



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 32 OF 2009 (O.S)

1. GIBSON NG'ONDU

2. FRANCIS MAINGA

3. GEORGE NDOLO

4. ISAAC WAMBUA NZYOKA AND 1,121 OTHERS.....PLAINTIFFS

VERSUS

ALEXANDER MUTINDA MWINI.....1ST DEFENDANT

ALBANUS PAUL MUTISYA.....2ND DEFENDANT

BERNARD MUTUKU NDUNGU.....3RD DEFENDANT

(All above sued as the Chairman, Secretary & Treasurer, Kenya

National Union of Teachers, Machakos Branch) and Executors

as trustees of the charge dated 1st December, 2008)

KENYA NATIONAL UNION OF TEACHERS.....4TH DEFENDANT

KENYA NATIONAL UNION OF TEACHERS,

MACHAKOS BRANCH.....5TH DEFENDANT

REGISTERED TRUSTEES, KENYA NATIONAL UNION

OF TEACHERS, MACHAKOS BRANCH.....6TH DEFENDANT

RULING

1. In the Notice of Motion dated 25th April, 2019, the 4th Defendant is seeking for a stay of execution of the Judgment of the court in the following terms:

a) That the court be pleased to grant a stay of execution of the Judgment delivered on 19th October, 2018 pending the hearing and determination of the Applicant's Appeal, in Civil Appeal No.124 of 2019, dated 2nd April, 2019 and filed on 3rd April, 2019, in the Court of Appeal, Nairobi.

b) That the Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

c) That costs and incidental to this Application be provided for.

2. The Application is premised on the grounds that being dissatisfied with the Judgment of the court delivered on 19th October, 2018, the Applicant filed an Appeal to the Court of Appeal; that the Applicant has an arguable Appeal with good prospects of success; that the Appeal will be rendered nugatory if stay is not granted and that the Plaintiffs will not suffer any prejudice if the stay of execution is granted.

3. The Applicants' Secretary General finally deponed that the Applicant is willing to give such security as the court orders for the due performance of such Decree or Order as may ultimately be binding on it and that the Application has been made within reasonable time.

4. The 5th and 6th Defendants also filed an Application dated 14th May, 2019 seeking the same prayers contained in the 4th Defendant's Application, and based on the same grounds.

5. In reply, the 1st Plaintiff deponed that the Decree sought to be executed arises from an unimpugned, regular and valid Judgment issued by a competent court and that the present Applications are only meant to buy time and delay execution of the Decree.

6. The 1st Plaintiff deponed that the Defendants have not shown that they have an arguable Appeal against the findings of the court; that there is no imminent execution underway and that the Defendants have failed to address the issue of the payable rent, both actually received for the portion of the premises leased out to third parties and that which the 3rd Defendant should be paying for its activities, use and possession of the property from the date of the Decree.

7. The 1st Plaintiff finally deponed that the Defendants have not met the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of a stay of execution of a Judgment. Both the Plaintiffs' and the Defendants' advocates filed written submissions and authorities which I have considered.

8. The Defendants herein are seeking for a stay of execution of the Judgment dated 19th October, 2018 pending the hearing and determination of the Appeal that they have filed in the Court of Appeal. The Judgment that the Defendants are seeking to stay decreed as follows:

a. A declaration be and is hereby issued that the 1,125 persons named in the list marked 'GN-1' and annexed on the Affidavit in support of the Originating Summons are the beneficial owners of a parcel of land known as Machakos Municipality Block 1/59.

b. A declaration be and is hereby issued that the security of the suit property in favour of IDB Capital Limited is unauthorized and therefore illegal.

c. An order be and is hereby issued that the Defendants to transfer parcel of land known as Machakos Municipality Block 1/59 to the Plaintiffs' nominee, that is, United Retired Teachers Company Limited.

d. The 4th and 5th Defendants to pay the costs of the suit.

9. The law pertaining to a stay of execution of an Order or Decree is set out in Order 42 Rule 6 (2) of the Civil Procedure Rules which provides as follows:

“(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.”

10. The Judgment of the court directed the Defendants to transfer parcel of land known as Machakos Municipality Block 1/59 (*the suit property*) to the Plaintiffs. The Plaintiffs are likely to transfer the land to third parties while the Appeal is pending. Such a scenario is likely to cause the Defendants substantial loss in the event their Appeals succeed.

11. Indeed, the Plaintiffs have commenced the process of having the Defendants evicted from the suit premises, which premises the Defendants have been using for many years. Other than using the premises, the Defendants have also leased a portion of the suit premises to third parties. In the event the said third parties are evicted alongside the Defendants, then the Defendants are likely to be sued by third parties for damages.

12. It is with the above circumstances in mind that I am of the view that the Defendants are likely to suffer substantial loss unless an order of stay of execution is granted.

13. The Applicants are willing to give such security as the court orders for the due performance of the Decree. In the circumstances, I shall direct for the deposit of the rent being collected by the Defendants from third parties who have leased the suit property to be deposited in a joint account of the Plaintiffs, the 4th, 5th and 6th Defendants' advocates.

14. For the reasons I have given above, I allow the Applications dated 25th April, 2019 and 14th May, 2019 as follows:

a) A stay of execution of the Judgment delivered on 19th October, 2018 pending the hearing and determination of the Appeal filed by the Defendants/Applicants.

b) The above order is granted on condition that all the rent collected by the Defendants from the tenants leasing parcel of land known as Machakos Municipality Block 1/59 is deposited in an interest earning joint account opened in the name of the advocates for the Plaintiffs, the 4th Defendant, the 5th Defendant and 6th Defendant within thirty (30) days of the date of the Ruling.

c) Each party to pay for his/its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020.

O.A. ANGOTE

JUDGE