



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MILIMANI
CIVIL SUIT ELC NO 2076 OF 2001

JAMES WAIGWA.....PLAINTIFF/RESPONDENT

VERSUS

THE HON. ATTORNEY GENERAL & 3 OTHERS.....DEFENDANT/RESPONDENTS

AND

PETER MBUGUA MUTURI & ANOTHER.....INTERESTED PARTIES/APPLICANTS

RULING

1. This is a Ruling in respect of a Notice of Motion dated 14th July 2015. The application is brought by the interested parties and seeks the following reliefs:-

1. Spent

2. Spent

3. That there be a stay of execution of the Judgement and decree dated 15th May 2015 and all subsequent execution orders until the hearing and determination of this application or the appeal or until further orders.

4. That the costs of this application be provided for.

2. The applicants contend that they have preferred an appeal against the judgment which was delivered on 15th May 2015. That the appeal has high chances of success and if stay of execution is not granted, the Appeal will be rendered nugatory.

3. The application is opposed by the Plaintiff/Respondent through grounds of opposition filed in court on 6th August 2015. The Respondent contends that the application is bad in Court, misconceived and is otherwise an abuse of the process of the Court. That the applicants' titles were cancelled pursuant to a court order and as such the applicants have no case which will succeed on appeal.

4. I have gone through the applicants' application, the opposition thereto by the Plaintiff/Respondent as well as the submissions by the Respondent's counsel. Before I decide on whether the applicants have met the threshold set out under Order 42 Rule 6(2) the Civil Procedure Rules, a brief history of this case is necessary.

5. The Plaintiff /Respondent herein had sued Stephen Gitau Kamunyu and the Attorney General, Director of Land Adjudication and settlement and the Land Registrar Nyandarua . The bone of contention is that Stephen Gitau Kamunyu who was named as the second defendant had been registered as the owner of a property which ought to have been registered in the Plaintiff's name.

6. The Plaintiff/Respondent had caused registration of a caution on the title held by the second Defendant. As the case was pending in court, the caution was fraudulently removed and the suit property subdivided and sold to the interested parties who are now the applicants in this application.

7. The Plaintiff/Respondent applied to have the interested parties enjoined in the suit as the suit property had already been subdivided and registered in their names. This application was allowed. The interested parties entered appearance but did not file any pleadings. An application was made seeking cancellation of the titles in favour of the interested parties. The interested parties did not resist the application. An Order was made directing cancellation of titles in favour of the interested parties. This order was made before the case could be finally determined.

8. The case was finally heard and concluded. In a judgement delivered on 15th May 2015, Justice Mutungi allowed the Plaintiff/Respondent's claim. An order was made cancelling the title which had now reverted to the second defendant and in place thereof, the same was to be issued in favour of the Plaintiff/Respondent. The Judgement further directed that the interested parties do vacate the two properties within 60 days from the date of judgement.

9. The applicants now contend that they were not afforded an opportunity to defend themselves and that their appeal has high chances of success. They therefore seek stay of execution pending appeal.

10. This is an application for stay pending appeal. As per the provisions of Order 42 Rule 1 6(2) the applicant is expected to bring the application without unreasonable delay , demonstrate that he will suffer substantial loss if stay is not granted and lastly provide security for the due performance of the decree as may ultimately be binding upon him.

11. In the instant case, the judgement being appealed against was delivered on 15th May 2015. This application was filed on 6th August 2015. This is a period of almost three months. This delay is not explained. I do not think there was anything which made the applicants not to file the application as soon as possible. They did not require proceedings to file application for stay. I therefore find that the delay in bringing this application is unreasonable in the circumstances.

12. The second consideration is whether the applicants have demonstrated that they will suffer substantial loss should stay of execution be rejected. The applicants are contending that they bought the suit land from the second defendant and that they did not know of any defect in the title held by the second defendant.

13. The applicants are claiming that they were not given an opportunity to be heard. A reading of the Court record and the judgement being appealed against show that the applicants were given opportunity to file defence but they did not do so. They only filed documents and submissions. Their titles had been cancelled by the court. They did not challenge the orders of the court through appeal. When the case went for further hearing, they did not file any defence. They only chose to file submissions.

14. As matters stand now, the entries which gave then the suit property to the interested parties reverted to its former position i.e in the name of the second defendant. When the case was fully heard, there were orders that the title now in the name of the second defendant be cancelled and the plaintiff's name put in the register. There is no execution which has been carried out sine 15th May 2015. This is perhaps because the omission by the judge who gave a judgement which could not be implemented because of the cancellation order directed to a party who has no power to cancel titles. The issue is however the subject of a separate ruling which will be delivered today.

15. The applicants titles were cancelled way back in 2011. There was no appeal from the cancellation order. The suit property does not legally belong to the applicants. I therefore do not see what substantial loss a party whose interest has been cancelled by a court would suffer.

16. Demonstration of substantial loss is the cornerstone for grant of stay of execution. If there is no demonstration of substantial loss, the issue of security cannot be considered. I therefore find that the applicants' application lacks merit. The same is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* this *21st* day of *March 2017*.

E.O .OBAGA

JUDGE

In the Presence of;-

Mr Kamere for the Plaintiff/Respondent

No appearance for the Defendants/Respondents

Mr Kiongora for Mr Mwaniki for the Interested Parties/Applicants

Court Assistant: Kevin

E.O .OBAGA

JUDGE