REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 148 OF 2017

TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY.....PLAINTIFF

VERSUS

JOSEPH MULI MUKULUTA & 26 OTHER.....DEFENDANTS

RULING

A. THE APPLICANTS' CASE

1. By a notice of motion dated 7th April 2020 expressed to be brought under **Order 51 Rule 1, Order 21 Rule 12 (1), Order 22 Rule 22 (1)** of the **Civil Procedure Rules** *(the Rules),* **Section 63 (e) & Section 3A** of the **Civil Procedure Act (Cap. 21) and all other enabling provisions of the law,** the 2nd-27th Defendants *(the Applicants)* sought an order for stay of execution of the judgement and decree of this court dated 12th March 2020 pending appeal. The said application was based upon the 10 grounds set out on the face of the motion. It was contended that the Applicants were dissatisfied with the said judgment hence they intended to appeal against it. It was further contended that the Plaintiff had commenced the process of beaconing the suit properties and that if execution were to proceed the Applicants would be rendered homeless.

2. The said application was supported by the affidavit of Silas Musyoka Charles sworn on 7th April 2020 together with the annexures thereto. The said affidavit reiterated and expounded upon the grounds set out in the notice of motion. The Applicants contended that the Hon. Chief Justice had issued a statement on 2nd April 2020 staying execution of all decrees but the Plaintiff had ignored the same and initiated the beaconing process with a view to eventually evicting them from the suit properties.

B. THE PLAINTIFF'S RESPONSE

3. The Plaintiff filed a replying affidavit sworn by its Managing Director, Steven Githaiga Ruimuku, on 19th May 2020 in opposition to the said application. It was contended that the application was defective and misconceived in that the Applicants had filed it personally whilst they had advocates on record. It was also contended that the Applicants had not yet filed any notice of appeal hence a stay would not serve any useful purpose.

4. The Plaintiff stated that whilst it was lawfully beaconing the suit properties in compliance with the court order of 9th April 2020, the Applicants and other rowdy mobs violently disrupted and stopped the process in a bid to resist or frustrate execution of the decree. Details were given of how motor vehicles belonging to the Plaintiff and the police service were stoned and damaged and the area Chief assaulted by people who were opposed to execution of the decree. Several photographs were attached to the replying affidavit to demonstrate the damage occasioned by the resistance to execution.

5. The Plaintiff further stated that some of the beacons which had already been placed were destroyed or interfered with. The said violence and destruction was reported to Kiritiri police station and evidence thereof annexed to the replying affidavit. The Plaintiff, therefore, urged the court to hold that the Applicants were not entitled to the discretionary remedy of stay of execution on account of their unlawful conduct. The Applicants did not file any further or supplementary affidavit to respond to the alleged obstruction, violence and destruction of property.

C. DIRECTIONS ON THE HEARING

6. When directions were given on 9th April 2020 it was directed that the said application shall be canvassed through written submissions. The parties were granted 14 days each to file and serve their respective submissions upon the Respondent filing a response to the application. However, the record shows that none of the parties had filed their submissions by the time of preparation of the ruling.

D. THE ISSUES FOR DETERMINATION

7. The court has considered the application on record, the replying affidavit in opposition thereto, and the entire material on record. The court is of the opinion that the following questions arise for determination in this matter:

a) Whether the instant application is incompetent and misconceived.

b) Whether the Applicants have made out a case for the grant of an order for stay pending appeal.

c) If the answer to (a) above is in the affirmative, whether the Applicants have become disentitled to such order on account of their conduct.

d) Who shall bear costs of the application.

E. ANALYSIS AND DETERMINATIONS

a) Whether the application is incompetent and misconceived

8. The court has considered the material on record on this issue. There is no doubt that at all material times the Applicants were represented by the firm of Duncan Muyodi & Co. Advocates up to and including the time of judgment. There is no indication on record that the said firm has formally ceased from acting for the Applicants. There is no application on record by the Applicants seeking leave to act in person in place of the law firm on record.

9. The relevant provisions on representation of parties are contained in **Order 9** of the **Rules. Order 9 Rule 9** of the **Rules** stipulates as follows:

> **"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**
>
> **(a) upon an application with notice to all the parties; or**
>
> **(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."**

10. There is no doubt from the material on record that no order for change of advocates was sought and obtained by the Applicants. There is also no consent to effect such change which has been filed in this matter. Accordingly, the court accepts the Plaintiff's contention that the instant application is incompetent and misconceived since it was filed by parties who were not competent to do so.

b) Whether the Applicants have made out a case for stay of execution

11. In case the court is wrong on the 1st issue, it shall consider the rest of the issues. The Applicants seek a stay of execution of the decree on the basis of **Order 22** even though the correct order is **Order 42** of the **Rules.** The court shall, therefore, consider the said application on the basis of **Order 42 Rule 6 (2)** which stipulates 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.**
>
> **(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**
>
> **(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."** (emphasis added)

12. The court has noted from the material on record that the Applicants by their own admission have not yet filed any notice of appeal against the decree whose stay of execution is sought. The material on record indicates that the Applicants were apprehensive that if execution was not stayed then the impeding eviction would render them homeless. There was no allegation that the intended appeal might be rendered nugatory. The material on record indicates that the suit properties constitute public land registered in the name of the Plaintiff. There was no allegation or demonstration that there was a danger of the suit properties being alienated pending the filing, hearing and determination of the intended appeal. The court is of the view that should the Applicants ultimately succeed on appeal, they can still be restored to the suit properties. The court is thus not satisfied that the Applicants have demonstrated substantial loss within the meaning of **Order 42 Rule 6 (2)** of the **Rules.** Accordingly, the court finds that the Applicants have not made out a case for stay of execution.

c) Whether the Applicants' conduct has disentitled them to the orders sought

13. The Plaintiff contended that regardless of the merits of the application, the Applicants were disentitled to the discretionary order of stay by their own violent and unlawful conduct. It was contended that the Applicants and their allies had employed violence and destruction of property as a means of resisting the restoration of beacons on the suit properties in spite of a court order allowing the Plaintiff to proceed with the exercise.

14. The court has noted that the Applicants did not file any further affidavit disputing their role in the alleged violence and destruction of property in a bid to resist execution of the decree. The court is aware that during the trial the Applicants claimed that the Plaintiff had failed to clearly delineate the boundaries of its buffer zone hence they were not sure of the boundaries they were supposed to observe. In its judgement dated 12th March 2020 the court directed that the Applicants shall not be evicted until the Plaintiff had restored all missing beacons marking out the boundaries of the buffer zone.

15. It would thus appear that the Applicants have employed violent and unlawful means to prevent restoration of the beacons and thereby frustrate execution of the decree. The court is satisfied on the basis of the material on record that the Applicants are using unorthodox and unlawful means to resist the process of execution. The court frowns upon such conduct and impunity. The court is thus of the view that even if the Applicants had satisfied the formal requirements for stay of execution under **Order 42 Rule 6 (2)** of the **Rules** they would still be disentitled to a stay on account of their unlawful and criminal conduct. In the case of **Aikman V Muchoki [1984] KLR 353,** the Court of Appeal held that a court of law should not assist a law breaker to keep or reap the benefits of his own wrongdoing. Accordingly, the court agrees with the Plaintiff's contention that by their own conduct the Applicants have become disentitled to the interim orders sought.

d) Costs of the application

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21).** As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful litigant in this matter should be deprived of costs. Accordingly the Plaintiff shall be awarded costs of the application to be borne by the 2nd – 27th Defendants.

F. CONCLUSION AND DISPOSAL ORDER

17. The upshot of the foregoing is that the court finds no merit in the notice of motion dated 7th April 2020. Accordingly, the same is hereby dismissed in its entirety with costs to the Plaintiff. It is so ordered.

RULING DATED and SIGNED in Chambers at EMBU this 18TH DAY of JUNE 2020 via zoom platform in the presence of Mr. Miano holding brief for Mr. Kibe Mungai for the Plaintiff and in the absence of the Defendants.

Y.M. ANGIMA

JUDGE

18.06.2020