



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 168 OF 2012

CONSOLIDATED WITH PETITION NO 18 OF 2012

BAHOLA MKALINDI RHIGHO.....PLAINTIFF

VERSUS

1. MICHAEL SETH KASEME

2. SAMUEL KINGI MWANGI

3. COUNTY COUNCIL OF TANA RIVER.....DEFENDANTS

IN PETITION NO. 18 OF 2012

PHILIF SUBILI RHIGHO & 9 OTHERS.....PETITIONERS

AND

1. MICHAEL SETH KASEME

2. HASSAN BARISA KALIME

3. SAMUEL KINGI MWANGI

4. THE COUNTY COUNCIL OF TANA RIVER.....RESPONDENTS

RULING

1. Before me for determination is a Notice of Motion application dated 1st November 2016. By the said application, the nine Petitioners herein pray for orders:-

1. That all that parcel of land measuring 15 acres or thereabouts situated at Hola Town in Tana River County near Hola Water Supply site and Laza Primary School be delivered into the possession of the Petitioners and the Plaintiff by evicting the 1st and 3rd Respondents, their servants and/or agents and by removing their structures or buildings from the said parcel of land.

2. That a warrant to the Court Bailiff to give possession of the said parcel of land to the Petitioners and the Plaintiff be issued.

3. That the Officer Commanding Hola Police Division do enlist Police Officers to provide security during the eviction exercise.

4. That the 1st and 3rd Respondents do bear the costs of this application and the costs of the execution.

2. The Petitioners' application is supported by an affidavit sworn by the 1st Petitioner Philip Subili Righo and is premised on grounds stated therein as follows:-

- a) That the parcel of land herein was awarded to the Petitioners and the Plaintiff;*
- b) That to date no appeal has been preferred against the Judgment and decree;*
- c) That the 1st and 3rd Respondents have refused to vacate from the said parcel of land;*
- d) That the Petitioners and the Plaintiff are being denied enjoyment of the fruits of the Judgment;*
- e) That the 1st and 3rd Respondents will not willingly vacate from the suit property unless force is used against them; and*
- f) That in order to avoid the specter of violence that may occur during the eviction of the Respondents it is necessary that adequate security be provided during the eviction exercise.*

3. In response to the Petitioners' Application, the 1st and 3rd Respondents have through the 1st Respondent Jemima Seth Kaseme sworn a Replying Affidavit filed herein on 10th April 2017 in which they state that the Petitioners' application is defective, inept and an abuse of the Court process as it does not disclose under which provisions of the law it has been presented to the Court.

4. While admitting that Judgment was entered against them, the 1st and 3rd Respondents aver that execution of the said Judgment will greatly prejudice the two of them and cause them irreparable damage and as such they advocate the use of an alternative dispute resolution to resolve the matter.

5. The 1st Respondent avers that her late husband one Michael Seth Kaseme acquired the plot in question in 1989 after which they spent huge sums of money developing the same by fencing it and depositing building materials. It is further her case that the 3rd Respondent also acquired his plot in the year 2007 by way of transfer from the 2nd Respondent and the 3rd Respondent has now constructed a "permanent and expansive" residential home thereon in which he currently lives with his large family and hence the execution of the Judgment will cause great loss, irreparable damage and injustice to the family.

6. It is accordingly the 1st and 3rd Respondents prayer that this Court stays execution of the Judgment pending the hearing of an application dated and filed on 10th April 2017, the same day the Replying Affidavit was filed.

7. The 1st and 3rd Respondents said application prays for Orders stated therein as follows:-

- 1. That (it) be certified as urgent and service thereof be dispensed with the first instance and the same be heard ex-parte.*
- 2. That this Honourable Court be pleased to issue an order of stay for the stay of the proceedings herein in respect of the Notice of Motion dated 1st November 2016 in which the Petitioners/Applicants are applying for execution of the Judgment of the Court delivered on 15th April 2016 pending inter-partes hearing of this application;*
- 3. That upon inter-partes hearing and upon grant of Prayer 2 above, this Honourable Court do order that the Petitioners and the Respondents do engage in the alternative form of resolution by mediation in terms of reaching an amicable agreement and/or settlement in terms of compensation and/or payment of the current land value rates of the disputed property;*
- 4. That upon reaching an amicable agreement as stated in Prayer 3 above, this Court do order for a comprehensive valuation of the land in dispute to ascertain the correct and adequate amount of consideration to be paid to the Petitioners for the disputed land;*
- 5. That upon completion of the valuation and acceptance of the same by the Petitioners, the 1st and 3rd Respondents be allowed to pay the compensation to the Petitioners in order to bring the matter to rest.*

8. The 1st and 3rd Respondents' application is supported by an affidavit also sworn by the said Jemima Seth Kaseme and raising the very same grounds as those in their Replying Affidavit to the Petitioners' application.

9. The County Government of Tana River, the 4th Respondent herein, has also filed Grounds of Opposition to the Petitioner's application dated 6th February 2017 stating inter alia that:-

- 1. The application as taken out does not satisfy mandatory provisions of the law and lacks any firm grounds to stand on;*
- 2. The Petitioners' application as filed is seriously misconceived, is frivolous, bad in law and nothing other than an utter abuse of the process of the Court and is premised on the wrong provisions of the law;*
- 3. No reason and/or grounds have been set forth to warrant the Court to exercise its discretion in favour of the Petitioners whereof the application must be dismissed;*
- 4.*

5.

6.

7. The application does not meet the requisite test of granting the orders prayed for which demands that such orders shall not be granted without giving regard to the principles applicable when entertaining such an application namely:-

(i) An applicant must show a prima facie case with a probability of success;

(ii) The Orders sought will not normally be granted unless the applicant might otherwise suffer irreparable injury;

(iii) When the Court is in doubt, it will decide the application on the balance of convenience.

10. After the filing of the said applications and the various responses, this matter came up in Court a number of times when parties were said to be negotiating on the Petitioners application dated 1st November 2016. On 17th July 2017 parties were directed to file submissions and to be prepared to proceed with the matter on 28th September 2017 in the event the negotiations failed. By 11th December 2017 when the matter came before me, the parties were unable to reach settlement.

11. I have accordingly considered the two applications and the various responses thereto. I have equally considered the submissions filed herein by the Learned Advocates for the parties.

12. A perusal of the Judgment delivered by the Honourable Justice Angote on 15th April 2016 reveals at paragraph 129(2) and (e) thereof as follows:-

(b) A declaration be and is hereby issued that all the parcels of land measuring 15 acres or thereabout situated at Hola town in Tana River County near Hola Water Supply site and Laza Primary School belongs to the Petitioners and the Plaintiff and their family to the exclusion of the 1st, 2nd and 3rd Respondents.

(c)

(d).....

(e) An order of vacant possession of the said portion of land and the eviction of the 1st and 3rd Respondents is hereby allowed.”

13. As at the time of delivery of the Judgment on 15th April 2016, the 1st and 3rd Respondents were in possession of the suit premises hence the order of vacant possession and/or their eviction therefrom. From the record, it is evident that the 1st and 3rd Respondents filed a Notice of Appeal dated 4th May 2016 against the said Judgment. The 4th Respondent also filed its own Notice of Appeal dated 27th April 2016. Thereafter however the parties have neither taken any steps in the Appeal nor sought any orders of stay of execution until the Petitioners filed the application dated 1st November 2016.

14. From their response to the Petitioners' application as well as the prayers sought in their application dated 10th April 2017, it is apparent that the 1st and 3rd Respondents have no intention of prosecuting the Appeal and now seek to be referred to an alternative dispute resolution mechanism for a resolution of the dispute. They have not vacated the suit premises as per the orders of 15th April 2016 on the basis that they had extensively developed their respective portions of the land and stand to suffer irreparable damage if the Judgment of the Court is enforced.

15. In my mind, I do not think a party to a dispute litigated before the Courts can resist the same on the basis that the orders issued by the Court shall inconvenience him or her and/or cause him the so called irreparable damage. Execution of decrees is a lawful Court process which unless otherwise stayed ought to proceed as by law provided. As it were, the dispute on the ownership of the suit property was resolved by the Judgment of this Court delivered on 15th April 2016. I am unable to see which dispute the 1st and 3rd Respondents now want to be referred to resolution through alternative dispute resolution mechanisms. Any such process ought to have been initiated before the Petition was heard and determined and not as is now sought herein after the determination of the case.

16. Indeed a perusal of the pleadings herein and the Judgment reveals that none of the Respondents ever offered to compensate the Petitioners for the subject land. Instead they all submitted that the Petitioners have no valid claim to the suit property. The prayer to have the execution of the Judgment stayed pending reference to an alternative dispute resolution mechanism appears to me to be an afterthought and is coming too late in the day. In any event, after having been allowed almost two years after the Judgment to negotiate and resolve the same, parties could not reach any settlement.

17. In the circumstances of this case, I am satisfied that the Petitioners are deserving of the Orders sought in their application dated 1st November 2016. The same is allowed as prayed.

18. The 1st and 3rd Respondents Application dated 10th April 2017 is dismissed.

19. The Petitioners shall have the cost of their application dated 1st November 2016 as well as for the one dated 10th April 2017 and filed by the 1st and 3rd Respondents.

20. Order accordingly.

21. Arising from the foregoing, I did not find merit in the Plaintiffs application dated 10th May 2017. The same is dismissed with costs to the Defendants/Respondents.

Dated, signed and delivered at Malindi this 21st day of September, 2018.

J.O. OLOLA

JUDGE