



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL SUIT NO.3 OF 2007(OS)

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT (CAP 381, LAWS OF KENYA) AND THE LIMITATION OF ACTIONS ACT (CAP 22, LAWS OF KENYA).

IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND RULES ENACTED THERETO

IN THE MATTER OF: LAND REFERENCE PLOT NUMBER 503 WATAMU

BETWEEN

KASIMU SHARIFU MOHAMED.....PLAINTIFF

VERSUS

TIMBI LIMITED.....DEFENDANT

RULING

1. By an Originating Summons dated 16th January 2007, the Applicant Kasimu Sharifu Mohamed sought an order that he be registered as the proprietor of Plot No. 503-Watamu instead of the Respondent-Timbi Limited by virtue of adverse possession. In a Judgement delivered herein on 9th April 2018, the Applicant's prayers were granted.

2. Subsequently by an application dated 30th July 2018 as filed herein on 31st July 2018, the Respondent prays for an order of stay of execution of that Judgment and the consequential decree. In addition, the Respondent urges the Court to be pleased to issue preservative orders of the suit premises against one Sophia Abdallahi Chacha pending the hearing and determination of an intended appeal.

3. The said application is grounded on the fact that the Respondent is dissatisfied with the Judgment and has commenced on the process of appealing the same to the Court of Appeal. The Respondent is further aggrieved that upon obtaining the Judgment, the Applicant in the Originating Summons hurriedly executed the decree and obtained a Provisional Certificate of Title on 10th May 2018. On that same day, he transferred the suit property to the said Sophia Abdillahi Chacha who is now seized on the same and may dispose it off to third parties and hence this application.

4. However in Grounds of Opposition dated and filed herein on 24th September 2018, the Applicant is opposed to the grant of the Respondent's prayers on the following grounds:

1. That this Court having delivered Judgment on 19th April 2018 and the Judgment having been perfected is now *functus officio*.
2. That the execution of the decree has already taken place as the order emanating from the said Judgment has been registered against Title No. CR 16721.
3. That Order 10 Rule 11 of the Civil Procedure Rules, 2010 only empowers a Court that has entered an ex-parte Judgment to set it aside at the first instance.
4. That the Supreme Court of Kenya in **Raila Odinga & 2 Others –vs- Independent Electoral & Boundaries Commission & 3 Others(2013) eKLR** held that a Court becomes *functus officio* only after Judgment or award has been perfected by a decree or formal order, which has been done in this case.
5. That unlike in Section 16 of the Employment and Labour Relations Court Act, 2011 which gives the Employment and Labour

Relations Court jurisdiction to review its Judgments, awards, orders or decree in accordance with its rules; Section 16 of the Environment and Land Court Act, 2011 provides in mandatory terms that appeals against any Judgment, award, order or decree of this Court shall lie to the Court of Appeal.

6. That Sophia Abdullahi Chacha is not a party to these proceedings.

7. That joinder of a party as provided for in Order 1 Rule 10(2) of the Civil Procedure Rules 2010 cannot be made after delivery of Judgment. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded.

8. That Order 22 Rule 22 of the Civil Procedure Rules, 2010 is inapplicable.

9. That the application does not satisfy the requisite conditions for the granting of a stay as envisaged under Order 42 rule 6(2) of the Civil Procedure Rules, 2010; and

10. That the Applicant's application is misconceived, mischievous, in bad faith, is frivolous and vexatious.

5. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides for stay of proceedings as follows:-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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 appellant Court to have such order set aside.

(2) No order of stay 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 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 or may ultimately be binding on him has been given by the applicant.

6. The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions. As Ringera J.(as he then was) stated in *Global Tours and Travels Ltd Nairobi Winding Up Cause No. 40 of 2000*(unreported):-

"...Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously."

7. The Applicant before me is aggrieved by the Judgment of this Court delivered on 19th April 2018. Subsequent to the delivery of the Judgment, they proceeded and lodged a Notice of Appeal herein on 3rd May 2019. As it turned out and inspite of the fact that the Applicants were represented in Court when the Judgment was delivered, no application for stay was made until more than three months later on 31st July 2018.

8. As it turned out, it is apparent that in the meantime, the decree was extracted and the decree holder proceeded to register the same against the suit property. According to the Applicant, the Decree holder hurriedly executed the decree and on 10th May 2018 he obtained a Provisional Certificate of Title which he then transferred on the same day to one Sophia Abdillahi Chacha. The applicant now in addition to stay craves preservatory orders to stop the said Sophia from alienating, selling or disposing off the suit property.

9. While it may be true that execution herein was hurried with an ulterior purpose, it is evident that this is a case in which the Applicant tried to shut the stable doors long after the horse had bolted. As it were and to the knowledge of the Applicant, execution has already taken place and the suit premises are now in the hands of a third party. No application has been made to enjoin the said third party in these proceedings and this Court would be loathe to exercise its discretion in a manner that shall affect third parties who may as well be innocent and unaware of these proceedings.

10. Accordingly, I decline to grant the orders sought in the application dated 30th July 2018.

11. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE