



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 321 OF 2017

EDWARD MUTINDA NDETEI

JAMES MUTUA MUTHOKA

DANIEL MAKAU MWOLOLO

(All suing on behalf of and in a Representative capacity on behalf of Maithya Mativu Christopher,

Samuel Kitililu Kilongwe, Esther Masai, Elizabeth Nduku Ndaka, Penninah Onesmus Masai,

Janet Masai, Brian W. Masai, Morris Masai, Erick N.Masai, Kelvin M. Masai, Lydia Muyo Munyaio,

Veronica Mutua Kalusi, Elizabeth Mbula Waita, Ndila K. Mavia, Stephen Warui Kabugi,

Peter Wambua Mutua, Kisilu Kiongwe Katilu, Pilisila Mukami Nzekele, May Mueni Muthoka,

Kalonde Mulinge Saidi, Priscilla Muvengi Wambua, Wislon Mumo Musyimi, Nthenya Ndolo,

Charles Musau Muthoka, Eunice Mutinda Mutyetumo, Esther Nthambi Waema,

Lois Kalewa Muli, Madgdalene Nzembi Nzekele, Murindoko Marekero Lekibola,

Joyce Ndandu Muasya, Teresia Kiio, Sammy Kunga Makato, Simon Mbuta,

Gibson Nzyuko Kiatine, Agnes Wayua Kioko, Josephat Muasya Nzivo, Tabitha Mute Kineene,

Charles Makau Muia, Pius Mulei Masila, Geoffrey Mutua Kioko, Redempta Nzilani Nziuko,

Thomas Muange, Peter Kyuvi, Kimuyu, Vincent Nganga Nguta, Nicholas Musyoki Nthokoi,

Paul Ngumbi Matata, Mary Kaindi Kitone, Mulee Mbindyo, Kivuva Mulinge, Samuel Tama,

Danson Mwalimu Makenga, Priscilla Muvengi Wambua,

Mang’oka Mbusu, Simon Mbuta).....PLAINTIFFS/APPLICANTS

VERSUS

DIRECTOR OF LANDS AND URBAN PLANNING

GOVERNMENT OF MAKUENI COUNTY.....1ST DEFENDANT/RESPONDENTS

THE COUNTY GOVERNMENT OF MAKUENI.....2ND DEFENDANT/RESPONDENTS

RULING

1. What is before this court for ruling is the Plaintiffs'/Applicants' Notice of Motion application expressed to be brought under Order 22 Rule 22 Order 42 Rule 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law for orders: -

1) Spent.

2) Spent.

3) **THAT this Honourable Court be pleased to issue an order staying the ruling and orders of Honourable Justice Mbogo on 5th February 2019 in Makeni Environment and Land Court Number 321 of 2017 pending the hearing and determination of the appeal.**

4) **THAT the cost of this application be in the appeal.**

The application is dated 21st February, 2019 and was filed in court on 22nd February, 2019. It is predicated on the grounds on its face and is supported by the affidavit of Edward Mutinda, the 1st Plaintiff/Applicant herein, sworn at Nairobi on 21st February, 2019 on his own behalf and on behalf of his co-Plaintiffs/Applicants.

2. The Defendants/Respondents have opposed the application vide their grounds of apposition dated 04th March, 2019 and filed in court on 05th March, 2019. The grounds are:-

1. **That the application is bad in law and abuse of court process.**

2. **That the application is vexatious, incompetent and cannot meet the test of law and thus it must fail in toto.**

3. **That the said application does not satisfy the conditions laid down in Order 42 Rule 6(2) of the Civil Procedure rules.**

4. **That the Plaintiffs herein shall not suffer irreparable loss if the stay order is not granted.**

5. **That the Plaintiff has not furnished sufficient reasons to merit the Orders sought.**

6. **That the application dated 21st February 2019 is opposed since it lacks merit and as such it ought to be dismissed with costs.**

3. The 1st Plaintiff/Applicant has deposed in paragraphs 10, 11, 12, 13, 14, 15, 17, 18, 19 & 20 that a ruling in favour of the Respondents was rendered by Honourable Justice Mbogo on 5th December, 2018 in the application, that the Applicants have since filed a Notice of Appeal, that he is advised by the Applicants' Counsel which advise he verily believes to be true that the appeal has good chances of success, the application for stay has been lodged without undue delay, the balance of convenience clearly weighs in favour of the Applicants in this matter owing to the substantial loss that the Applicants stand to suffer, that the ruling is excessive and the Applicants stand to suffer great substantial loss as a result of the illegal acquisition of their land by the Respondents without compensation and the ruling itself is flawed for *inter alia* the following reasons, the court failed to consider the Applicant's evidence that the Respondents were in contempt of court orders prohibiting the demolition, the court failed to consider the Applicant's evidence that they had valid title deeds to the said land and therefore the acquisition was illegal, that if the order of stay sought herein is not granted by this Honourable Court, the appeal will be rendered nugatory, that the Applicants are bound to suffer substantial loss and damage if this application is not allowed, that in any event the Respondents stand to suffer no prejudice irredeemable by an award of costs, that in making this application for stay of ruling pending the appeal the Applicants are willing to abide by such terms and conditions as the Honourable court may direct or order, in order to ensure that the Respondents are not in any way prejudiced, that he has been informed by his advocates on record which information he verily believes to be true that in the circumstances of the present case it is in the best interest of substantive justice that the Honourable court exercises its discretion in favour of the Applicants, and that this application has been made without unreasonable delay and ought to be granted in the interest of justice.

4. The Counsel on record for the parties herein filed their submissions pursuant to the Court's direction on 28th February, 2019 that the application be disposed off by way of written submissions.

5. In his submissions, the Counsel for the Plaintiffs/Applicants cited **Order 42 Rule 6 of the Civil Procedure Rules** which stipulates the principles for granting stay of execution of a judgment pending determination of appeal 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 to 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 appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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 unreasonable 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.”

6. Arising from the foregoing, the Counsel submitted that if stay of execution of ruling is not granted, substantial loss will be occasioned to the Applicants who have developed permanent structures on the suit property. The Counsel added that there is real and impending danger of the structures being demolished to give effect to the ruling entered herein. To buttress his submissions, the Counsel cited the case of **Kiplagat Kotut vs. Rose Jebor Kipngok [2015]** where Anthony Ombwayo, J allowed an application for stay of execution and stated thus:-

“It follows therefore as much as the Plaintiff/Applicant has failed to prove to the trial court that the suit land belongs to him and being ordered to vacate the same, it is not in dispute that for the last 14 years he has invested on the said land to the tune of Kshs.6,000,000/= and given the fact that he has preferred an appeal against the judgement herein, it is very clear beyond peradventure that unless stay is granted he will suffer substantial loss of worthy Kshs.6,000,000/=.”

The Counsel further cited the case of **Selestica Ltd vs. Gold Rock Development Ltd [2015] eKLR** where R. E. Aburili J observed that: -

“...The question is what substantial loss the appellant will suffer if stay of enforcement of that order of the subordinate court is not made in its favour.

It is not in dispute that the suit premises are used for commercial business venture. In my view, the appellant will suffer substantial loss if the eviction orders are enforced. It cannot therefore be denied that whether or not the appellant is illegally holding over the suit premises, eviction will no doubt occasion substantial loss in terms of not only business but employment for the staff that eke their living from the commercial business and who may sue the appellant for unpaid dues.”

7. It was the Counsel’s submissions that the Applicants stand to suffer substantial loss that cannot be compensated by the Respondents if the appeal succeeds.

8. The Applicants’ Counsel went on to submit that the Applicants are ready to furnish this court with sufficient security as may be ordered by the court and pointed out that the application is not merely a means to deny the Respondents the fruits of the judgement issued by this court. To buttress his submissions, the Counsel cited the case of **Focin Motorcycle Co. Ltd vs. Ann Wambui Wangui & another [2018] eKLR** where L. W. Gitari, J stated that: -

“where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgement. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

9. It was also submitted on behalf of the Applicants that the application was filed in due time taking into consideration that ruling in this matter was delivered on 05th February, 2019. The Counsel cited among other cases **Focin Motorcycle Co. Ltd vs. Ann Wambui Wangui [2018] eKLR** where L. W. Gitari, J stated: -

“There is no doubt that the appeal was filed without undue delay. The application for stay was filed after two months. This was after the Applicant realized the execution of the decree was imminent. The Court has to consider whether the delay was unreasonable. The Applicant has tried to explain that the delay was due to the fact that proceedings were supplied towards the end of June, after which they filed the application. It is submitted by the Respondent that the Memorandum of Appeal was filed without proceedings. My view is that having filed the appeal within the stipulated time and in view of the explanation offered, a delay of two months cannot be said to be unreasonable. The Applicant cannot be shut out, he is seeking the discretion of the court. My view is that he should be given an opportunity to ventilate the appeal.”

10. In the alternative, the Counsel urged the court to find it fit to grant conservatory orders to preserve permanent structures existing on the suitland pending the hearing and determination of the intended appeal.

11. On the other hand, the Counsel for the Respondents submitted that the Applicants have not proved that they will suffer any loss if the Respondents were to go ahead and execute the orders issued by this court vide its ruling dated 05th February, 2019. The Counsel added that the Respondents do not intend to demolish any of the Applicants’ property and nor have any eviction or enforcement notices issued to the Applicants.

12. It was further submitted that from the pleadings, it is easily discernible that the Applicants are not in occupation of the suit property and that the intended demolitions have already happened, valuation of the losses suffered incurred done, a bus park, an open air market constructed and already opened for business.

13. As to whether sufficient security has been offered for the due performance of the order dated 05th February, 2019 the Respondent’s Counsel submitted that a successful litigant must enjoy the fruits of his/her judgement. That should the court be persuaded to grant the Applicants an order of stay of execution, then it is only fair that the Applicants be ordered to deposit Kshs.5,698,123.30/= being the minimum instruction and rising up fees pursuant to the provisions of Schedule 6 Sections 1(b) and 2 of the Advocates Remuneration Order, 2014.

14. The Counsel concluded by submitting that it is improper for the Applicants to seek for an alternative conservatory order in their submissions when the same had not been prayed for in their application.

15. Having read the application, the grounds of opposition as well as the submissions that were filed by the Counsel on record for the parties herein, my finding is as follows: -

16. Firstly, it is not disputed that the Applicants have invested in the suit property to the tune of about Kshs.270,000,000/=. The Respondents state that there is nothing to demolish since what the Applicants claim to have invested in have already been demolished and other developments made on the suit property. The Respondents and particularly the 2nd Respondent, though a County Government, has not shown that it is capable of compensating the Applicants for the loss of investments. In the circumstances, my finding is that Kshs.270,000,000/= is a substantial investment and demolition of the properties that the Applicants have built on the suit property will occasion them loss. Thus my finding is that the Applicants will suffer substantial loss if stay is not granted.

17. Secondly, the Applicants have deposed in paragraphs 17 and 18 of their supporting affidavit that they are willing to provide the court with sufficient security. In my view, the observations of L. W. Gitari, J in the case of **Focin Motorcycle Co. Ltd vs. Ann Wambui Wangui & another [2018] eKLR** are applicable in this application before me. Her Ladyship said thus:-

“where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgement. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.” are appropriate.

The amount proposed for security for costs by the Respondents is in my view, sufficient under the circumstances and this is what I will order the Applicants to deposit.

18. As for the issue of undue delay in filing the instant application, I am in agreement with the Applicants' Counsel that the same was filed timeously. The Respondents have not controverted the deposition by the Applicants.

19. Fourthly, as for granting of conservatory order, I am in agreement with the Respondent's Counsel that the same cannot be granted since it is not a prayer in the application by the Applicants.

20. The upshot of the foregoing is that the application has merits and I will proceed to allow it in terms of prayers 3 and 4 on condition that the Applicants do deposit Kshs.5,698,123.30/= in an interest earning account in the joint names of the advocates on record for the parties within the next 45 days from today failure of which execution shall issue.

Signed, Dated and Delivered at Makueni this 22nd day of October, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Kemunto holding brief for Mr. Mwagambo for the Applicant

No appearance for the Respondent

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

22/10/2019.