



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION NO. 15 OF 2017

BANDARI INVESTMENT COMPANY LIMITED.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE & 22 OTHERS.....RESPONDENTS

RULING OF THE COURT

1. By an application dated 29th December, 2017 and brought under Sections 1A & 3A of the Civil Procedure Act and Order 42 Rules 6 of the Civil Procedure Rules, the 6th, 12th, 20th, 21st and 23rd Respondents seek the following orders:

a. A conservatory order to maintain the status quo ante by staying or suspending the implementation of the order of the court made on 19th December, 2017 pending of a Rule 5 (2) (b) application lodged by the applicants with the Court of Appeal under a certificate of urgency;

i. to obviate a situation where the latter application may be rendered nugatory;

ii. the applicants having filed and served a notice of appeal and invoked a process to stay the impugned order, yet there is no Judge of Appeal to the said application during vacation.

iii. the 1st Respondent has in the meantime been mobilizing resources to implement the impugned order by erecting a perimeter fence two feet high around plot no. 817 of Section II Mainland North;

iv. the implementation of the said order would engender conflict and spell doom for the applicants' pending cases based on the doctrine of adverse possession while allowing the Petitioner an automatic head start;

v. the mischief and other legal consequences of the ensuing inequality of arms upon the imminent implementation of the said order is irreversible/irreparable;

vi. an order staying the impugned order is the only just and fair way of ensuring that the applicants and the respondents alike, exercise their undoubted right of appeal;

vii)and the applicants have moved this court, and have gone to the Court of Appeal with promptitude.

b. In the alternative, an unconditional order to stay execution/implementation of the said order of 19.12.2017 be given, on the same grounds as prayer (a) above, to enable the applicants exercise their undoubted right to access the Court of Appeal; and obviate a travesty of justice by laying of money on disputed land aforesaid by one party to the dispute, before determination of the central issues of who has physical possession of plot no. 817 of Section II Mainland North;

c. That the costs of this application be provided for.

The application is supported by the grounds set out therein and those in the affidavit of **MARTIN MWABUNI CHIPONDA** (6th Respondent) sworn on 29th December, 2017.

2. The Applicants aver that they have lodged an appeal against the orders issued by this court on 19th December, 2017 hence they seek a stay of execution of the said orders pending consideration of their appeal by the appellate court.

3. The Applicants aver that the Police and the County administration for fear of being cited for contempt have been mobilizing resources,

including police personnel and vehicles to support and protect the Petitioner and its private contractor to implement the court order of 19th December, 2017. The Applicants further claim that the construction of the fence/wall would commence on 2nd January, 2018 and if it does the character of the parties' possessory rights in the pending cases including ELC No. 301 of 2014; Constitutional Petition No. 298 of 2013 and others would change to the grave detriment of the claimants in those cases as the issue of physical possession will change irredeemably.

4. The Applicants contend that substantial loss and prejudice will occur to both parties if the order is implemented as the applicants will resist any form of fencing that could confer advantage to the Petitioner.

5. It is the Applicants' case that they are exercising their undoubted right of appeal against the impugned order and if the order is implemented before the Court of Appeal considers their appeal the appeal may be rendered nugatory.

6. The Petitioner/Respondent opposed the application by way of grounds of opposition dated 18th January, 2018. The Petitioner/Respondent states that the application is bad law as it does not meet the basic threshold for grant of conservatory orders. Further, the Petitioner/Respondent stated that a conservatory order is issued upon consideration of constitutional principles and underpinnings and a violator of the Constitution cannot benefit from constitutionally based orders. The Petitioner/Respondent also claimed that the Applicants had not demonstrated the ability to deposit security to safeguard the status quo they are seeking.

7. The 5th Respondent (the contractor) opposed the application by way of a Replying affidavit sworn by **Mr OBED NJIRU** on 29th January, 2018. The 5th Respondent stated that he has only built a small portion of the fence as he has been facing resistance from the squatters.

8. The 5th Respondent claimed that on diverse dated in January, 2018 unknown people interfered with the construction by piercing their water tanks, taking down a stretch of the wall that had already been built and stopping construction materials from being brought to the site. Further the 5th Respondent stated that if the wall is constructed it will leave one entrance into the land making it easy to safeguard the land.

9. The 1st to 3rd Respondents opposed the application by way of grounds filed in support of Notice of Motion dated 1st December, 2017 dated 5th February, 2017. Simply put, the 1st to 3rd respondents claim that the application is frivolous and without merit.

Submissions

10. The application came up for hearing on 7th February, 2018. Mr. Muniyithya appeared for the Petitioner/Respondent, Mr. Egunza appeared for the 5th Respondent, Mr. Wachira appeared for the 1st to 3rd Respondents while Mr. Kimani appeared for the Applicants 6th, 12th, 20th, 21st and 23rd Respondents.

11. Mr. Kimani begun by indicating that he had misquoted the Order under which the application is brought. He pointed out that his application read Order 43 which is wrong as it should read Order 42 Rule 6 of the Civil Procedure Rules. Counsel submitted that the 5th Respondent had no laid any basis for opposing the application as non-performance of a contract cannot be relevant in an application for stay.

12. Mr. Kimani submitted that had there been full disclosure in this matter, this court would have deviated from the orders of 19th December, 2017. Further, Counsel submitted that the 5th Respondent had not demonstrated that he is likely to breach the rules of the National Construction Act if the stay order is granted.

13. Mr. Kimani argued that losing a case would occasion more prejudice than financial loss. As to the issue of providing security for costs, Counsel contended that the contract was not the subject matter of this suit and that the 5th Respondent was only anticipating the issue of security without any proof for the same.

14. Mr. Kimani submitted that the Attorney General's position that the Petitioner/Respondents is the absolute owner of the suit land is premature and fallacious and if this was the position then there would be no need for the Petitioner/Respondent to file this suit. Mr. Kimani claimed that the order by the court of 19/12/2017 was for specific purpose but the other parties want to use it for other purposes not envisioned by this court.

15. Mr Muniyithya for the Petitioner/Respondent urged that the Court should consider the character of parties before it i.e they are not dealing with ordinary trespassers hence the reason they engaged the services of central police. Secondly that the Petitioner has a membership. Mr Muniyithya submitted further that in their affidavit in support of the petition they had annexed an approved plan for the construction of the wall. That the value of the land is massive and it is not easy to buy land. That the applicants are asking the Police to abandon securing the wall at no cost to them and therefore the Court cannot ignore imposing an order for security.

16. Mr Muniyithya submitted further that the parties opposing the building of the wall are only 5 and not 100 squatters. The photographs annexed by the 5th Respondent shows the land is vacant. That if the stay order is granted, it infers that the mobilization done by the Contractor has to be dispensed with/discharged. He stated that none of the cases cited by Mr Kimani are relevant to this application. He stated further that fairplay should be for those on the land as well as those who own the land. He asked what guarantees the applicants are giving of keeping new entrants on the land. He urged the court to dismiss the application and allow the orders of 1st Dec 2017 to be implemented.

17. Mr. Egunza, for the 5th Respondent submitted that the 5th Respondent being a contractor operates under strict timelines which if exceeded, the 5th Respondent is likely to be sued for damages. According to Counsel, the 5th Respondent is governed by the Regulations of the National Construction Authority Act and if he goes against the Regulations he is criminally liable.

19. Further, Mr. Egunza submitted that the 5th Respondent had several employees on the ground who are paid on a daily basis and equipment that is on hire hence if the stay order is granted, it will be to the detriment of the 5th Respondent.

20. Mr. Egunza contended that the Applicants had not demonstrated any prejudice that they would suffer if the wall is completed and that the 5th Respondent has tried to accommodate the Applicants by conceding to creating an entry and exit to the suit property. Additionally, Mr. Egunza indicated that none of the Respondents reside on the temporary structures on the suit property.

22. In the alternative, Mr. Egunza submitted that if stay is granted the same should be conditional upon the Applicants depositing such sums of money to guard the 5th Respondent against suits by the National Construction Authority or the Petitioner.

23. Mr. Wachira, for the 1st to 3rd Respondents submitted that the Petitioner is the absolute owner of the suit land and the court has a duty to assist him use the land. Counsel argued that this court should facilitate the Petitioner in building the wall by dismissing the application for stay. Further, Mr. Wachira submitted that the Applicants have a recourse as they can be compensated by way of damages.

Determination

24. The only issue for determination is whether this court should stay execution of the orders it granted on 19th December, 2017 pending determination of the appeal before the Court of Appeal.

25. Order 42 Rule 6 sets out conditions that must be met before an order for stay of execution is allowed. It states as follows:

[Order 42, rule 6.] Stay in case of appeal.

6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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 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.

26. The applicants herein needs to demonstrate that they will be occasioned substantial loss if the stay is not granted and that they are ready to comply with any conditions that may be ordered by the court such as deposit of security. The application herein was filed on 29th December 2017. The orders in question were issued on 19th December 2017. The period between filling of this application and the issuance of the orders is only 10 days. I therefore find that there was no delay on the part of the applicants in bringing this application.

27. I have perused the application and the documents annexed thereto. There is on record and filed a Notice of Appeal dated 19th December, 2017. The law does this court at this stage to determine whether the appeal is merited or not.

28. Have the applicants demonstrated that they will suffer substantial loss if the order of stay is not granted? The Applicants contended that if the order is not granted and the 5th Respondent is allowed to build the wall, the Applicants' possessory rights over the suit property would change to their detriment. Further, the Applicants submitted that the loss of a case is more prejudicial than financial loss.

29. On 19th December, 2017, this court made several orders in relation to this matter. The Applicants, however, were dissatisfied with one particular limb of order made by this court by which this court permitted the Petitioner to lay the foundation and build a perimeter wall up to 2 feet above the ground to enable the boundaries of the suit property be identified for the purpose of carrying out the census of the persons living on the suit land.

30. This limb of the order should not be read and interpreted in isolation but as a whole. In order for it to be understood it must be read together with the other orders issued on the same day. This court on the same day clearly stated that where the foundation wall was likely to pass through existing structures, such structures be skipped to avoid demolition. The court was categorical by specifying in the order that the foundation wall was not to be taken to mean that the court had granted possession to any party and that the costs incurred in the building were not to be recovered from any of the Respondents in the event the Petition fails.

31. The Applicants are submitting that they will be adversely affected if the order to build the perimeter wall is not stayed. However, the Applicants failed to demonstrate to this court how they will suffer substantial loss or that they are already suffering substantial loss from the implementation of the order. For instance, they did not annex any pleadings showing they have sued the Petitioner for a claim of adverse possession. It is not enough for the Applicants to merely state that they will be prejudiced if the order of stay is not granted. No evidence was also shown that in some way destroyed their property has been interfered with or their day to day activities affected upto the level where the

construction had taken place.

32. In responding to the Applicants claim that their possessory rights will change if the orders are not stayed, this court reiterates that its orders of 19/12/2017 which was clearly said the building of the wall would not be interpreted to confer or deny any party possessory rights over the suit property. The Applicants have also submitted that the Petitioner was utilizing the orders in question for a different purpose other than that intended by the court. No proof was shown of this allegation.

33. This court takes cognizance of the fact that a stay of execution helps preserve the subject matter of the appeal 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 herein is not granted. **The subject matter of this suit which is the suit land will still be present post the appeal, despite the party that succeeds in the appeal as the orders to do not ownership or possession to any party.**

34. I have read the case law cited by the Applicants. In **MSA Petition No 105 of 2012, Eurotrucks & Trailers Ltd Vs Juma Abdalla & Ano.**, the decision made was found to be wrong ab initio which in my view is not the position herein. The extract from **Clerk & Lindsell on TORTS** at page 529 would apply if my orders were issued purposely to confer possession on the Petitioner. And the holding in **Yego vs Tuiya (1986) KLR 726**, I have not directed that the Applicants be evicted and or that they surrender vacant possession.

35. With regard to the issue of security, the 5th Respondent submitted that if the stay was to be granted it should be conditional upon the Applicants depositing a certain sum of money to safeguard the 5th Respondent who may be sued for breach of his contractual obligations. The Applicants, on the other hand, submitted that this court should not be concerned with the 5th Respondent's performance of his contractual duties and further that the 5th respondent had not offered compelling reasons for grant of security.

36. In the orders granted by this court on 19/12/2017, the court stated that the costs of building the wall would not be recovered from any of the Respondents. Therefore, the 5th Respondent cannot seek for security from the Applicants for any losses that he may incur if the stay is granted. However I do not find it necessary to order for any security from the Applicants as the stay orders have been refused.

37. For the foregoing reasons, I find the application dated 29th December as lacking in merit and hereby dismiss it. The orders suspended on 7th February, 2017 pertaining to the construction of the wall are hereby reinstated. Given the orders of 19th Dec 2017 varied the ex parte orders earlier issued on 4th Dec 2017 to allow for any other interested parties to join the Petition after second service and given that service was duly effected by the Petitioners as directed by the court on the 19th December, those ex parte orders are forthwith extended pending determination of the first application dated 1st December 2017. Costs of this application to be borne by the Applicants.

Dated, Signed & Delivered in Mombasa this 21st day of March, 2018.

A.. OMOLLO

JUDGE