



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 121 OF 2014

FRED KAZUNGU JUSTIN DINDI.....PLAINTIFF/RESPONDENT

VERSUS

1. JULIUS LEWA JEFWA

2. DZENDERE LEWA JEFWA

3. SAMINI KAINGU

4. HARUN KAINGU

5. BARAKA KAINGU.....DEFENDANTS/APPLICANTS

RULING

1. By a Complaint dated and filed herein on 30th June 2014, the Plaintiff sought vacant possession and a permanent order of injunction restraining the five Defendants by themselves, their servants, agents and/or any other person deriving interest from them from trespassing and entering into all that parcel of land known as Plot No. 5044 Malindi.

2. Having heard all the parties and by a Judgment delivered herein on 15th March 2018, this Court was satisfied that the Plaintiff had proved its case on a balance of probabilities. Accordingly, the Defendants were directed to grant vacant possession of the suit property within 30 days failure to which the Court Bailiff was required to ensure their eviction forthwith from the suit property.

3. Aggrieved by the said decision, the Defendants have filed the present Notice of Motion before me dated 27th April 2018 seeking an order that this Court be pleased to order a stay of execution of the Judgment and the consequential decree pending the hearing of an appeal they intend to file. The said application is supported by an Affidavit sworn by the 5th Defendant Baraka Kaingu and is premised on the grounds that the Plaintiff intends to execute the decree and that the Defendants will suffer substantial loss and be rendered homeless if they are evicted from the suit premises.

4. In a Replying Affidavit filed herein on 16th July 2018, the Plaintiff Fred Kazungu Justin Dindi is opposed to the grant of the stay of execution. He avers that this suit was filed in 2014 and it is high time he was allowed to enjoy the fruits of his Judgment. The Plaintiff further accuses the Defendants of not taking the matter seriously given that they are yet to file an Appeal against the decision.

5. I have considered the Defendants' application and the response thereto by the Plaintiff. I have equally considered the written submissions by the Learned Advocates for the parties and the authorities they referred me to.

6. Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

i. That substantial loss may result to the applicant unless the order was made;

ii. That the application was made without unreasonable delay; and

iii. 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. In their submissions before me, the Applicants assert that the suit premises is the only place they call home and that if the Plaintiff executes the decree they shall be rendered homeless. In addition, they submit that they have an arguable appeal with high chances of success and that if the orders sought herein are not granted, their intended appeal shall be rendered nugatory.

8. As it were, the Applicant did not put anything before me from which an inference could be made that the appeal which they are yet to file is arguable or raises any serious questions of law or a reasonable argument deserving consideration by this Court.

9. At any rate, I am not entirely satisfied that the execution of the orders herein would render the Defendants homeless. From their own admission at the trial herein, the Defendants had been staying in another piece of land before they invaded the suit premises in the year 2013. Before then, the Respondent had lived on the land for some 26 years without any interference from the Applicants.

10. In the circumstances of this case I am not satisfied that any substantial loss may result to the Applicants who in any case are yet to file any Notice of Appeal from the decision they claim to be aggrieved about.

11. As a result, I find no merit in the application dated 27th April 2018. The same is dismissed with costs to the Plaintiff/Respondent.

Dated, signed and delivered at Malindi this 26th day of June, 2019.

J.O. OLOLA

JUDGE