8th May 2020 should be dismissed with costs to the Applicant.

2. Whether the application dated 22/05/2020 is merited?

From the perusal of the court record, there is no evidence that the Cross-petitioner served the 3rd Respondent to the Cross Petition/Applicant herein with the Cross-petition and neither have they addressed the same in his reply nor in their submissions. This is a violation of Article 50(1) of the Constitution of Kenya as pleaded by the Applicant.

With regard to the Grounds of opposition by the 1st Respondent that the affidavit in support violates the mandatory provisions of the Civil Procedure Rules, the supporting Affidavit of Tom Okoko bears a commissioning stamp from Ben Nyanga Aduol an Advocate and commissioner of Oaths as well as the annexures referenced TO1 (a) & (b), TO2, TO3, TO4, TO5 (a) & (b) hence the said ground is

frivolous.

The ground of opposition that the Applicants have failed to produce the part development plan (PDP) and annexing a resolution by the Kenya Railways Board and/ or Directors approving the excision of plot number 530, it is trite in law that he who alleges must prove in this case the Applicant did not allude to the PDP nor the Resolutions of Kenya Railways Board and/ or Directors hence had no onus to produce the same.

Under Order 10 Rule 11 of the civil procedure Rule, Cap 21, the court may set aside judgment or vary the same on such terms as are just. This court was inclined to allow the application in its entirety, however there is a pending appeal in the Court of Appeal and therefore this application cannot be, and is not allowed. The applicant's recourse is in the Court of Appeal in the appeals filed by the petitioner and the 1st respondent herein.

3. Whether the application dated 11/06/2020 meets the threshold for grant of stay orders pending Appeal?

The principles that the court should consider while deciding whether to grant Stay of Execution Pending Appeal are under Order 42 Rule 6(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 order as may ultimately be binding on him has been given by the applicant.”

In Civil Appeal No.107 of 2015, Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

Firstly, the Applicant must satisfy that he will *suffer substantial loss*, unless the orders sought are issued.

From the Judgment, it is clear that the 1st Respondent's had sought for damages which damages were granted by the court and the 1st Respondent was decreed to pay an amount of Kshs. 5,000,000/= as damages and Kshs. 473,975/= from 14th August 2019 to 5th May 2020 and the 1st Respondent's acquisition of the title was declared illegal, null and void and unless stay is granted the 1st Respondent's may move to execute.

The Court having already found in favour of the Applicant's and the 1st Respondent's in terms of damages and acquisition of title and both are to benefit from the fruits of his Judgment, there is need to balance both claims, it is important to preserve the subject matter of the Appeal by maintain status quo and not denying the successful litigants the fruits of his Judgment.

The Applicant must satisfy the Court that the application was made without unreasonable delay. It is noted that the notice of Appeal was filed on 12/05/2020 six days after delivery of judgment and the Application of stay was filed on 11/05/2020. Therefore the Court finds that that there was no inordinate delay in filing this Application.

On the issue of security of costs, the Applicant has averred that they are a state corporation and is ready to provide security for costs however from its submission they allege that the Kenyan Public in general will suffer substantial loss bearing in mind that the money to be paid is public money and the 1st Respondents/ Petitioners failed to proof that they are capable of refunding the said sums should the same be paid to them. The Court should find this argument untenable as they themselves have not issued any security and therefore the Court should order the Appellant to provide security of Kshs. 5,000,000/= as damages and Kshs.473,975/= from 14th August 2019 to 5th May 2020 within 30 days from the date of Judgment. Equally, the Court should find that the Order sought of stay of execution would protect and preserve the suit property and should issue the same.

With regard to whether there is an arguable appeal which will be rendered nugatory, it is noted that the Applicant has not annexed its draft

memorandum of appeal. However, this court is satisfied that the parties herein have met the thresh hold for stay pending appeal and I do order stay of execution of the Judgment dated 5th May 2020 and the decree issued on the 8th of May 2020 and all other consequential orders arising therefrom and that status quo on the ground be maintained pending hearing and determination of appeal that the 1st respondents in the petition are restrained from evicting the petitioners and or taking possession of the suit property until the appeal is heard and determined. Each party to bear own costs.

DATED AT KISUMU THIS 18th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE