



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**MISC. APPLICATION NO. 31 OF 2018 (O.S.)**

- 1. HUSSEIN SULEIMAN MASILA**
- 2. LILIAN KAVUTI MUSYOKA**
- 3. IBRAHIM LUGUSA ALUDA.....APPLICANTS**

**VERSUS**

**KROTONITE ENTERPRISES LIMITED.....RESPONDENT**

**RULING**

1. The application for consideration is the Notice of Motion dated 30<sup>th</sup> September, 2019 brought by the interested party seeking for orders of stay of execution of the ruling delivered on 20<sup>th</sup> May, 2019 and for leave to fully participate in these proceedings. The application is stated to be brought under Section 1A, 3A and 63(e) of the Civil Procedure Act and Articles 40, 47 and 159 of the Constitution of Kenya.
2. The application is premised on the grounds on the face of the motion and supported by the affidavits of Mutuku Isaac Malila. It is deposed that the interested party is the registered and beneficial owner of all that parcel of land known AS LR. NO. MN/111/5612 (“the suit property”). A copy of letter of allotment, company’s resolution, surveyor’s report and bankers cheques have been attached. It is the interested party’s contention that the Applicants sued the respondent herein wrongly as they are not the owners of the suit property. The interested party wants to be granted leave to fully participate in the matter.
3. In opposing the application the applicants filed a replying affidavit sworn by Hussein Suleiman Masila, the 1<sup>st</sup> Applicant. The applicants contend that the application is a non-starter, frivolous and intended to delay the hearing and determination of the suit herein. They further contend that the letter of allotment annexed to the application was obtained fraudulently.
4. The respondent also opposed the application through a replying affidavit sworn by Abdulkarim Saleh Muhsin in which he deposes that the respondent is the registered owner of the suit property and denied the alleged proprietorship of the interested party. The respondent has attached a copy of the title document in respect of the suit property. The respondent has also exhibited a document from the Registrar of companies indicating that the interested party was registered on 11<sup>th</sup> June, 2002 and argue that the interested party would not have been allotted the suit property even before it was incorporated. It is the respondent’s case that the alleged letter of allotment is a nullity. The respondent have also annexed a letter from the National Land Commission to the interested party questioning documents forwarded to obtain title.
5. I have considered the application and the submissions made. This application is for stay of execution of the ruling delivered on 20<sup>th</sup> May, 2019. The only issues of determination are whether the interested party herein should be granted stay and leave to participate in these proceedings as sought.
6. Order 22 Rule 22 of the Civil Procedure Rules requires that sufficient cause must be shown before stay of execution is granted. Similarly, Order 42 Rule 6 sets out the conditions that must be met before an order for stay of execution is allowed. For an applicant to succeed, he/she must inter alia satisfy that loss may result to the applicant unless the order is made. Has the applicant demonstrated that it will suffer substantial loss if the order of stay is not granted?
7. The ruling of the court delivered on 20<sup>th</sup> May, 2019 simply set aside the judgment and decree that was entered on 11<sup>th</sup> May 2018. How does the stay of execution of such a ruling benefit the interested party herein? Is the interested party seeking to reinstate the judgment and decree that was set aside? To me it is quite superfluous for the interested party who is claiming ownership of the suit property to want to have the judgment and decree entered in favour of the applicants upheld. In my view, the Interested Party has failed to demonstrate to this court how it would suffer substantial loss from the implementation of the order of 20<sup>th</sup> May, 2019. I therefore decline to grant the stay order

sought.

8. The other issue to consider is whether the interested party should be granted leave to fully participate in this suit. Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. However, joinder of parties may be refused where such joinder will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determine factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.

9. The applicants' claim herein against the respondent is that of adverse possession. The respondent is the registered owner of the suit property. The interested party alleges it is also registered as the owner of the suit property. This court cannot be able to determine as to between the respondent and the interested party holds valid title over the suit property in these proceedings. That in my view, is an issue that can only be determined in a separate and substantive suit. Accordingly, the court is of the view that the interested party is not a necessary party in these proceedings and I decline to grant leave to the interested party to participate in these proceedings.

10. For the foregoing reasons, I find that the notice of motion dated 30<sup>th</sup> September, 2019 as lacking in merit and hereby dismiss it with costs to the applicants and the respondent.

11. Order accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29<sup>th</sup> day of July 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**