



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 243 OF 2015 (O.S)

SIMON KILINGE KING'OO.....1ST PLAINTIFF
ROBERT KYALO MUEMA.....2ND PLAINTIFF
BENSON MAKAU MWANGANGI.....3RD PLAINTIFF
PETER MBINDYO MUTINDA.....4TH PLAINTIFF
JOSEPH KIVULA WAMBUA.....5TH PLAINTIFF
JULIUS MUTUKU KYENGO.....6TH PLAINTIFF
DORCAS HEDRICK KIOKO.....7TH PLAINTIFF
PATRICK MAINGI MUTIE.....8TH PLAINTIFF
TITUS MAKAU KING'OLA.....9TH PLAINTIFF
MUTHEU MASUNI.....10TH PLAINTIFF
PATRICK WAMBUA.....11TH PLAINTIFF
MUTISYA KAMIA.....12TH PLAINTIFF

VERSUS

AMOS KAMIA NGUKU.....1ST DEFENDANT
MUENI KAMIA.....2ND DEFENDANT
MUTIO KAMIA.....3RD DEFENDANT
MUNYAKA KAMIA.....4TH DEFENDANT
ROBERT KAMIA.....5TH DEFENDANT

AND

ANTHONY KUVIKA KAMIA

DAVID NZOMO KAMIA (*administrators of the Estate of*

AMOS KAMIA NGUKU.....INTERESTED PARTIES/APPLICANTS

RULING

1. The Notice Motion dated 9th August, 2019 is seeking for a stay of execution of this court's Judgment dated 25th January, 2019 pending the hearing and determination of Court of Appeal Civil Appeal No. 377 of 2019.
2. The Application is supported by the Affidavit of Anthony Kuvuika Kamia, who is the 1st Interested Party/Applicant, who deponed that the Applicants are dissatisfied and aggrieved with the Judgment of the court dated 25th January, 2019 and that they have filed a Notice of Appeal in the Court of Appeal challenging the said Judgment.
3. The 1st Interested Party deponed that this court awarded to the Plaintiffs 40 acres of land and ordered the Land Registrar of Machakos to register the Plaintiffs as the proprietors thereof; that the intended Appeal has a high chance of success and that unless the orders sought are granted, the intended Appeal will be rendered nugatory.
4. The Application was opposed by the Plaintiffs. The 6th Plaintiff deponed that there is a pending Application before the Court of Appeal seeking that the Record of Appeal that was filed by the Interested Parties be struck out having been filed out of time; that on that account, this court does not have jurisdiction to give orders in respect of matters pending before the Court of Appeal and that the Application should be dismissed with costs.
5. The 6th Plaintiff finally deponed that the Interested Parties have not shown the substantial loss that they will suffer if the Application is not granted and that the Application has been filed late in the day.
6. The Application was canvassed by way of written submissions. In his submissions, learned counsel for the Applicants cited the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules and the case of *Bob Morgan Systems Ltd & Another vs. Jones (2004) eKLR*.
7. Counsel submitted that the Appeal was arguable and that under Section 3A of the Civil Procedure Act, this court has jurisdiction to grant the orders sought. Learned counsel submitted that the Applicants will suffer substantial loss unless the Application is allowed because the suit property may be transferred to third parties and that the court should allow the Application.
8. Learned counsel for the Plaintiffs submitted that the Applicants have not satisfied the conditions for granting of stay of execution of the Judgment; that this court lacks jurisdiction to entertain this Application because the court is *functus officio* and that there is a pending Application before the Court of Appeal.
9. Counsel submitted that this court cannot adjudicate on matters pending before the Court of Appeal especially where the competence of the said Appeal is in question; that the Application was not filed timeously; that the delay in filing the Application was not explained and that the Applicants have not offered any security for due performance of the Decree.
10. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending Appeal. The conditions to be met by an Applicant in order to be entitled to an order of stay are set out in that Rule in the following terms:

“6. (1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 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.”

11. In considering if the Applicants will suffer substantial loss unless an order of stay of execution is granted, this court is guided by the decision of the Court of Appeal in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in which the court stated as follows:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

12. This court delivered its Judgment in this matter on 25th January, 2019. In the said Judgment, the court allowed the Plaintiffs' claim as follows:

a) The Plaintiffs are entitled by virtue of adverse possession in their respective shares of parcel of land known as Mavoko Town/Block 3/2668.

b) Machakos Land Registrar to register the Plaintiffs as proprietors of the parcel of land known as Mavoko Town/Block 3/2668.

13. Although the Judgment of the court was read in open court on 25th January, 2019 in the presence of the Interested Parties' advocate, the advocate did not seek for a stay of execution. Indeed, since the Judgment was delivered on 25th January, 2019, it was not until 18th September, 2019 that the current Application was filed.

14. I have gone through the Affidavit of the 1st Interested Party. In the said Affidavit, the Applicants have not informed the court why they did not seek for a stay of execution on the day the Judgment was delivered or immediately thereafter.

15. Having waited for more than eight (8) months before filing the current Application, and the Applicants having not given a satisfactory explanation for the said delay, it is my finding that the delay in filing the Application was unreasonable.

16. On that ground alone, I dismiss the Application dated 9th August, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE