



Simasi & another (Suing as Administrators of the Estate of the Late D.A Vaughan Philpott) v Registrar of Lands, Mombasa & another (Environment & Land Case 188 of 2016) [2020] KEELC 3993 (KLR) (9 July 2020) (Ruling)

Timothy Simasi & another (Suing as Administrators of the estate of the late D.A Vaughan Philpott) v Registrar of Lands, Mombasa & another [2020] eKLR

Neutral citation: [2020] KEELC 3993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 188 OF 2016**

**M SILA, J
JULY 9, 2020**

BETWEEN

**TIMOTHY SIMASI 1ST PLAINTIFF
RICHARD WANYONYI 2ND PLAINTIFF
SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE D.A
VAUGHAN PHILPOTT**

AND

**REGISTRAR OF LANDS, MOMBASA 1ST DEFENDANT
MUSERURE SUZANNE KAINEMBAMBAZI (SUED AS THE EXECUTRIX
OF THE ESTATE OF THE LATE JOHN WYCLIFFE RUTAGYEMWA
KAZZORA) 2ND DEFENDANT**

RULING

(Application for stay pending appeal; stay given on condition of deposit of taxed costs as security)

1. The application before me is that dated 17 March 2020 and filed on 9 April 2020 filed by the unsuccessful plaintiffs. It is an application said to be brought pursuant to the provisions of Order 40 of the Civil Procedure Rules. As drawn, it seeks an order of injunction to restrain the respondents from selling, transferring, occupying, leasing or in any other way interfering with the land parcels identified as Subdivision No. 1509 (Original No. 863/10) Section 1/ Mainland North, Title CR No. 597821/1 and Subdivision No. 1108 (Original No. 863/8) Section 1/Mainland North, Title CR No. 58781/1



- (the suit properties), pending the hearing and determination of an intended appeal to the Court of Appeal. The application is opposed by the 2nd defendant.
2. To put matters into perspective, the applicants filed this suit on 12 July 2016, on behalf of the estate of Captain D.A Vaughan Philpott (deceased). They claimed that the suit properties belong to the estate of the deceased and claimed that title was fraudulently transferred into the name of one John Wycliffe Rutagyamwa Kazzora. They thus sought an order to have the title cancelled and for the suit properties to be reverted back to the name of D.A Vaughan Philpott (deceased). The 2nd respondent in her defence pleaded that in the year 1974, the late Philpott in order to settle accounts with the late Kazzora, executed transfers of the suit properties into the name of Mr. Kazzora. The formal transfer was not however registered and had not been registered before 1999 when Mr. Kazzora died. The executors of his will eventually transferred the properties in the year 2013.
 3. The case was heard by Omollo J and judgment delivered on 10 February 2020. The learned Honourable Judge found that the transfer of the suit properties to the name of the late Mr. Kazzora was done above board and she upheld the title held by the 2nd respondent. The case of the applicants was dismissed with costs. Aggrieved, the applicants filed a Notice of Appeal on 9 March 2020 and followed it up with this application.
 4. The 2nd respondent filed Grounds of Opposition and a replying affidavit. She deposed that she is the caretaker and the physical custodian of the suit properties and that none of them is being considered for sale, transfer, or any manner of development. She is however opposed to the parcels of land remaining fallow and unproductive. She has contended that the applicants have no capacity to pay costs in the event that their appeal is dismissed.
 5. The 1st respondent did not participate in the application.
 6. I have taken note of the submissions of both counsel for the applicants and counsel for the 2nd respondent. I take the following view of the matter.
 7. First, although the application is said to have been brought pursuant to the provisions of Order 40 of the Civil Procedure Rules, 2010, that cannot be the case, for Order 40 applies to interlocutory injunctions. What the applicants want is a stay of execution and/or injunction pending appeal, and this is the subject of Order 42 Rule 6. I will not dismiss the application for this technicality but will, despite the wrong provision of the law, consider it on its merits.
 8. Order 42 Rule 6 (2) states the principles that a court needs to consider when assessing an application for stay pending appeal. It provides 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.
 9. From the foregoing, it will be seen that the applicant need to demonstrate three elements being :-
 - (i) That they have filed this application without unreasonable delay;
 - (ii) That they stand to suffer substantial loss if the application is not allowed;
 - (iii) That they are ready to offer security for the due performance of the decree.



10. On the first element, that of unreasonable delay, I think the application has been filed timeously without delay. I am also of the view that the applicants stand to suffer substantial loss if the respondents deal with the property. It is important that the subject matter be preserved so that it is available in the event that the applicants succeed on appeal. I am thus prepared to have the title preserved pending appeal, and also to have the status quo prevailing with regard to possession and use maintained, pending the hearing and determination of this appeal, if the applicants are ready to offer security. In our case, it appears as if the property has been in the hands of the 2nd respondent. I think in those circumstances security for costs of this suit would be sufficient. There are already fears that the applicants may not be able to shoulder costs of this suit. I think the 2nd respondent will not complain if the applicants, as a condition for stay, are directed to deposit the costs of this suit upon taxation.

11. Given the above, I make the following orders :-

- (i) That subject to the applicants depositing the taxed costs within 30 days of taxation, there is issued an order of stay pending appeal, which order restricts the registration of any disposition in the titles of the suit properties, and which order further restrains the 2nd respondent from entering into any sale, charge, or other adverse dealings in respect of the suit property.
- (ii) That subject to deposit of security as ordered above, the status quo be maintained pending appeal.
- (iii) That if the applicants do not deposit security within 30 days of taxation, in a joint interest earning account, to be held in the names of counsel for the applicants and counsel for the 2nd respondent, the orders of stay hereinabove given will lapse, and the respondents will be at liberty to deal with the suit properties as they so wish.
- (iv) That however, pending taxation of costs, and the lapse of 30 days for depositing security, there is hereby issued an interim order of stay, which stops the respondents from entering into, or registering any adverse dealings, over the suit properties.
- (v) If the applicants abide by the terms of stay, the costs of this application will be within the appeal, but if they do not, the costs of this application will be to the 2nd respondent.

12. Orders accordingly.

DATED AND DELIVERED THIS 9TH DAY OF JULY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

