



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 301 OF 2009

SIMEON MUEKE MAINGIPLAINTIFF

VERSUS

STEPHEN MULWA ILIVI1ST DEFENDANT

LAND REGISTRAR MACHAKOS DISTRICT.....2ND DEFENDANT

AND

VITO AUTO SPARES LIMITED.....INTERESTED PARTY

RULING

1. This Ruling is in respect to the Application by the Interested Party dated 5th September, 2017. In the Application, the Interested Party is seeking for the following orders:

- a. That leave be granted to Messrs. Odondi & Odondi Company Advocates to come on record for the Interested Party.***
- b. That the Notice of Appeal dated 7th February, 2017 be deemed as duly filed.***
- c. That pending the hearing and determination of this Application, there be stay of execution of the Ruling dated 27th January, 2017.***
- d. That there be stay of execution of the Ruling dated 27th May, 2017 pending hearing and determination of the Interested Party's Intended Appeal to the Court of Appeal.***

2. The Application is premised on the grounds that the Ruling delivered on 27th January, 2017 amending the consent order was made despite the fact that the consent order was entered into without the knowledge and input of the Interested Party; that the consent order was made without reference to the Interested Party's claim in ELC Number 238 of 2011 and that the Interested Party has an arguable Appeal with a high probability of success.

3. In response, the Plaintiff deponed that throughout the proceedings, the Interested Party was represented by an advocate; that the Interested Party participated in the hearing of this matter and that the Notice of Appeal is incompetent because the leave of the court was never granted.

4. According to the Plaintiff, the Applicant does not own any of the five (5) properties listed in the Judgment of the court; that the Applicant attempted to purchase one of the suit properties in collusion with the 1st Defendant to defraud him and that having not obtained the consent of the Land Control Board, the Intended Appeal by the Interested Party has no chances of success.

5. I have perused the record and have not seen the submissions filed by the Interested Party/Applicant. The Plaintiff's/Respondent's advocate submitted that the Applicant having admitted that there was no Land Control Board consent to the alleged sale of the suit land, the sale was null and void; that the Applicant has no arguable Appeal and that the Application is intended to frustrate the Plaintiff from enjoying the fruits of his Judgment.

6. The Plaintiff's/Respondent's advocate finally submitted that the Interested Party has not given any reason why she has not collected her money from the 1st Defendant and that the power to grant a stay of execution is discretionary.

7. The law relating to the Grant of an order of stay of execution of an order of the court pending the hearing and determination of an Appeal

is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

“(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.”

8. The Ruling of this court dated 20th January, 2017 was predicated on the compromise in respect of the suit land by the Plaintiff and the 1st Defendant, which was reduced into a consent. It is the Interested Party’s case that it purchased a parcel of land number Mavoko Town Block 2/110 from the 1st Defendant and that the consent that was entered into between the Plaintiff and the 1st Defendant did not take into account its interest in the suit land.

9. The evidence before this court shows that the Interested Party/Applicant purportedly purchased one of the suit land that is subject of the Ruling of this court. Indeed, the Interested Party sued the 1st Defendant in ELC. No. 238 of 2011 in which he was claiming ownership of a parcel of land known as Mavoko Town Block 2/110. It is the Interested Party’s case that it was not aware of the issue of trusteeship between the Plaintiff and the 1st Defendant in respect of the suit land.

10. The Ruling of this court of 27th January, 2017 ordered that the land which the Interested Party purportedly purchased be sub-divided into two portions. In the said Ruling, the court allocated to the Plaintiff and the Defendant the suit land in the ratio of 45%:55%, effectively removing the land out of reach of the Applicant.

11. It is therefore obvious that if the Applicant succeeds in its Appeal, it is likely to suffer substantial loss in the event the Plaintiff and the 1st Defendant dispose of the land. Indeed, an order of stay of execution pending Appeal is meant to preserve the suit property so as not to render the Appeal nugatory.

12. In the circumstances, I am satisfied that unless the order for stay of execution of the Ruling of this court is granted, the Applicant will suffer substantial loss in the event that the Appeal succeeds. The current Application, having been first filed on 24th February, 2017, was filed within reasonable time.

13. For those reasons, I allow the Application dated 5th September, 2017 as prayed, but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE