



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO. 15 OF 2016

ASTORIA PARK LIMITED.....PLAINTIFF

VERSUS

- 1. NASIB NGUMBAO**
- 2. WILSON KEMENWA MUDOME**
- 3. WILLIAM CHIBUTE NDUNE**
- 4. NICKSON KITSAO CHARO.....DEFENDANTS**

AND

- 1. JACKSON MWANGOME NGOME**
- 2. ELIAS CHANGA**
- 3. HASSAN HAMISI HASSAN**
- 4. FUAD SAID**
- 5. PRISCAR CHIPANDE.....AFFECTED PARTIES/APPLICANTS**

RULING

1. By this Notice of Motion dated and filed herein on 27th August 2019, Jackson Mwangome Ngome, Elias Changa, Hassan Hamis Hassan, Fuad Said and Priscar Chipande terming themselves the Affected Parties/Applicants pray for Orders: -

2.....

3. That the Honourable Court be pleased to stay the orders of execution issued on 11th July 2019 pending the hearing and determination of the Affected Parties/Applicants application dated 15th January 2019 filed in Court on even date.

4. That the costs of this application be in the cause.

2. The application which is supported by an affidavit sworn by Jackson Mwangome Ngome is premised on the grounds: -

i) That the Applicants herein are permanent residents on the land known as Parcel No. MN/III/1611 (Mutation from Parcel MN/III/313) being the suit premises in the instant case.

ii) That the Applicants have been residents in the said property for a long period exceeding 12 years but were not made parties to the instant suit nor served with summons or any other document;

iii) That the Applicants became aware of the matter only after Judgment and proceeded to file the application for stay of

execution dated 15th January 2019. The Plaintiffs responded to the application by way of a Preliminary Objection but neither the application nor the objection have been heard;

iv) That it is necessary that the Applicants are heard before the orders of demolition and eviction are confirmed otherwise the Applicants' rights of natural justice would be gravely violated.

3. The application is opposed. In a Replying Affidavit sworn on its behalf by one of its directors Mohammed Wanyoike Mburu and filed herein on 20th September 2019, Astoria Park Limited (the Plaintiff) asserts that it is the registered owner of the suit property. The Plaintiff disputes the Applicants assertions and avers that the Applicants have not demonstrated beyond reasonable doubt that they reside on the said property and that they are hence entitled to the orders sought.

4. The Plaintiff further asserts that the Applicants were not parties to this suit and they cannot therefore apply for orders of stay of execution as sought herein. At the same time, the Plaintiff asserts that the Applicants were served with summons and hearing notices but deliberately failed to enter appearance and or to participate in the proceedings herein in a bid to frustrate the Plaintiffs from enforcing Judgment against themselves.

5. I have perused the application and the response thereto. I have similarly perused the written submissions and authorities placed before me by the Learned Advocates for the parties.

6. The application before me is expressed to be brought under Order 22 Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. That Rule provides as follows: -

(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the Judgment- debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the executions or for any other order relating to the decree or execution which might have been made by the Court of first instance, or appellate Court if execution has been issued thereby, or if application for execution has been made thereto;

(2) Where the property or person of the Judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application; and

(3) Before making an order of stay of execution or for the restitution of property or the discharge of the Judgment-debtor the Court may require such security from, or impose such conditions upon, the Judgment-debtor as it thinks fit.

7. With respect to the Applicants and their Counsel on record, I am unable to fathom how the above provisions could be applicable to the circumstances before me. The Applicants herein claim to be parties affected by the Judgment of this Court delivered against the Defendants herein on 22nd May 2018.

8. On the basis of their being so affected, the Applicants filed before this Court an application dated 15th January 2019 wherein they sought to be enjoined in these proceedings for purposes of setting aside the same in order for them to be allowed to file a defence to the Plaintiff's claim. That application is yet to be heard and or determined.

9. When the said application came up for hearing on 20th February 2019, the parties sought time to be allowed to file submissions. This Court adjourned the matter to 3rd April 2019 to enable the parties to do so. On the said 3rd day of April 2019 however, the Applicants and their Counsel were absent from the Court and to be fair to them, this Court adjourned the matter indefinitely even though Counsel for the Plaintiff was present and ready to proceed with submissions.

10. The Applicants did not do anything thereafter until four months later when, having learnt that the Plaintiffs were proceeding with execution, they rushed to this Court to file the present application. As it were, it would appear to me that someone misled the Applicants that the filing of their application dated 15th January 2019 amounted to the securing of orders of stay of execution. Unfortunately for them, that was not the case.

11. As the matter stands before me, the Applicants are not yet parties to this suit. Unless and until they prosecute their application dated 15th January 2019 aforesaid, and unless and until they are enjoined in this suit, their application for stay remains premature and misconceived.

12. At any rate, a party who seeks an order of stay of execution must bring himself or herself within the ambit of the provisions set out under Order 42 Rule 6(2) of the Civil Procedure Rules. That Rule prohibits the Court from granting an order of stay of execution unless 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. The Court must further satisfy itself that the Applicant has provided such security as may be sufficient for the due performance of the decree.

13. Taking all those factors into consideration, I am not satisfied that there is any merit in the Motion dated 27th August 2019. The same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 2nd day of October, 2020.

J.O. OLOLA

JUDGE