



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 215-224 OF 2009

KENYA ANTI CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

FRANN INVESTMENTS & 6 OTHERS.....DEFENDANTS

RULING

(Suit by plaintiff/respondent claiming that the applicant became unlawfully registered as proprietor of land that was public land assigned to the customs department; respondent adducing evidence that the original title number was changed and subsequently the land subdivided into 10 plots; applicant having developed flats on one or some of the plots; judgment entered for the respondent; court ordering cancellation of the applicant's titles and giving possession to respondent; applicant filing appeal and now seeking stay pending appeal; substantial loss established as the property may be flattened; order that titles be maintained; on possession, same granted to applicant but with order to preserve the property; costs may be taxed but not executed).

1. The application before me is that filed on 4 December 2020 by the unsuccessful 1st defendant. It seeks orders of stay of execution of the judgment pending appeal to the Court of Appeal.

2. To put matters into perspective, the plaintiff filed this suit on 30 June 2009, seeking recovery of the plot MN/III/293 (hereinafter, 'the suit land') whose title was subsequently converted into LR No. MN/III/2974 and later subdivided by the applicant into ten plots being land reference numbers MN/III/3650 to 3659. All the 10 plots are registered in the name of the applicant. The 2nd to 6th defendants are directors of the applicant. It was its case that the suit land was set apart as a customs house for use by the Customs & Exercise Department and later by the Kenya Revenue Authority (the Authority). The respondent argued that the suit land was fraudulently converted into a different parcel number and transferred to the 2nd defendant who was an employee of the Authority. The 2nd defendant then transferred the land to the 1st defendant/applicant and the land, as I have mentioned, was later subdivided into 10 plots which are all in the name of the applicant. It was the argument of the 1st – 6th defendants that the land was unalienated and that they were innocent purchasers for value. I heard the dispute and delivered judgment on 12 November 2020. I found for the plaintiff and held inter alia as follows :-

- (i) That the conversion and renumbering of LR No. MN/III/293 into LR No. MN/III/2974 and the subsequent creation of the plots MN/III/3650-3659, was illegal and null and void;
- (ii) That there be a rectification of the register by cancelling the entries transferring the land to the applicant;
- (iii) That there be a permanent injunction restraining the defendants from the suit land;
- (iv) That the 7th defendant (former Commissioner of Lands) to pay damages of Kshs. 1,000,000/= for breach of his fiduciary duties;
- (v) That the 1st – 6th defendants do give vacant possession within 30 days;
- (vi) That the 1st – 6th defendant remove the developments on the suit property within 30 days at their own cost and in default, the plaintiff or the public entity that will take over the property be at liberty to either keep or remove the developments.

3. It is the above judgment that the applicant wants stayed. The application is based on the grounds inter alia that the intended appeal raises fundamental questions of law and fact; that the court has a duty to preserve the substratum of the appeal, so that an appeal, if successful, is not rendered nugatory; that if stay is not granted, the respondent will proceed to have the register rectified and proceed to evict the applicant and demolish the houses standing on the suit property, which will render the appeal nugatory; and that the applicant is ready to abide by any conditions that the court may set.

4. The application is supported by the affidavit of Edward Kagume, the 5th defendant and a director of the applicant. He has more or less rehashed the above grounds upon which the application is based.

5. The application is opposed by the plaintiff vide the replying affidavit of Moses Muia, the Deputy Commissioner, Facilities and Logistics, Kenya Revenue Authority (the Authority) and a further affidavit of Ben Murei. Mr. Muia deposed that pursuant to the judgment, the suit property has reverted to the Authority. He deposed that the court had issued injunctive orders pending hearing and determination of the suit and pursuant to that, the developments on the properties remained unoccupied and as such, no hardship will be occasioned to the applicant if the Authority takes possession of the same. He does not also think that the appeal is arguable. He urged that the right of appeal must be balanced against the equally weighty right that a successful party must be allowed to enjoy the fruits of the judgment and there must be just cause before depriving a successful party this right. He has deposed that the Authority is a public body with a substantial annual budget and will be in a position to compensate the applicant for any damages suffered in the event that the appeal succeeds. He asked the court to take judicial notice of the time it has taken to revert the property to the Authority and the notoriety of similar claims affecting public land in Kenya.

6. I invited counsel for the parties to file written submissions, which they both did.

7. Mr. Gikandi, learned counsel for the 1st defendant, submitted inter alia that the Court of Appeal may or may not allow the appeal, however, the court is under a duty to preserve the subject matter, so that the appeal is not rendered nugatory if it succeeds. He added that this application was filed without undue delay. Counsel submitted that the 1st defendant has built a five-storey building on the suit land which has been let out to various occupants, and the demolition of the said development would occasion the 1st defendant huge financial loss, and further that the 1st defendant will lose out on the revenue collected from the tenants. He submitted that if the land register was to be rectified, it would render the appeal nugatory, and therefore, the court should balance the interests of both parties pending the outcome of the intended appeal. Counsel urged the court to be guided by the decision in *MM Butt vs. Rent Restriction Tribunal Civil Appeal No. 6 of 1979*. Lastly, counsel submitted that the 1st defendant has acted without undue delay and as such there is no hindrance capable of persuading the court against granting the said orders as prayed.

8. On the other hand, Mr. Murei, learned counsel for the plaintiff/respondent, submitted inter alia that the intended appeal is not arguable and proceeded to make some arguments to demonstrate this. He submitted that there is no sufficient cause to order stay as no hardship will be occasioned to the 1st defendant if execution took place. Counsel submitted that the 1st defendant's developments on the suit land were unoccupied as compliance with the court order dated 24 May 2012. He further submitted that if the appeal succeeds, the loss that will have been suffered by the 1st defendant will be quantifiable in monetary terms and reparable by damages that the Authority as a public body will be able to compensate. Mr. Murei submitted that the suit land which is the sub strum of the appeal will vest in the Authority in perpetuity and will not be subject to retransfer or conversion in any manner therefore, if the appeal is successful, then the suit land will be available to the 1st defendant. Lastly, counsel submitted that there are no sufficient reasons for denying the plaintiff, and by extension the Authority, the enjoyment of the fruits of the judgment taking into account the length of time it has taken to obtain orders of restitution of the suit land for public use.

9. What I have before me is an application for stay pending appeal and applications of this nature are covered under Order 42 Rule 6 (2) which provides as follows :-

“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 may ultimately be binding on him has been given by the applicant.”

10. It will be noted from the above that there are three elements that the court needs to look at when dealing with an application for stay pending appeal. First, the court needs to be persuaded that the application has been made without unreasonable delay, secondly, the applicant needs to demonstrate that she stands to suffer substantial loss if the application is not allowed, and finally, there needs to be provided security for the due performance of the decree. I am also alive to the general principle that the purpose of a stay of execution is to ensure that the appeal is not rendered nugatory by preserving the subject matter of appeal. At the same time, the court needs to balance the right of the successful litigant to the fruits of the judgment, and thus also requires to ensure that in the event that the appeal fails, the successful litigant will have intact, as much as possible, the benefit of his judgment. That is why the element of security for the due performance of the decree is crucial. There are arguments raised by the parties on the chances or arguability of the appeal, the applicant being of the view that the appeal has overwhelming chances of success, and the respondent naturally holding the opinion that the appeal is a non-starter. However, the issue of whether or not the appeal has strong chances of success is not among the matters to be tested when looking at an Order 42 application for stay pending appeal. I will not therefore dwell into whether or not the applicant has demonstrated an arguable appeal. I will restrict myself to what Order 42 Rule 6 (2) requires.

11. I will start with the element of delay. The judgment in this matter was delivered on 12 November 2020. This application was filed on 4 December 2020. I do not think that, in the circumstances of this matter, there can be considered to have been unreasonable delay. The judgment gave 30 days for the removal of the applicant and the 30 day period had not lapsed when this application was filed. The application was therefore filed timeously.

12. The second element that an applicant needs to demonstrate is substantial loss. The judgment herein would entail cancellation of the titles of the applicant and also the cessation of possession and possible demolition of the structures in the suit land. If say, the respondent proceeds to demolish the structures therein, and the applicant succeeds on appeal, then it is apparent that the applicant will stand to suffer substantial loss. What I need to balance is the interest of the successful litigant in light of the above.

13. There are three elements that I need to consider. The first is the preservation of the titles; the second is the possession/preservation of the property; and the third is taxation of costs. I have no doubt in my mind that it is necessary to preserve the titles so I will stay the order for rectification of the register and cancellation of the titles. No dealings should however be entered into or registered.

14. On the possession of the suit property, although Mr. Gikandi in his submissions did submit that the suit property is let out to some tenants, this is doubtful, because Mr. Murei in his further replying affidavit has contested it, and pointed out that there were interim orders issued which would mean that the premises is unoccupied. I think this should be the position of the matter and I will take it that the premises is unoccupied though developed. For the duration of the appeal, somebody must be in charge. Taking all surrounding circumstances, I will hand over the suit premises to the respondent which is a well resourced public institution. However, the duty of the respondent will be to preserve the property as it is, without using or wasting it in any way. If the applicant succeeds on appeal, she will find the property there with the developments that she had made. In the event that the applicant, through its agents, wish to make any routine inspections of the property, they should be allowed to do so, but with adequate written notice being issued before hand. I am aware that I awarded costs to the respondent.

15. On costs, I am aware that I awarded the same to the respondent. The costs can be taxed, but in my discretion, I order that no execution should issue, in so far as the same touches on the applicant, until the appeal is heard and determined.

16. The only issue left is costs of this application. I order that the costs of this application do abide the costs in the appeal.

17. Orders accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA