



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 62 OF 2012**

**HOUD MAHMOUD ATHMAN.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**RISHAD HAMID AHMED.....3<sup>RD</sup> RESPONDENT**

**ABDULBASIT SWALEH MOHDIN.....4<sup>TH</sup> RESPONDENT**

**SWALEH MOHAED WAZIRI.....5<sup>TH</sup> RESPONDENT**

**NASRA HASSAN MOHAMED.....6<sup>TH</sup> RESPONDENT**

**AHMED ABDULHASIM KASSIM.....7<sup>TH</sup> RESPONDENT**

**MATANO AHMED.....8<sup>TH</sup> RESPONDENT**

**NDOVU MASAUD MOHAMED.....9<sup>TH</sup> RESPONDENT**

**JAMILA YUSUF MAHAMED.....10<sup>TH</sup> RESPONDENT**

**RULING**

1. By an Amended Petition dated 6<sup>th</sup> February 2013, the Petitioner Houd Mahmoud Athman sought a declaration that he is the legal and beneficial owner of all that parcel of land known as Lamu/Manda/Island/93. He also sought for the cancellation of the title in respect of parcel numbers Lamu/Manda Island/88 and 176-185.

2. The Petitioner's case was based on his contention that the Commissioner of Lands(the 2<sup>nd</sup> Respondent) had by a letter dated 20<sup>th</sup> August 1997 allocated to him an unsurveyed agricultural Plot number 'C' at Manda Island. The said Plot was later on surveyed and renamed as parcel No. 93 Manda. It was the Petitioner's case that he later on learnt that a parcel of land known as Manda Island/58 had overlapped on Manda Island/93. Title for the said Manda Island/58 was subsequently cancelled.

3. It was the Petitioner's case that later on, he came to learn that another parcel of land known as Manda Island/88 had been carved out of his parcel of land. He averred that the title document for Plot No. 88 was forged as the Field Report and data were based on a survey report for a piece of land in Nairobi. In spite of the Petitioner's protests, the said title was issued to Rishad Hamid Ahmed (3<sup>rd</sup> Respondent) and Abdulbasit Swaleh Mohdin (4<sup>th</sup> Respondent) who thereafter proceeded to sub-divide the land into parcel numbers 176 to 185.

4. On 19<sup>th</sup> July 2018 having heard the parties and their witnesses, this Court granted Judgment in favour of the Petitioner and directed the cancellation of parcel numbers Lamu/Manda Island/88 and Lamu/Manda Islands/176-185.

5. Aggrieved by the said decision, six of the ten Respondents have now filed the application presently before me dated 10<sup>th</sup> September 2018 seeking a stay of execution of the decree emanating from the Judgment pending the hearing of their intended appeal. The application which

is supported by an Affidavit sworn by Swaleh Mohamed Wazir is premised on the grounds that the applicants stand to lose their respective properties in the event that the Land Registrar –Lamu County proceeds to implement the decree of the Court. It is further their case that their appeal shall be rendered nugatory in the event the decree is enforced and that the Respondent/Petitioner will not suffer any prejudice if the order of stay is granted.

6. Both the 1<sup>st</sup> Respondent/Petitioner and the Honourable the Attorney General have filed Grounds of Opposition in which they separately object to the application on the grounds that it is misconceived and bad in law and that there is no sufficient cause advanced to warrant the issuance of an Order of stay of execution. In addition, the 1<sup>st</sup> Respondent has filed a Replying Affidavit herein on 23<sup>rd</sup> October 2018 amplifying the issues raised in their Grounds of Opposition.

7. I have considered the Plaintiff's application and the response thereto. I have also taken into account the submissions made herein by the Learned Advocates for the parties. The conditions to be met before a stay of execution is granted are provided under Order 42 Rule 6(2) as follows:-

***“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.***

8. In ***Butt –vs- Rent Restriction Tribunal (1982) KLR 417***, the Court of Appeal offered guidance on how a Court should exercise discretion in such circumstances and stated as follows:-

***1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal Court reverse the Judge's discretion.***

***3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.***

***4. The Court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements....***

***5. The Court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”***

9. In the matter before me, the decision sought to be stayed was rendered on 19<sup>th</sup> July 2018. The application before me was filed some two months later on 10<sup>th</sup> September 2018. The Applicants have pinned blame on their previous advocate whom they accuse of failing to take action to file this application in good time. I am prepared to give them the benefit of the doubt and do hold that the delay was not inordinate in the circumstances.

10. As to whether or not the Applicants would suffer any substantial loss if the application was not granted, there was nothing placed before me to enable the Court assess the likelihood of loss. Indeed other than a statement at paragraph 7 of Swaleh Mohamed Athman's Supporting Affidavit to the effect that they “stand to suffer substantial and irreversible loss”, nothing was placed before the Court in support of that contention.

11. As it were none of the Applicants before me testified before the trial Court and it was completely unclear to me whether they were in possession and/or occupation of the suit properties at the time the decision was rendered. That being the case, it was near impossible for this Court to hazard any guess as to the likely consequences of the impugned decision upon them.

12. At any rate, it was apparent that no competent appeal is presently pending that may be rendered nugatory if an order of stay is not granted. I Say so because at Prayer 4 of the Application before me, the Applicants had sneaked in a Prayer for enlargement of time to file the said Appeal upon realizing that the one they had filed was filed out of time. That Prayer was silently abandoned on the obvious realization that this Court was not seized of the power to grant the same.

13. In the circumstances therefore, I am not satisfied that the Applicants have met all the requisite grounds to warrant a stay of execution herein. Accordingly, the application dated 10<sup>th</sup> September 2018 is dismissed with costs.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of December, 2018.**

**J.O. OLOLA**

JUDGE