



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW MISC. CAUSE NO. 11 OF 2008

IN THE MATTER OF: AN APPLICATION BY MWAI LIMITED, JAMES MATHENGE MWAI, GRACE GACHEKE MWAI AND CATHERINE WANGUI MUIGAI (as Administrator of the estate of ISIAAH MWAI MATHENGE AND SIMON NYAGA MATHENGE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT (CAP 281 LAWS OF KENYA)

THE RATING ACT (CAP 267 LAWS OF KENYA)

AND

1. MWAI LIMITED

JAMES MATHENGE MWAI, GRACE GACHEKE MWAI AND

CATHERINE WANGUI MUIGAI as Administrator of the Estate

of

2. ISIAAH MWAI MATHENGE

3. SIMON NYAGA MATHENGE.....APPLICANTS

VERSUS

1. MUNICIPAL COUNCIL OF MOMBASA

G.K. MEENYA & M.N. KIRIMA T/A

2. MEENYE KIRIMA ADVOCATES

3. MOUNT HOLDINGS LIMITED

4. THE HONOURABLE ATTORNEY GENERAL

5. CHIEF MAGISTRATE'S COURT MOMBASA

6. REGISTRAR OF TITLE MOMBASA.....RESPONDENTS

RULING

1. This Ruling relates to an Application by way of a Notice of Motion dated 9th June, 2015 (the Application), in which the Applicants seek the following –

- (1) a temporary stay of execution of the Ruling delivered herein on 29th May, 2015 and any subsequent orders therefrom pending the hearing and determination of the Appeal filed herefrom; and
- (2) Costs hereof be provided for.

2. The Application was supported by the Affidavits of Ashok Doshi, a Director of Mount Holdings Limited, one of the Interested Parties in the Judicial Review Application, the subject of my Ruling of 29th May, 2015 in which there issued orders of certiorari to quash the purported transfer of the lands referred to in the said Ruling to the Interested Party.

3. The application is opposed **firstly** by the First Respondent's Grounds of Opposition dated and filed on 17th June, 2015, arguing that the Application does not satisfy the mandatory provisions of Order 42, rule 6 of the Civil Procedure Rules, 2010, nor the provisions on stay pending appeal, and that the application lacks any firm ground to stand on.

4. The application was also opposed by the ex parte Applicants through the submissions of its Advocate dated 1st September, 2015, and filed on 10th September, 2015 essentially reiterating the grounds of opposition filed by the Second Respondent.

THE APPLICANTS' CASE

5. The applicants' case is elaborated in the written submissions dated 18th August, 2015, and filed on 20th August, 2015. The Applicant's counsel argues that the appeal has been lodged timeously and without inordinate delay that it would suffer irreparable and substantial loss if the orders sought are not granted and it would mean that the contested suit property may be transferred to the Respondents when in essence it is registered in the name of the Applicant, and that if the transfer was effected, its appeal would be rendered nugatory were it to succeed. The Applicants also offer to give such unequivocal undertaking not to alter, alienate, sell or in any other way deal in the suit property pending the hearing of the Appeal.

6. For those reasons, the Applicants urge the court to grant the orders staying the execution of the Ruling of 29th May, 2015.

RESPONDENTS' ARGUMENTS AND DETERMINATION

7. The Respondents' arguments are basically that the Application does not meet the mandatory requirements of the provisions of Order 42 rule 6 of the Civil Procedure Rules, so their case will be considered in the determination.

8. The Application is correctly premised upon the provisions of Order 42, rule 6(2) which provides that 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
- (b) that the application has been made without unreasonable delay, and
- (c) such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given by the applicant.

9. I will consider in turn these conditions for stay of execution. The Ruling, the subject of appeal was

delivered on 29th May, 2015. The application herein was made on 4th June, 2015, that is another 10 days after the Ruling. There is no doubt the Application was made timeously.

10. As to substantiate loss, the Applicants are bound by their pleadings in both the Application and the Judicial Review Application. There is no evidence of any consideration paid by the Applicant to the County Government of Mombasa (formerly Municipal Council of Mombasa), for the acquisition of the suit property. There is evidence that the ex parte Applicants had paid for rates well before the purported sale to the Applicant.

11. As for offering security, I am of the firm view that no amount of security can compensate an illegality in relation to the acquisition of the suit property. That is the very issue to be determined in the Appeal that is pending in the Court of Appeal.

12. Counsel for the Applicants cited the case of **WILSON VS. CHURCH (NO. 21 [1879] 12 CIF.D. 454** where Brett LJ said –

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are no particular circumstances in the case to make an order staying, execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful being nugatory.”

and Cotton L.J. said at page 458 –

“I will state my opinion that when a party is appealing exercising his undoubted right of Appeal, this court ought to see that the Appeal if successful is not nugatory.”

13. That is certainly the position in England and the grant of stay by the Court of Appeal of Kenya. The only thing of similarity is that the stay of execution is dependent upon the discretion of the court. In Kenya the discretion of this court is circumscribed by Order 42, rule (6) of the Civil Procedure Rules 2010. Discretion must always be exercised on sound principles, in addition to the conditions in Order 42 rule 6(2). There was evidence that the Applicants had paid full the rates well before the purported sale to the Third Respondent. There was no evidence of payment of any consideration by the Third Respondent for the suit property to the First Respondent. There was no evidence of any instructions to the Second Respondent by the First Respondent. The transaction between the Second Respondent and the Third Respondent had a tinge of illegality, and a finding of illegality can only be reversed by a higher court.

14. For those reasons, I decline to grant any orders of stay of execution. The Applicants’ Notice of Motion dated and filed on 9th June, 2015 is therefore dismissed with costs to the Applicants/Respondents.

15. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 3rd day of December, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Busiega for Applicants

Miss Lutta holding brief Ngari for 4th – 6th Respondents

Mr. Silas Kaunda Court Assistant