



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PET. NO. 6 OF 2018

(FORMERLY MOMBASA HIGH COURT CONSTITUTIONAL PETITION NO.85 OF 2012)

1. ABDULRAHMAN C. KIRAO

2. KAREN ONYANGO KOMBE

3. GRACE M. KILANGO

4. MWNAHAMIS GENERAL.....PETITIONERS

VERSUS

SAID SEIF.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By a Notice of Motion dated 24th January, 2019 and brought under Article 50, 159 of the Constitution, Section 3 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, the Petitioners seek the following orders:

1. spent

2. This Honourable Court be pleased to issue Restraining Orders against the 1st Respondent, his agents, servants and/or employees from evicting the Petitioners from the suit property, selling, advertising for sale, demolishing structures, depositing building material, digging trenches, putting up structures, transferring, leasing, charging and/or in any manner whatsoever dealing with the suit property known as LR. NO.17906/SECTION 1/MAINLAND NORTH (FORMERLY PLOT NO.331/SECTION 1/ MAINLAND NORTH) pending hearing and determination of the Appeal.

3. That costs of this application be provided for.

2. The Application is premised on the grounds set out therein and is supported by the affidavit of ABDULRAHMAN C. KIRAO, the 1st Petitioner sworn on 25th January, 2019. The Applicants aver that they were not aware of the delivery of the judgment in which the petition was dismissed by this court on 14th January, 2019 as they were not informed by their former counsel. That they only came to learn about the judgment herein when on 15th January 2019 one Mohamed Hashim, an agent of the 1st Respondent informed the Petitioners that they are supposed to move out of the suit premises or be evicted. The applicants state that they are dissatisfied with the said judgment and have since filed a Notice of Appeal, hence they seek a stay of execution of the said judgment pending consideration of their appeal by the Appellate Court. The Applicants aver that they are fearful that if stay orders are not granted, they risk losing their properties and land to which they have called home for more than 50 years and in which they have invested heavily on. That unless stay is granted the intended appeal will be rendered nugatory, adding that the intended appeal has high chances of success. The applicants contend that it is only fair and just for this court to allow this application in order to give the applicants an opportunity to prosecute their appeal as envisaged in the constitution.

3. The 1st Respondent opposed the application by way of grounds of opposition dated 18th February, 2019 and a replying affidavit sworn on 20th February 2019. The 1st respondent states that this court lacks jurisdiction to entertain the motion and issue any orders thereto. That no stay can be granted from a negative order. Further the 1st Respondent states that the Applicants have neither pleaded nor shown substantial loss that may result if the orders are not made and that the applicants have not offered any security for the due performance of such decree or order as may ultimately be binding on them. The 1st Respondent avers that as matters stand, his title to the suit property remains unassailed and his rights and privileges as absolute owner of it are sanctified under Section 23(1) of the Registration of Titles Act (repealed) as well as Article 40 of the Constitution. The 1st Respondent avers that during the pendency of the Petition, the Applicants invited people to squat on the suit property and have unsuccessfully attempted selling portions of it with a view to steal a march and crudely legitimize their claims over the suit property without reference to the judicial process that they themselves had set in motion. The 1st Respondent aver that he has suffered great hardship and economic loss as he has been unable to utilize the suit property in exercise of his rights as absolute proprietor, and that the orders sought in the motion will only inflict greater hardship on him as he will be denied use of the suit property yet he is the registered proprietor.

4. In their submissions filed through M/s Anaya & Company Advocates on 13th May, 2018, the Applicants submitted that they shall suffer great prejudice should the orders sought herein not be granted. That they are resident on the suit property and have lived there and raised their families for over 50 years and have built homes thereon. That they have buried their loved ones on the suit property and have immense sentiments attachment to the property and know no other home apart from the suit property. The Applicants cited the provisions of Order 42 (6) (2) of the Civil Procedure Rules and relied on the case of **Kiplagat Kotut –v- Rose Jebor Kipngok (2015)eKLR**. The Applicants further submitted that their appeal may be rendered nugatory and that they are ready and willing to abide by any conditional orders regarding security that this court shall order.

5. M/s A. A. Said & Co. Advocates for the 1st Respondent submitted that this court can only grant a temporary injunction in the exercise of its appellate jurisdiction. That this court exercised its original jurisdiction and dismissed the petition, and therefore the court concluded its business and became functus officio and cannot exercise appellate jurisdiction over its own decision. The 1st Respondent relied on the case of **John Mosingi Marube –v- County Commissioner Kisii County & 2 Others (2016)eKLR**, and the case of **Francis Kuiru Wainana–v- Lucy Wairimu Wainana (2017)eKLR** and the case of **Bartholomew Mwangungu & 3 Others –v- Florence Dean Karimi (2019)eKLR**.

6. The 1st Respondent further submitted that no stay can be granted from a negative order. This is because the court in dismissing the Petition, did not order any of the parties to do anything or to refrain from doing anything. That any execution can only be in respect of costs. They relied on the Court of Appeal decisions in **Shade Manufacturers and Hotel Limited –v- Serah Mweru Mutuu & 3 Others (2018) eKLR**. Secondly, that when the court dismissed the Petition, it simply meant that the petitioners stay in the situation they were before coming to court and therefore the issue of intended appeal being rendered nugatory does not arise. That the Applications' grievance is not on costs and no loss has been pleaded or shown in this respect. The 1st Respondent therefore urged the court to dismiss the application with costs.

7. I have considered the Application and the submissions made. The only issue I find for determination by the court is whether the Applicants herein should be granted the restraining orders sought against the Respondents pending the determination of the intended appeal against the judgment delivered on 14th January, 2019.

8. The 1st Respondent submitted that this court does not have the jurisdiction to grant the orders sought as issuance of injunctive orders is a preserve of the appellate court. The application is brought pursuant to the provisions of Order 42 of the Civil Procedure Rules. Order 42 Rule 6 states as follows:

6 (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 to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court appealed from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order for stay of execution 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 that the application has been made without undue 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.

3)

4)

5)

6) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate court or tribunal has been complied with.

9. It should be noted from the above provision of the law, and in particular order 42 Rule 6 (6), that this court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the court has already rendered its decision. The applicants have stated that they intend to appeal to the court of Appeal against the decision of this court given on 14th January, 2019. I am not aware of any provisions of the law empowering the court to entertain an application for injunction post judgment. The civil procedure only provides for application for stay after judgment. On the basis that the applicants are seeking restraining orders, which in my view are clearly injunctive orders, I find that the court does not have the jurisdiction to entertain the present application and grant the orders sought by the applicants. This court is not exercising its appellate jurisdiction.

10. Further, in the judgment delivered on 14th January 2019, the court dismissed the applicants' petition. There are no positive orders to stay as the order dismissing the petition was a negative order and is incapable of execution, save perhaps, for costs.

11. In the case of **Shade Manufacturers and Hotel Limited –v- Serah Mweru Mutuu & 3 Others (supra)**, the Court of Appeal stated:

“The Oder dismissing the Application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order.....

The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issue of substantial loss that he is likely to suffer and/or the appeal being rendered nugatory does not arise....The jurisprudence of this court in such an application is that no stay can be granted from a negative order.... ”

12. On the argument that the appeal has high chances of success and would be rendered nugatory unless the orders sought are granted, that in my view is not a matter for consideration by this court. The arguability or otherwise of the appeal and whether or not such appeal would be rendered nugatory is a matter for the appellate court, not his court.

13. For the foregoing reasons, I find that the Notice and Motion dated 24th January 2019 as lacking in merit and hereby dismiss it with costs to the 1st Respondent.

DATED, SIGNED and DELIVERED at MOMBASA this 30th day of September 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Anaya for Petitioners/Applicants

Mureithi holding brief for Said for 1st Respondent.

No appearance for 2nd – 4th Respondents

Yumna Court Assistant

C.K. YANO

JUDGE