



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 224 OF 1990

NJENGA KIBUTHA.....PLAINTIFF

VERSUS

JANE NGINA KUKAN

ANTHONY PARMERES LELIAH (As administrators of the estate of the

late KUKAN LILA the original Defendant).....DEFENDANTS

BEMWA REALTORS LTD.....INTERESTED PARTY

RULING

In a ruling that was delivered on 3rd November, 2017, the court ordered among others that the title that was held by the interested party in respect of L.R No. Kitengela 14760/4 (hereinafter referred to only as “the suit property”) be nullified and the said property be registered in the name of the plaintiff as the proprietor thereof. The interested party was aggrieved by the said decision and filled a notice on 11th November, 2017 of its intention to challenge the same in the Court of Appeal. The interested party also requested for the typed and certified copies of proceedings and ruling for the purposes of the intended appeal.

What is now before me is the interested party’s Notice of Motion application dated 16th November, 2017 seeking a stay of execution of the said order that was made on 3rd November, 2017 pending the hearing and determination of the intended appeal against the same to the Court of Appeal. The application has been brought on the grounds that the interested party has appealed against the said order to the Court of Appeal and that if the said order is executed while the said appeal is pending the suit property and 302 subdivisions thereof of which 166 have been sold to and/or transferred to third parties shall cease to exist. The interested party has contended that if the stay sought is not granted, the plaintiff may dispose of the suit property thereby putting the same beyond the reach of the interested party if its appeal succeeds. The interested party has contended that its appeal would be rendered nugatory if the stay sought is not granted. The interested party has contended further that it was an innocent purchaser of the suit property for value without notice of the plaintiff’s title and as such its intended appeal has high chances of success.

The application is opposed by the plaintiff through a replying affidavit sworn on 30th November, 2017. The plaintiff has contended that the issues that have been raised by the interested party in support of its application were raised in its affidavit in opposition to the plaintiff’s application which gave rise to the ruling of 3rd November, 2017. The plaintiff has averred that the court must have considered the said issues when it made the order sought to be appealed. The plaintiff has averred further that he has been kept off the suit property for more than three (3) decades through acts of fraud and as such if the stay order sought by the interested party is refused, the interested party would not suffer loss more than that which the plaintiff is likely to suffer if the stay is granted. The plaintiff has averred that if the court is inclined to grant the stay sought by the interested party, the interested party should be ordered to deposit a sum of Kshs.61,000,000/= as security.

The interested party’s application was argued by way of written submissions. The interested party filed its submission on 16th February, 2018 while the plaintiff filed his submissions in reply on 9th March, 2018. I have considered the interested party’s application together with the affidavit filed in support thereof. I have also considered the plaintiff’s affidavit in reply and the submissions of counsel from both sides. The interested party’s application was brought out under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

“(2) No order for stay of execution shall be made under sub-rule 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 ultimately be binding on him has been given by the applicant.”

In the case of Kenya Shell Limited v Karuga (1982 – 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

I am satisfied that the interested party would suffer substantial loss if the stay sought is not granted. The interested party is currently the registered owner of the suit property. The order of the court sought to be stayed has nullified the interested party’s title and directed that the property be registered in the name of the plaintiff. There is evidence that the interested party has entered into agreements for sale with third parties in relation to the subdivisions of the suit property. If the order made on 3rd November, 2017 is not stayed, the interested party’s title would be cancelled and the suit property registered in the name of the plaintiff. The plaintiff as the registered owner of the property would be at liberty to freely deal with the same a situation that would put the interested party’s investment in the property which is said to be over Kshs.60,000,000/= into jeopardy in the event that its appeal is successful. The interested party would also be exposed to the risk of several suits being filed against it by third parties. I am in agreement with the plaintiff that he has been kept out of the suit property for several years. However, the interested party has a right of appeal against this court’s order made on 3rd October, 2017 and that right must be protected so that it does not become illusory. I am also satisfied that the interested party’s application was brought without unreasonable delay. On the issue of security, the interested party has agreed to abide by any order on security that the court may give.

In conclusion, it is my finding that the interested party’s application dated 16th November, 2017 has merit. The application is allowed on the following terms:

1. Pending the hearing and determination of the appeal by the interested party to the Court of Appeal, the execution of the orders made herein on 3rd November, 2017 is stayed.
2. Pending the hearing and determination of the appeal by the interested party to the Court of Appeal there shall be an inhibition inhibiting the registration of any other or further dealings with all those parcels of land from Title No. I.R 170058 to Title No. I.R 170362(L.R NO. 14760/21 – 203) and any other portion of L.R NO. 14760/4.
3. For the avoidance of doubt, the status quo prevailing as of the date hereof in relation to all those parcels of land from Title No. I.R 170058 to Title No. I.R 170362(L.R NO. 14760/21 – 203) and any other portion of L.R NO. 14760/4 shall be maintained.
4. The interested party shall deposit in an interest earning bank account in the joint names of the advocates for the plaintiff and the advocates for the interested party a sum of Kshs.2,000,000/= as security within sixty (60) days from the date hereof in default of which the stay granted herein shall lapse automatically without any further reference to the court.
5. The costs of the application to be in the cause.

Delivered and Dated at Nairobi this 6th day of December 2018

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr Njau h/b for Mr. Mugo for the Plaintiff

N/A for the Defendants

Ms. Muyai h/b for Mr. Mugambi for the Interested Party

Catherine-Court Assistant