



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 58 OF 2011

DANIEL TOKALI MWAMUYE.....PLAINTIFF

-VERSUS-

ABDI HASSAN GRUE

ADEN HASSAN YUSUF

ESMAIL MOHAMUD

MAALIM MOHAMED ALI MUSE

MOHAMED OSMAN GEDI

HUSSEIN IBRAHIM

RASHID NASORO

ALI ABDI SALA.....DEFENDANTS

RULING

1. The defendants who are the applicants have moved the Court vide their application dated 20.12.2017 seeking the following orders:

1. Spent

2. Spent

3. An order of stay is issued, to preserve the status quo ante before the impugned judgement, pending the hearing and determination of this application and ultimately the substantive appeal, on the grounds that the defendants have an undoubted right of appeal, they have served a notice of appeal, demolition of their residential fortresses in compliance with the judgement of Court is irreparable, and the hearing of the intended appeal may take more than the 90 days grace period allowed them to voluntarily vacate the suit land, or face forcible eviction;

4. Spent

5. Costs of this application be provided for.

2. The application is supported by the affidavit of 1st defendant. At paragraph 3 thereof, Mr Gure deposed that they have taken steps to exercise their right of appeal. At paragraph 4, he deposes that if their structures are demolished in execution of the decree then they will suffer irreparable loss from the ensuing damage as the structures cannot be resolved without great expense should their appeal succeed. He has deposed that the Respondent is a professional squatter who is likely to dispose off the subject land. That they have a good appeal.

3. The decree holder in opposing the application filed a 15 paragraph affidavit on 16th February 2018. Of relevance to the present application commences at paragraph 5 where the Respondent deposes that the applicants have not complied with the provisions of Order 42 rule 6 of the Civil Procedure by demonstrating that they will suffer substantial loss. He denied being a squatter as alleged by the applicants and pleaded

that he has a valid title deed. The Respondent denied the averment by the 1st defendant that he had approached him to sell the land. The Respondent also deposed that the continued occupation of the suit property by the defendants have denied him the opportunity from realizing the economic potential of the land. He urged the Court to dismiss the application with alternative prayer that the sum of Kshs 116,209 awarded as general damages be paid to him or be deposited in Court.

4. The parties filed detailed written submissions in respect of the application. The reasons to be considered on whether or not to grant a stay of execution is set out under Order 42 rule 6 of the Civil Procedure Rules. In the instant application a notice of appeal was filed on 14th November 2017. An applicant need not justify that he/she has a good appeal as the filing of notice of appeal is sufficient before this Court. The judgement appealed from was delivered on 8th November 2017 and this application was made on 20th December 2017 slightly over a month later. Therefore the application was made without undue delay.

5. The only issue for consideration by the Court is whether the applicants will suffer substantial loss unless the orders are granted. Without going into the evidence adduced during the trial of this case, the plaintiff/respondent admits that the defendants/applicants have been on the land for more than 12 years (see paragraph 7 of the Replying Affidavit). Further in paragraph 4 and 10 in the affidavit in support of the motion, the applicants have stated that they have structures on the land where they live with their children and that if the structures are demolished, restoring them would be at a great expense. The execution of the present decree would involve both eviction from the piece of land and demolition of their houses. This is no small thing to deal with and it would serve the interests of justice that before they are removed from the suit land they be accorded an opportunity to exhaust all their options provided for in law in order not to render the appeal nugatory. These were the sentiments expressed by the Court of Appeal in the case of *John Mwangi Ndiritu vs Joseph Ndiritu Wamathai (2016) eKLR* at page 384.

6. Order 42 rule 7 gives this Court powers to make an order for provision of security by the applicant. The respondent herein has urged the Court to order the applicants to release to him a sum of Ksh 116,209 or make an order for the deposit of the said sum in Court. I am alive to the fact that the granting of stay order should not be made on terms that would defeat the purpose of the intended appeal. In the circumstances of this case where the applicants are enjoying occupation of the land which occupation the respondent may not get compensated for in the event the appeal fails. Justice requires that the interest of both parties be looked into. For this reason I do hereby make an order for deposit of security directing the applicants herein to deposit the sum of Kshs 116209 awarded in the judgement in an interesting earning account in the joint names of the advocates for the Applicants and the Respondent's advocates within 60 days of this ruling.

7. In conclusion, the application for stay pending appeal is granted. On the order for deposit for security set out in paragraph 6 above, in case there is default, the Respondent is at liberty to execute for the money decree only and not for vacant possession/eviction which shall await the conclusion of the appeal. Each party to bear their respective costs of the application.

Dated, signed & delivered at Mombasa this 13th June 2018

A. OMOLLO

JUDGE