



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 589 OF 2011

AKSELI LAMEC & 121 OTHERS.....PLAINTIFFS

VERSUS

METHODIST CHURCH IN KENYA TRUSTEES & 7 OTHERS.....DEFENDANTS

RULING

(Application for stay pending appeal; application allowed on conditions)

1. The application before me is that dated 6 February 2020 filed by the plaintiffs. It is an application for stay pending appeal.

2. To put matters into context, the 1st respondent is the trustee of Methodist Church and holds the assets of the said Church. It is the registered owner of the land reference No. 163/Section V/Mainland North (the suit land) situated in Jomvu Kuu, Mombasa and popularly known as Jomvu Mission. Through a plaint filed on 9 November 2011, the 122 plaintiffs/applicants contended that they have been congregants of Jomvu Methodist Church and the Jomvu Mission Residents since its existence. They claimed that since time immemorial, they occupied the suit land and that their forefathers are buried here. It is pleaded that the 1st defendant requested the Jomvu Mission Residents to contribute money for the subdivision of the suit land and authorised them to look for a surveyor, which they did, and that on 10 July 2008 a Physical Plan was prepared. They pleaded that the conduct of the 1st defendant made them believe that they now own the suit land, and that this conduct by itself conferred ownership of the suit land to the applicants, and formed a valid agreement enforceable in law. It was further contended that the respondents negated their agreement and refused to honour the physical plan dated 10 July 2008. In the suit, they inter alia wished to have an order to have the Municipal Council of Mombasa (sued as 7th defendant) approve the said physical plan and for the same to be enforced.

3. The suit was resisted and the matter proceeded for hearing with judgment being delivered on 16 December 2019 by Omollo J. She did not find any merit in the case of the applicants and dismissed the suit with costs. The Honourable Judge further ordered that the applicants be assigned plots following a plan presented by the 1st – 6th respondents (the Methodist Church Trustees and its representatives) subject to them proving that they have made the requisite payments. After judgment was delivered, the applicants' counsel orally requested for a stay of 30 days pending the filing of a formal application for stay pending appeal, and this request was granted. This application was later filed on 6 February 2020.

4. The supporting affidavit to the application is sworn by Akseli Lamec. Inter alia, he has deposed that they have filed a Notice of Appeal and he believes that they have an arguable appeal with a high probability of success. He has averred that if the respondents proceed with their subdivision plan, they stand to lose some of their land and will suffer irreparably.

5. In opposing the application, Mr. Siminyu, learned counsel for the 1st – 6th respondents, argued that there is no executable decree. He further submitted that the applicants have not demonstrated that they stand to suffer any substantial loss. He added that no security has been offered by the applicants. Mr. Jumbale in his rejoinder submitted that this was a case touching on land and therefore it is not a must to offer security.

6. The 7th and 8th defendants (Municipal Council of Mombasa and Registrar of Titles respectively) did not participate in the application with counsel submitting that it does not affect them.

7. I have considered the application. This is an application for stay pending appeal. Applications of this nature are governed by the provisions of Order 42 Rule 6 (2) which is drawn as follows :-

(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.

8. From the foregoing, it will be noted that the applicants need to demonstrate the following :-

- That this application has been made without unreasonable delay.

- That they stand to suffer irreparable loss if the stay orders are not granted.

- That they are ready to offer such security for the due performance of the decree in the event that they do not succeed on appeal.

9. On whether or not the application has been made without unreasonable delay, judgment in the matter was delivered on 16 December 2019. This application was made on 6 February 2020. The applicants of course benefited from 30 days of stay granted immediately judgment was read. I do not think that this application has been made after unreasonable delay since the applicants benefit from the period between 20 December and 13 January of the following year which is not computed following the provisions of Order 50 Rule 4.

10. On substantial loss, I am prepared to hold that the applicants stand to suffer substantial loss if the 1st – 6th respondents proceed to implement their plan yet there is a chance that the applicants may very well succeed on appeal.

11. The only issue left is security. The 1st – 6th respondents wish to implement their physical plan and the grant of stay will certainly delay them from doing so. Sub-divisions and implementation of physical plans is an expensive exercise especially for large parcels of land such as the suit land, which measures approximately 135 acres. If there will be delay, this will certainly cost the 1st – 6th respondents, in the event that the applicants fail on appeal. In my discretion, I will make an order for the deposit of security in the sum of Kshs. 12,200,000/= which is a sum equivalent to an aggregate of Kshs. 100,000/= per applicant.

12. This amount of money needs to be confirmed, in writing, as being available, by counsel for the applicants within a period of 30 days from today, and the same to be deposited at the latest 15 days thereafter in a joint interest earning account to be held in the names of counsel for the applicants and 1st – 6th respondents. In the event that the applicants abide by the above, and subject thereto, I make the further order that the current prevailing status quo be maintained pending the hearing and determination of the appeal.

13. If the applicants abide by the order on security and will thus be entitled to benefit from stay, they will have to maintain the status quo, and if the respondents demonstrate that the applicants have disrupted the status quo, the order of stay will lapse and the security amount (if deposited) forfeited to the 1st respondent.

14. In the event that the security amount is deposited and the applicants succeed on appeal, the said monies plus any interest be released to the applicants, but if they fail on appeal, the said monies plus any interest be released to the 1st respondent. In the event that the applicants fail to abide by the terms given above for stay, the respondents will be at liberty to execute the decree.

15. On costs, if the applicants abide by the terms above, the costs of the application will be costs in the appeal. If they do not abide by the terms of stay, the costs of the application will be to the 1st – 6th respondents.

16. Orders accordingly.

DATED and delivered this 23RD day of APRIL 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA