



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL PETITION NO. 2 OF 2019

LA MARINA LIMITED.....PETITIONER

VERSUS

1. NATHAN KAHARA.....1ST RESPONDENT

2. THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

3. THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. By the Notice of Motion dated and filed herein on 25th June 2020, La Marina Ltd (the Applicant) prays for an order that this Honourable Court be pleased to issue an order of stay of execution and/or order for maintenance of status quo ante the Ruling and Order of this Court dated 27th May 2020 restraining the 1st Respondent from disposing off, transferring, trespassing onto, advertising for sale or interfering in any way with Plot No. Chembe/Kibabamshe/375 or its sub-divisions Chembe/Kibabamshe 646 and 665 pending the hearing and determination of the Applicant's intended Appeal.

2. The application which is supported by an affidavit sworn by the Applicant's director Philip Munge Ndolo is premised on the grounds:

- a) That following the Ruling of this Court dated 27th May 2020 the Applicant is desirous and intends to file an Appeal;*
- b) That the Applicant is apprehensive that following the said Ruling, the 1st Respondent herein will dispose of or interfere with the suit property and or its said sub-divisions;*
- c) That these actions in execution will occasion the Applicant substantial loss as it will occasion their loss of possession of the properties and render their Title Deeds useless and their intended Appeal merely academic;*
- d) That the Applicant's intended Appeal has high chances of success and will be rendered nugatory if the orders are not stayed;*
- e) That the 1st Respondent is completely unrestrained in his dealings with the suit properties since the Court's decision and had already taken measures to wrestle possession from them earlier;*
- f) That this application is brought without undue delay; and*
- g) That it is in the interest of justice that the orders sought be granted and that there be a positive order of status quo pending the hearing of the intended Appeal.*

3. Mr. Nathan Kahara (the 1st Respondent) is opposed to the application. In a Replying Affidavit sworn on 14th July 2020 and filed herein on 15th July 2020, the 1st Respondent avers that the application has no merit, is not maintainable in law and that it ought to be dismissed as it does not meet the threshold stipulated under Order 46 Rule 6 of the Civil Procedure Rules.

4. The 1st Respondent further avers that this Court has already found that the Petition is misconceived and without merit and the order issued was a negative one incapable of execution and hence incapable of being stayed as sought herein. The 1st Respondent further asserts that the Petitioner has not demonstrated any loss that it is likely to suffer that cannot be compensated by an award of damages and urges this Court to dismiss the same with costs.

5. I have given full consideration to the Petitioner's application and the response thereto by the 1st Respondent. I have similarly given consideration to the rival submissions and authorities placed before me by the Learned Advocates for the two parties.

6. In respect of an application for stay pending an appeal, Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) 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 the application before me, the Petitioner asks to be granted three substantive prayers, namely, an order of stay of execution of the orders issued by this Court on 27th May 2020, and secondly, an order for the maintenance of the status quo ante the said Ruling as well as an order restraining the 1st Respondent from disposing off, transferring, trespassing onto, advertising for sale or interfering in any way with the suit property pending the hearing and determination of the intended Appeal.

8. The orders sought to be stayed arose from a consideration of a Preliminary Objection dated 15th March 2019 filed by the 1st Respondent herein in opposition to the Petition instituted by the Petitioner on 8th February 2019. By that Petition, the Petitioner had sought a declaration that it has a right to be heard in respect of a complaint touching on Plot Nos Chembe/Kibabamshe/646 and 665. The Petitioner also sought an order of Certiorari to quash the decision of the National Land Commission (the 2nd Respondent) granting Plot No. Chembe/Kibabamshe/375 to the 1st Respondent as well as an order of mandamus to compel the Land Registrar Kilifi to cancel the title deed issued for the said parcel No. 375.

9. Contemporaneously filed with the Petition was Notice of Motion dated 7th February 2019 wherein the Petitioner sought an order to the effect that pending the determination of the Petition, a conservatory order be issued to maintain the status quo which existed as at 30th November 2018 when the 1st Respondent was said to have moved into the suit property and evicted the Petitioner's Caretaker therefrom following the issuance of a new title deed for parcel No. 375 to the 1st Respondent by the 2nd Respondent.

10. Having considered the Preliminary Objection vis-à-vis the application and the entire Petition, this Court determined in the Ruling dated 27th May 2020 that the Petition had been filed to recover the land some 16 years after the 1st Respondent was issued with title on 30th June 2004 and that the Petitioner had previously unsuccessfully tried to challenge the same in Court. It was also the Court's finding that the Judicial Review application had not been filed within six (6) months as stipulated under Order 53 Rule 2 of the Civil Procedure Rules and as a result, both the Petition and the Judicial Review application were struck out.

11. In my view, where the orders granted by the Environment and Land Court which are the subject of an appeal to the Court of Appeal are capable of being executed, such orders are amenable to a stay of execution. In the circumstances herein however, all that this Court did in the Ruling against which the Petitioner has appealed was to dismiss its quest for a declaration and orders of Judicial review.

12. As the Court of Appeal stated in ***Yagnesh Devani & 4 Others –vs- Joseph Ngindari & 3 Others Civil Application No. Nai 136 of 2004 (unreported):*** -

“By dismissing the Judicial review application the Superior Court did not thereby grant any positive order in favour of the Respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage, what the Superior Court has done. It can only do so after hearing the appeal. It seems to us that the application for the stay of execution of the dismissal order was not brought in error. It was deliberately designed to achieve that result which regrettably is impracticable”.

13. Similarly, the Petitioner herein seeks to appeal the order striking out his Petition and application for Judicial review. This is not an order capable of being stayed because there is nothing that the Applicant/Petitioner has lost. The refusal to grant the orders sought simply means that the Applicant stays in the situation he was in before coming to Court with his Petition and therefore the issues of substantial loss that he is likely to suffer and or that the appeal can be rendered nugatory cannot arise.

14. Indeed, from the material placed before me and the record herein, the status quo ante the Ruling that the Applicant prays for herein are not helpful in any way to the Applicant. Long before he filed the Petition, the Applicant conceded that the 1st Respondent had taken possession of the suit premises upon being issued with a title deed by the 2nd Respondent in 2018. I am unable to see any reason why the 1st Respondent should now at this stage be restrained from “trespassing” on a parcel of land which by the Applicant's own admission has been in his possession prior to the institution of these proceedings.

15. Again in an application for stay pending appeal to the Court of Appeal, I am not aware of any requirement that the Court considers the chances of success of the intended Appeal. That must be a requirement where the Court of Appeal is considering an application under Rule 5 (2) (b) of the Court of Appeal Rules since the intended Appeal would be heard by the Court of Appeal.

16. In the premises, I am in agreement with the 1st Respondent that the application does not meet the threshold for the grant of an order of stay of execution. For that reason, I dismiss the same with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021.

J.O. OLOLA

JUDGE