



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.43 OF 2018

PINK PROPERTIES LTD.....PLAINTIFF

VERSUS

1. NATIONAL LAND COMMISSION.....1ST DEFENDANT

2. CHIEF LAND REGISTRAR.....2ND DEFENDANT

3. ELIZABETH MUTHONI RIITHO.....3RD DEFENDANT

RULING

1. By this Notice of Motion application dated 18th December 2018, Elizabeth Muthoni Ritho(the 3rd Defendant) prays for orders as follows:

1.

2. That the Honourable Court be pleased to issue a Stay of Execution of its entire Ruling delivered by Honourable Justice J. O. Olola dated 14th December 2018.

3. That the Honourable Court be pleased to set aside the adverse injunction orders that were issued in favour of the Plaintiff/Respondent against the Applicant in the Ruling of this Court delivered on 14th December 2018 pending the hearing and determination of this application and hearing of issues to be canvassed during trial.

4. That the Status Quo existing prior to granting of the adverse injunctions Orders be reinstated and upheld pending the hearing and determination of the application and hearing of the main suit.

5. That this Court be pleased to grant an early hearing date available for full hearing to receive viva voce evidence of all parties.

6. That the costs be in the cause.

2. The application which is supported by an affidavit sworn by the 3rd Defendant is based on the grounds:-

i) That the net effect of the orders granted by the Court on 14th December 2018 is to prevent the Applicant from accessing the suit property which belongs to her father Samuel Kanogo Ritho;

ii) That the Applicant is apprehensive that the Plaintiff may gain illegal access to the suit property and proceed to engage in illegal construction thereon before all issues have been canvassed before the Court; and

iii) That it is only proper that this Court restores, maintains and upholds the status quo prior to the issuance of the said orders and to prevent all parties from having any access to the suit property pending the hearing and determination of the main suit.

3. The application is opposed. In a Replying Affidavit sworn by its Director Anna Catani and filed herein on 10th January 2019, the Plaintiff accuses the 3rd Defendant of seeking to play lottery with the Court as regards the omnibus prayers sought for stay, setting aside and status quo pending the hearing and determination of the application and the suit.

4. The Plaintiff avers that it is not open for the 3rd Defendant to circumvent an appeal or review route by faulting the Judgment of the Court and on the same vein proceed to seek orders whose effect is to circumvent the very same orders that do not favour her. The Plaintiff further avers that there are no new issues or evidence that has been availed to warrant the issuance of the orders sought by the 3rd Defendant and it is their case that this application amounts to nothing but an abuse of the Court process.

5. I have considered the 3rd Defendant's application and the response thereto by the Plaintiff. I have equally considered the written submissions and the authorities placed before me by the Learned Advocates for the parties.

6. As it were, the 3rd Defendant is aggrieved by the Ruling of this Court delivered on 14th December 2018. The said Ruling arose from an application dated 19th February 2018 filed by the Plaintiffs seeking orders of injunction against the three Defendants from vesting the suit Property LR No. Chembe/Kibabamshe/272 to the 3rd Defendant or any other person, revoking the Plaintiff's title thereto, or entering, trespassing, taking possession of, wasting, damaging or in other manner interfering with the suit property.

7. After hearing the parties, this Court allowed the Plaintiff's application. It is now the 3rd Defendant's application that this Court be pleased to stay execution of the decision and it sets aside the "adverse" orders of injunction granted and instead make an order restoring the status quo prior to the determination of the Plaintiff's application.

8. The application before me is expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 42 Rule 6 of the Civil Procedure Rules. The said Order provides as follows at sub-rule (1) thereof:-

“(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.”

9. It is clear from a reading of the above provision that an application for stay of execution premised under Order 42 Rule 6 presupposes the filing of an appeal against the decision of the Court which is sought to be stayed. From a perusal of the material placed before me, it is clear that the Applicant has not filed an appeal and there is no indication that she contemplates so to do.

10. The 3rd Defendant's application as it were is premised on the grounds that the net effect of the Orders of 14th December 2018 is to prevent her from accessing the suit property which belongs to her father and that she is apprehensive that the Plaintiff will now use the same to gain illegal access to the property and to carry on with illegal construction thereon.

11. It is however clear to me that the injunction granted on 14th December 2018 was founded on the fact that the Plaintiff was on the suit property and that neither the 3rd Defendant nor her father Samuel Kanogo Ritho had ever occupied and/or been in possession of the same. The question of denying the 3rd Defendant access or allowing the Plaintiff illegal access to the suit property therefore does not arise in the circumstances.

12. While this Court has jurisdiction to vary an injunction order and/or to review the same, I was not persuaded that there were any circumstances herein to warrant such a Variation and/or review. The injunction granted on 14th December 2018 was arrived at after this Court had heard both parties herein and the Court was satisfied that it was necessary to grant the same.

13. The Applicant before me does not claim that there was any concealment of any material facts which, if they had been brought before the Court before that decision was arrived at, the orders would not have been granted. Rather it is clear that the 3rd Defendant is simply unhappy with the Orders made by this Court and seeks with the very same facts earlier put before the Court to get different results. This can be clearly discerned at Paragraph 13 of the 3rd Defendant's Supporting Affidavit where she depones as follows:-

“13. That I am advised by my advocate on record that, the Court misapplied the principles laid out in Giella –vs- Cassman Brown and failed to appreciate the competing interests of the parties.”

14. In my view, a party seeking a reconsideration of similar facts is an aggrieved party whose only remedy is an appeal of the decision of the Court and not an application for variation and/or review of the orders as the 3rd Defendant purports to do by this application.

15. Accordingly, it is my finding that the application dated 18th December 2018 is bereft of merit. The same is dismissed with costs to the Plaintiff/Respondent.

Dated, signed and delivered at Malindi this 5th day of December, 2019.

J.O. OLOLA

JUDGE