



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 281 OF 2018

ISHMAEL MANGI KATANA & 57 OTHERS....PLAINTIFFS

VERSUS

KENYA PIPELINE COMPANY LTD..... DEFENDANT

RULING

1. By a notice of motion dated 23rd April 2019 and brought under Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Plaintiffs/applicants seek orders that this Honourable Court do stay the execution of the ruling and order of the court issued on 9th April 2019 pending the hearing and determination of the Appeal. The application is based on the grounds set down therein and supported by the affidavit of Reuben Muli Nzau sworn on 23rd April, 2019.

2. The applicants aver that they are residents of PLOT NO.3794/VI/MN which borders the respondent's PLOT NO.4182. The applicants state that they have developed the portion of land where they have been staying since 1960 and have constructed both permanent and semi-permanent houses. That on 28th November, 2018 the Respondent issued a notice to the applicants indicating that the houses they are staying on are standing on PLOT NO.4182 and have been earmarked for demolition. On 4th December 2018, the applicants filed suit and an application for temporary injunction pending hearing and determination of the suit, but on 9th April 2019 this court dismissed the said application. The applicants' aver that they are aggrieved by the said ruling and are appealing against the same. The applicants aver that on 23rd April 2019 the respondent issued a notice dated 17th April, 2019 directing the applicants to demolish their houses and give vacant possession of the premises known as PLOT NO.MN/VI/4182 Mbuyuni within three days from 23rd April 2019, hence this application. The applicants state that there is imminent danger that the respondent may move and evict them and or demolish their houses during the pendency of the suit herein and the appeal hence the need for stay orders. It is the applicants contention that their houses are on PLOT NO.3794/VI/MN and not 4182 which is owned by the respondent. They further state that there is a dispute between the applicants and Kenya Ports Authority in respect of parcel No.3794 and currently there is a court order restraining Kenya Ports Authority from dealing with the property. The applicants argue that their appeal and the main suit have a likelihood of success based on the documentary evidence on record. They aver that they stand to suffer irreparable harm and loss if the application is not allowed, adding that the respondent will suffer no prejudice if the application is allowed.

3. In opposing the application, the respondent filed a replying affidavit sworn by James Nyamongo on 7th May, 2019. It is deposed that the subject matter where the respondent company has an interest is PLOT NO. MN/VI/4182, Mbuyuni which is different from PLOT NO.3794/II/MN which the applicants lay claim. That at no time did the respondent issue a notice in respect to PLOT NO. MN/II/3794. It is stated that the dismissal of the applicants' application for injunction was based on sufficient reasons and that the order annexed to the supporting affidavit and marked "RMN 6" alleging to bar any party from interfering with the suit property refers to PLOT MN/VI/3794 and not PLOT NO.4182/VI/MN, and that the same was issued 17 years ago and was to last for 14 days. Further, that the respondent, herein was not a party to that case. It is the respondent's contention that no irreparable loss was urged or at all is capable of being suffered where, as in the instant case, it has not been demonstrated that there is an entitlement to PLOT NO.4182/VI/MN by the applicants or even PLOT NO.3794/II/MN which they urge their interests. It is further the respondent's contention that the application does not meet the threshold for granting orders of stay pending appeal. The respondent further states that the application is incompetent as the deponent of the affidavit in support has no authority of the co-applicants, adding that the appeal has zero chances of success. It is averred that if a stay is granted great prejudice and loss shall be suffered by the respondent.

4. The application was canvassed by way of written submissions. The respondent filed their written submissions on 16th September 2019 while the applicants filed theirs on 20th September 2019. The applicants submitted inter alia, that they have a prima facie case and shall suffer irreparable harm if the stay is not granted because the respondent shall proceed to demolish their houses before the pending appeal is determined, and that if the appeal succeeds, they will be forced to institute proceedings, for compensation, and shall be subjected to homelessness. The applicants relied on the case of **Kinyanjui Muguta –v- Wotuku Muguta (2018)eKLR and Butt –v- Rent Restriction Tribunal (1970)eKLR**. The applicants submitted that the application is competent as the supporting affidavit is sworn by one granted authority by the co-applicants and that the authority to Act and swear affidavit was filed together with the main suit and the application dated

4th December, 2018. The applicants further submitted that they have an arguable appeal. The applicants cited the case of **JMM – v- PM (2018)eKLR** and submitted that the application is merited.

5. On their part, the respondent submitted that the application is incompetent and fatally defective and ought to be dismissed because the same has been brought without authorization of the co-applicants. It is the respondent's submission that the application does not meet the threshold for granting orders of stay pending appeal as exposed in Order 42 Rule 6 of the Civil Procedure Rules. It was further submitted that the ruling appealed against had no positive requirement as it was merely dismissed and the respondent relied on the case of **Catherine Njeri Maranga –v- Sarah Chege & Another (2017)eKLR; Feisal Amin Janmohamed t/a Dunyia Forwarders –v- Shami Trading Co. Ltd (2014) eKLR; Co-operative Bank of Kenya Limited –v- Banking Insurance & Finance Union (Kenya)(2015)eKLR; Raymond O. Omboga –v- Austine Pyan Maranga; and Peter Ondande t/a Spreawett Chemis –v- Josephin Wangari Karanja (2006)eKLR**. It is further the respondent's submission that the application does not have any chances of success.

6. I have considered the application and the submissions made. The only issue for determination is whether the applicants herein should be granted stay of execution of the ruling and orders of the court issued on 9th April 2019 pending the hearing and determination of the intended appeal. Order 42 Rule 6 of the Civil Procedure Rules sets out the conditions that must be met before an order for stay of execution is allowed. It states as follows:

6. (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 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 appealed 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 undue 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.

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7. The application herein was filed on 24th April, 2019 and the ruling appealed against was made on 9th April 2019. This is a period of about two weeks. On whether or not the application was brought without undue delay, I am satisfied that there was no delay.

8. Have the applicants demonstrated that they will suffer substantial loss if the order of stay is not granted? The applicants have stated that they are residents in the parcel of land known as PLOT NO. 3794/II/MN which borders PLOT NO.4182/VI/MN owned by the respondent. The notice issued by the respondent is in respect to its PLOT NO.4182/VI/MN and not on the PLOT NO.3794/II/MN which the applicants state they reside in. The applicants in my view, have failed to demonstrate to this court how they will suffer substantial loss when the respondent's action is not on the plot the applicants are residing on. This court takes cognizance of the fact that a stay of execution helps preserve the subject matter of the appeal so that it is not rendered nugatory if it succeeds. In this case, I am not convinced that the intended appeal will be rendered nugatory if the stay is not granted. In any event, the stay sought is in respect of the ruling delivered on 9th April 2019 in which the court dismissed the applicants' application for injunction. In my view, there were no positive orders that are capable of being stayed. The order dismissing the application dated 4th December, 2018 was a negative order and incapable of execution save for costs. Such order is incapable of stay. On the argument on whether or not the appeal is arguable, that in my view is not a matter for consideration by this court. The arguability or otherwise of the appeal is a matter for the appellate court, not this court.

9. Having considered the application before me, I am not persuaded that the same has met the pre-requisites of granting of stay of execution under Order 42 Rule 6. The upshot is that I find that the Notice of Motion dated 23rd April 2019 as lacking in merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 23rd day of January 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Adhoc for Defendant/Respondent

No appearance for Khatib for Applicant

Yumna Court Assistant

C.K. YANO

JUDGE