



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 160 OF 2014

JAVAN LEWA MUYE.....PLAINTIFF

VERSUS

SHIVA ENTERPRISES LTD

COMMISSIONER FOR LANDS

KILIFI COUNTY COUNCIL (NOW KILIFI COUNTY GOVT)

ATTORNEY GENERAL (sued in a representative capacity for

and on behalf of the government of Kenya, Ministry of Lands,

Housing and Land Registrar/Registrar of titles, Kilifi County)....DEFENDANTS

AND

MBEYU MWANDAZA MWANGONI.....INTERESTED PARTY/APPLICANT

RULING

1. This ruling is in respect of the Notice of Motion dated 3rd October 2018 brought under Section 1A, 1B, & 3A of the Civil Procedure Act, Order 22 of the Civil Procedure Rules and Section 19 of the Environment and Land Court Act. The Interested Party/Applicant seeks orders of stay of execution of the consent judgment entered herein pending the hearing and determination of the Appeal preferred to the Court of Appeal.

2. The Application is based on the following grounds:

i. There is a consent judgment which has been partly executed.

ii. The Interested Party/Applicant intends to lodge and appeal against the Ruling delivered on the 26th day of September 2018 to the Court of Appeal.

iii. The intended appeal will be rendered nugatory if the consent judgment is fully executed as the respondents are intending to dispose off the suit property.

iv. This is the only avenue available to the applicant through which she can seek redress.

v. That the Applicant stands to suffer immense loss unless the stay orders are issued.

vi. It is in the greater interests of justice that the orders sought do issue.

3. The application is supported by the affidavit of Ratemo Enock, the advocate for the applicant sworn on 3rd October 2018 and which basically reiterates the grounds in support of the application.

4. The Plaintiff opposed the application by filing an affidavit sworn on 21st February 2019. The plaintiff/respondent faults the deponent of the affidavit in support of the motion as being an advocate he cannot swear an affidavit on contentious matters. That the applicant has never been joined as a party to the case and her application for consolidation of her case, ELC NO. 4 of 2017 with this case was dismissed on 26th September 2018. The Plaintiff avers that the original suit property PLOT NO. LR 1000/III/MN, CR 27426 has been subdivided and therefore the current application has been overtaken by events. It is the plaintiff's contention that the application is incompetent, misconceived, bad in law, incurably and fatally defective and an abuse of the court process. The plaintiff states that the applicant was not a party and never participated in the case prior to judgment and to date is not a party.

5. The application was canvassed by way of written submissions. The applicant filed her submissions on 15th May 2019 while the 1st defendant filed their submissions on 29th April 2019.

6. The applicant submitted through Mr. Ratemo advocate that she was never a party in this suit and never participated in the proceeding, hence was not party to the consent judgment entered herein which is yet to be fully executed. The Applicant submitted that being dissatisfied with this court's ruling declining to be enjoined in this suit, she has preferred an appeal. That the appeal will be rendered nugatory if the judgment is fully executed. The applicant submits that she will never recover the suit property if execution proceeds in full and that there are other suits pending over the suit property between the applicant and other parties. It was the applicant's submission that the advocate for the applicant is duly authorized to swear an affidavit in support of such an application.

7. On their part, counsel for the 1st defendant Ms. Ngigi submitted that under order 42 Rule 6(1) and (2), stay may only be granted in respect of the orders emanating from the ruling delivered on 26th September 2018 and not the consent judgment entered on 17th November, 2018. They relied on the case of **Municipal Council of Kisumu –v- Kenya Power & Lighting Company Limited (2017)eKLR**. It was further submitted that the Applicant is not a party to the suit, her application for joinder having been dismissed, as such cannot seek to stay the consent judgment entered herein to which she was not a party. Further, that there is no appeal or review application filed by the applicant against the said consent judgment.

8. Again, relying on the case of **Municipal Council of Kisumu –v- Kenya Power & Lighting Company Ltd (supra)**, it was submitted that there are no orders issued in the ruling delivered on 26th September 2018 which are capable of execution or enforcement, as such there is nothing to stay. That the order emanating from this court's ruling is not capable of being stayed. It was also submitted that the Applicant has not satisfied the conditions for grant of stay as set out under Order 42 Rule 6 of the Civil Procedure Rules. The 2nd Defendant further submitted that the Applicant has not sworn any affidavit to prove that she is likely to suffer substantial loss if stay is not granted, adding that Rule 9 of the Advocates Practice Rules and Order 19 Rule 3 of the Civil Procedure Rules do not permit advocates to swear affidavits in contentious matters, hence it was improper for the applicant's advocate to swear the supporting affidavit. The 2nd Defendant submitted that the consent judgment has been executed and that there exists titles from the subdivision of the original title. It was also submitted that the applicant does not have an arguable appeal.

9. Mr. Amadi counsel for the Plaintiff, Ms. Kiti for the 2nd and 4th Defendants and Mr. Ileri for the 3rd Defendants adopted the submissions by the 1st defendant and urged the court to dismiss the application with costs.

10. I have considered the application. The only issue of determination is whether the applicant herein should be granted stay of execution of the consent judgment herein on 17th November 2015 between the plaintiff and the defendants. The application is stated to be brought under Order 22 of the Civil Procedure Rules. Order 22 Rule 22 requires that sufficient cause must be shown before stay of execution is granted.

11. Similarly, Order 42 Rule 6 sets out conditions that must be met before an order for stay of execution is allowed. It 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 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)

12. For an applicant to succeed, he/she must satisfy the following conditions, namely;

a. Substantial loss may result to the applicant unless the order is made;

b. The application has been made without undue delay; and (c) such security as the court orders for the due performance of the decree or order as may ultimately be binding on him has been given by the applicant.

13. The application herein was filed on 9th October 2018. The notice of appeal indicates that the applicant intends to appeal to the court of Appeal against the ruling of this court made on 26th September 2018. I note however that the application seeks stay of the consent judgment entered herein pending the hearing and the determination of the appeal referred to the court of Appeal. The consent judgment herein was entered on 17th November 2015. The period between the filing of this application and the issuance of the consent judgment is about three (3) years. I therefore find that there was inordinate delay on the part of the applicant in bringing this application. No explanation has been given for such delay. In addition, the court has not been shown any appeal filed in respect to the judgment entered herein on 17th November 2015. The notice of Appeal that has been filed is in respect to the ruling delivered by this court on 26th September 2018 which declined to enjoin the applicant as a party to these proceedings and to set aside the decree dated 17th November 2015 as well an order for consolidation.

14. Has the applicant demonstrated that she will suffer substantial loss if the order of stay is not granted? The applicant submitted that the decree herein has been partially executed. The respondents on their part have submitted that the decree has been fully executed and the original title has been subdivided and new titles issued. The applicants however, failed to demonstrate to this court how she will suffer substantial loss or that she is already suffering substantial loss from the implementation of the decree herein. The applicant herself did not file any affidavit in support of the application. It is not enough for the applicant to merely state, through her advocate, that she will suffer substantial loss if the order of stay is not granted.

15. This court takes cognizance of the fact that a stay of execution helps preserve the subject matter of the appeal so that it is not rendered nugatory if it succeeds. In this case, I am not convinced that the intended appeal will be rendered nugatory if the stay is not granted. The applicant is on record having stated that she has filed a separate suit which is pending to agitate her rights. She has not been left without a remedy.

16. Even assuming the stay sought is in respect of the ruling delivered on 26th September, 2018, the court dismissed the applicant's application to be joined in the suit as an Interested Party as well as setting aside the decree herein. In my view, there was no positive orders that are capable of being stayed. The order dismissing the application was a negative order and incapable of execution save for costs.

17. In the case of **Shade Manufactures and Hotel Limited –v- Sarah Mweru Mutuu & 2 Others (2015)eKLR**, the Court of Appeal stated as follows:

“The order 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 issues 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...”

18. On the argument on the whether or not the appeal is arguable, that in my view is not a matter for consideration by this court. The arguability or otherwise of the appeal is a matter for the appellate court not this court.

19. For the foregoing reasons, I find that the Notice of Motion dated 3rd October 2018 as lacking in merit and hereby dismiss it with costs to the respondents.

DATED, SIGNED and DELIVERED at MOMBASA this 3rd of October day 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

No appearance for Ratemo for Applicant

Ms. Mgala holding brief for Kadima for plaintiff

Ms. Ngigi for 1st defendant

Mwandeje holding brief for Mrs. Waswa for 2nd and 4th defendants

Ileri for Kiti for 3rd defendant

Yumna Court Assistant

C.K. YANO

JUDGE