



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 3 OF 2018

FRANCIS KIIO MWANZAU.....APPELLANT

VERSUS

MWANZAU NZIU.....1ST RESPONDENT

KIVUITI NGUZE.....2ND RESPONDENT

GIDEON MWALUKO KAVYU.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Chief Magistrate's

Magistrate's Court at Machakos in Civil Case No. 556 of 2013

delivered on 7th March, 2018 by Hon. A.G. Kibiru -CM)

RULING

1. The Notice of Motion before me is the one dated 14th March, 2018 in which the Appellant is seeking for the following orders:

a. Pending the hearing and determination of the filed Appeal, there be stay of execution of the entire Judgment and Decree of the Hon. A. Kibiru (Chief Magistrate) delivered on 7th March, 2018 in the Chief Magistrate's Court at Machakos Civil Suit 556 of 2013 and the Respondents be restrained from conveying, transferring, alienating, trespassing, developing and/or in any manner dealing with Land Title No. Kiteta/Kiambwa/1183.

b. That costs of this Application be provided for.

2. The Application is premised on the grounds that the Applicant has preferred an Appeal against the Judgment of Hon. Kibiru in Machakos CMCC No. 556 of 2013; that the Appeal will be rendered nugatory in the event the stay of execution is not granted and that the suit land being ancestral land has a unique value and attachment which cannot be quantified.

3. The Appellant deponed that the Appeal has high chances of success; that the learned Magistrate erred by not finding that a parcel of land known as Kiteta/Kiambwa/1183 (*the suit land*) was ancestral land and that the Magistrate erred by failing to find and hold that the doctrine of holding land under a resulting trust could not be defeated by registration of land.

4. The Appellant deponed that he has since filed a Memorandum of Appeal and requested for certified copies of the proceedings and the Judgment and that the Respondents have other parcels of land and would not suffer any prejudice if the order prayed for is granted.

5. In response, the 3rd Respondent deponed that the Appellant is the son of the 1st Respondent; that the 1st Respondent is the registered proprietor of the suit land and which he purchased and that the lower court correctly found that the suit land was not ancestral land.

6. According to the 3rd Respondent, the Appellant has not proved that he will suffer substantial loss if a stay of execution is not granted and that as such, the Application should not be allowed. The 3rd Respondent finally deponed that the Plaintiff has not provided security for the due performance of the Decree should the Appeal fail and that the security should be in the form of costs of the suit.

7. The Appellant filed brief submissions which I have considered.

8. The Appellant herein has filed a Memorandum of Appeal challenging the decision of the lower court in Machakos CMCC No. 556 of 2013. The Judgment of the lower court delivered on 7th March, 2018 shows that the Appellant had sought for a declaration that parcel of land known as Kiteta/Kiambwa/1183 is an ancestral land held by the 1st Respondent in trust and that the same should not be disposed of without the consent of the 1st Respondent's children.

9. In his Judgment, the trial Magistrate held that the 1st Respondent had an absolute title; that the 1st Respondent had settled the Appellant on a different piece of land and that the 1st Respondent only sold 2¼ acres of the suit land out of the eight acres. The court finally found that the 1st Respondent did not have a legal duty to provide the Appellant with land and that the Appellant's right to inherit the 1st Respondent's land cannot arise while the 1st Respondent was still alive.

10. Order 42 Rule 6 of the Civil Procedure Rules allows the court to grant to an Applicant an order of stay of execution pending the hearing of the Judgment where the court is satisfied that unless the order is given, the Applicant is likely to suffer substantial loss. The court is also supposed to consider if indeed the Application has been filed without unreasonable delay, and if security for the due performance of the Decree has been given by the Applicant.

11. It is true, as argued by the Appellant, that the Registered Land Act (*repealed*) recognizes the concept of trusts, including customary trusts, pertaining to ancestral land (*See the proviso to Section 27 of the Act*). However, the circumstances of each case have to be considered before establishing if indeed the subject land falls under what can be considered as customary land, and whether a party claiming such land has already been allocated another parcel of land. This court, while arriving at its decision, will consider the evidence that was placed before the lower court to ascertain if indeed the 1st Respondent holds the title to the suit land in trust for his children, including the Appellant.

12. It is not in dispute that the 1st Respondent has disposed of a portion of the suit land. It is therefore likely that the 1st Respondent, who is the registered proprietor of the suit, is likely to sell the remaining portion of the land. The sale of the land is likely to take away the substratum of the suit, thus rendering the Appeal nugatory. Indeed, the sale of the suit land before the finalization of the appeal will cause the Appellant substantial loss in the event the Appeal succeeds.

13. The Appellant filed the Memorandum of Appeal and the current Application within seven (7) days of the delivery of the Judgment. The Application was therefore filed within reasonable time. Considering that the suit land will be available even after the Judgment of the court, the requirement for security is not necessary in the instant case.

14. It is for the reasons that I have given above that I allow the Appellant's Application dated 14th March, 2018 as prayed, but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE