



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 237 OF 2014

JOSIAH KAFUTA MTILA.....PLAINTIFF

VERSUS

ABDULKHALL MOHAMED & OTHERS.....DEFENDANTS

RULING

1. For determination is the Notice of Motion dated 22nd March 2018 brought by the 1st and 2nd Defendants/applicants under the provisions of order 42 rule 6, Order 51 rule 1 and Section 3A, 1a & 1B of the Civil Procedure Rules. The applicants pray to be granted orders of stay of execution of the judgement of this court delivered on 7th February 2018 pending hearing and determination of the intended appeal. They also prayed for costs of the application.

2. The applicants being dissatisfied with the decision of this court pleads that they intend to appeal and unless stay orders are granted, they are likely to suffer substantial loss. That the application was brought without undue delay.

3. The application is opposed by the plaintiff/respondent who swore a replying affidavit dated 18th July 2018. The respondent urges that the applicants are yet to file the appeal for the court to be able to ascertain whether it has any chance of success. That the application is frivolous and is an abuse of the court process merely seeking to deny him the rightful fruits of his judgement. He urged the court to dismiss the application with costs.

4. The advocates participating in this motion filed their respective submissions. The applicants submitted that they have a right of appeal. That the filing of grounds of appeal at this stage is not mandatory. The Respondent on his part submitted that if the orders are granted, the applicants should be directed to deposit security in the sum of Kshs10,500,525/= being monies awarded as compensation by the National Land Commission.

5. In an application such as this, the applicant ought to meet the conditions set out under Order 42 rule 6(2) of the Civil Procedure Rules. The applicant already filed a notice of appeal as shown in annex ANAM-2 to the supporting affidavit. The application was also filed one month after the delivery of the judgment which is not undue delay.

6. The only conditions remaining for the court to determine are two;

(a) Whether the applicants shall suffer substantial loss unless the orders are granted.

(b) If there is need to provide for security.

7. I have considered the pleadings together with the submissions. I have also perused the record. On 19th August 2016, this court did issue an order restraining the National Land Commission from releasing compensation funds in the sum of Kshs10,500,525/= pending hearing and determination of the application dated 17th August 2016. The plaintiff has not disclosed to the court in his replying affidavit that the said monies have left the hands of the National Land Commission.

8. Every person is guaranteed a right to a fair hearing by the constitution of Kenya. This right includes giving a party an opportunity of pursuing legal redress to the highest court i.e exhausting all available options including the right of appeal. A notice of appeal having been filed, it would be unfair to allow the execution to proceed since that would render the appeal process an academic exercise. Secondly, the amount of compensation funds due on the suit property is huge and in the event the appeal succeeds, the applicant may not be able to recover the funds if at all from the respondent. That such loss is equivalent to substantial loss.

9. On security, since the funds are being held or compensation amount assessed by none of the parties to this application, it would be punitive

to order the applicants to deposit the quoted sum of Kshs10,500,525/=. The suit land is still intact and thus I do not see the need to order for provision of security.

10. In view of the above observations made, I conclude that the Notice of Motion dated 27th March 2018 is merited. I allow it in terms of prayer no 3, with costs in the cause.

Dated, Signed and Delivered at Mombasa this 27th day of June 2019.

A. OMOLLO

JUDGE.