REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 310 OF 2014

DIGNIFIED HOLDINGS LIMITED.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

SAID B. NDEGE.....2ND DEFENDANT

RAIA A. MKUNGU.....3RD DEFENDANT

OMARI ZONGA.....4TH DEFENDANT

SAID H KABANGI.....5TH DEFENDANT

HILMI M AHMED.....6TH DEFENDANT

SAID MWANLYIKAI TOMAS.....7TH DEFENDANT

ATHUMAN SAID RIMO.....8TH DEFENDANT

ALI JUMA NGONYO.....9TH DEFENDANT

YASMIN DUSHMANI SHABAN.....10TH DEFENDANT

DAVID K. KANDIE.....11TH DEFENDANT

SILAS KIPTUI KIPCHILAT.....12TH DEFENDANT

KENNEDY BEGI ONKOGBA.....13TH DEFENDANT

RULING

(Application for stay pending appeal; principles to be considered, substantial loss; whether applicants have demonstrated substantial loss; supporting affidavit sworn by counsel and not the applicants; held that it is for the applicants to demonstrate what loss they stood to suffer and not their counsel; no proof by applicants of what loss they stood to suffer; application dismissed).

1. The application before me is that dated 20 May 2020 filed by the 2nd, 4th, 5th and 6th defendants. It is an application brought inter alia pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, and seeks orders of stay of execution of the decree pending appeal. The application is opposed by the plaintiff, who is the successful party.

2. To put matters into context, the respondent filed this suit against 13 defendants, and claimed to be the owner of the land comprised in the title Kwale/Diani Beach Block/60. The respondent pleaded that this land was formerly known as LR No. 5004/14 title No. CR 12859 and that it was then renumbered to the title Kwale/Diani Beach Block / 151. The respondent pleaded to have purchased this land in the year 1992, as Kwale/Diani Beach Block/60, from the previous proprietor who held a lease for 99 years from 1914. A transfer of lease was effected in the year 1992 after which the respondent took possession. In the year 2007, the respondent applied for an extension of the lease and a new

lease was granted on 31 January 2008 for a further 50 years. In the year 2010, the respondent was contacted over investigations being conducted by the Ethics and Anti-Corruption Commission, over the title Kwale/Diani Beach Block/151. The respondent subsequently discovered that this title Kwale/Diani Beach Block/151 occupied the same land as that comprised in the title Kwale/Diani Beach Block/60. It further discovered that this renumbering was done when the Beach Road Diani was created which cut across the land dividing it into two. It pleaded that the Land Registrar, Kwale, on 4 October 2006, issued to the 2nd, 3rd, 4th, 5th and 6th defendants a certificate of lease for the same land and further issued another certificate of lease to the 7th, 8th and 9th defendants on 18 October 2006. Yet another certificate of lease was issued to the 7th, 8th, 9th and 10th defendants. It was the respondent's case that the issuance of other titles to the disputed land was illegal, fraudulent, null and void. In the suit, the respondent sought orders that the land comprised in the title Kwale/Diani Beach Block/60 occupies the same geographical position as Kwale/Diani Beach Block/151 and a cancellation of the titles to Kwale/Diani Beach Block/151 issued to the 2nd – 13th defendants by the Land Registrar, sued as 1st defendant. The 7th – 10th defendants claimed that they applied for and were allotted title to the land parcel Kwale/Diani Beach Block/151 and they were thus the lawful owners. The 3rd – 6th defendants on their part also asserted ownership of the title Kwale/Diani Beach Block/151. They averred that Kwale/Diani Beach Block/60 was subdivided in October 1974 after a compulsory acquisition of part of it, for the Diani Beach Road, resulting in the land parcels Kwale/Diani Beach Block/151 for the plot and Kwale/Diani Beach Block/152 for the road reserve.

3. The evidence adduced was to the effect that the Diani Beach Road passed between the Plots Nos. 59 and 60. The plot No. 60 was thus subdivided into the Plots No. 151 and 152 for the road reserve. The learned Judge (Omollo J) was thus persuaded that the respondent is entitled to ownership of the land parcel Kwale/Diani Beach Block/151. She further declared the allotment of the land to the 2nd – 13th defendants to have been illegal and she proceeded to cancel their titles. Each party was ordered to pay bear their own costs. Aggrieved, the 2nd – 6th defendants filed a Notice of Appeal and followed it up with this application. I have already mentioned that it is an application seeking stay of execution pending appeal. The supporting affidavit is sworn by Jared O. Magolo, who is also counsel for the applicants. He has stated that the applicants are apprehensive that should execution proceed, they will suffer irreparable loss by losing their ancestral land.

4. To oppose this application, the respondent filed Grounds of Opposition and a Replying Affidavit. It is averred inter alia that the application is premature as there is no imminent threat of execution. It is further averred that considering the nature of orders made, the applicants do not stand to suffer any substantial loss, and that this application is an attempt to prevent the respondent from enjoying the fruits of the judgment. The application is also said to be defective by dint of the provisions of Order 19 Rule 3 (1), which states that affidavits need to be confined to such facts as the deponent is able of his own knowledge to prove. The replying affidavit is sworn by Damary Ayuku Angulu, the legal advisor of the respondent. She has more or less alluded to the above. She has deposed that the applicants do not stand to suffer any substantial loss as they have never been in possession of the land. She has further averred that the applicants have not offered any security for the due performance of the decree and have further failed to demonstrate an arguable appeal.

5. Counsel agreed that the application can be argued by way of written submissions. I have seen the submissions of Mr. Magolo, learned counsel for the applicants, and Mr. McCourt, learned counsel for the respondent. I have considered these in arriving at my decision.

6. This is an application for stay pending appeal, and therefore the provisions of Order 42 Rule 6 apply. The said law is drawn as follows :-

> (2) No order for stay of execution shall be made under subrule (1) unless –
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> > (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.

7. It will be seen from the above that there are three issues to look at being:-

> i. Whether the application has been made without unreasonable delay;
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> ii. Whether the applicant stands to suffer substantial loss if the order for stay is not made; and
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> iii. Whether there is security for the due performance of the decree.

8. I am aware that in the replying affidavit, the respondent has argued that the applicants do not have an arguable appeal, but as can be seen from a reading of Order 42 rule 6 (2), that is not a consideration for an application of this nature before this court.

9. On the first limb, that of delay, I am of the view that the application was made timeously and it cannot be argued to have been made after unreasonable delay. It was made within one month of delivery of the judgment.

10. The main contention in this application is on substantial loss. Mr. McCourt, learned counsel for the respondent, in his submissions, argued that substantial loss is a question of fact and evidence. He pointed out that the affidavit in support of the application is sworn by a person who is not privy to the facts of substantial loss. Indeed, the supporting affidavit was sworn by Mr. Magolo, who is counsel for the applicants, and not by any of the applicants. On this point, I agree with Mr. McCourt. There needed to be a demonstration by the applicants of what substantial loss they stand to suffer if the order of stay is not made. It is them who know what loss they will suffer and counsel cannot speculate on their behalf. A stranger cannot say that they (applicants), will endure a certain loss when the applicants themselves have not come out to demonstrate the nature of loss that will befall them if the order of stay is not granted. It is the wearer who knows where the shoe pinches and a bystander cannot be heard to say that it is the wearer's toe which is hurting, when the wearer himself has not complained. It has been held time without number that counsel should be careful with the nature of affidavits that they swear. Where the facts are within the domain of the litigant, it is that litigant who needs to swear the affidavit.

11. I am not therefore persuaded that the applicants have demonstrated to this court that they stand to suffer any substantial loss if the order of stay is not granted. Since I am not so satisfied on the question of substantial loss, the application must fail.

12. There was an issue raised by Mr. Magolo, learned counsel for the applicants, on the veracity of the replying affidavit. It was argued that there was no board resolution annexed authorising the deponent to swear the affidavit. To me, this is a red herring, for even if I am to hold that the affidavit is incompetent, it still does not help the applicants, for it was them who bore the burden of demonstrating substantial loss, which they have failed to do.

13. For the above reasons, this application is hereby dismissed with costs to the plaintiff/respondent.

14. Orders accordingly.

DATED AND DELIVERED THIS 29TH DAY OF OCTOBER, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA