



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

ELC. APPEAL NO. 75 OF 2017

ROSE NDUNGE MASILA.....1ST APPELLANT

SUSAN MUMBE MASILA.....2ND APPELLANT

VERSUS

LUKENYA RANCHING AND FARMING

CO-OPERATIVE SOCIETY LIMITED.....1ST RESPONDENT

JOSEPH MUNYAO KIILU.....2ND RESPONDENT

RULING

1. The Notice of Motion before me is the one dated 11th November, 2013. In the said Application, the Appellants are seeking for the following orders:

a. The Honourable Court be pleased to direct and order the liquidator of the first Respondent Mr. Stanley Ongeti and or his successor(s) and the first Respondent Lukenya Ranching and Farming Co-Operative Society Limited together with the second Respondent Joseph Munyao Kiilu, their employees, servants and or agents, jointly and or severally to deposit the original title documents in respect of Plot No. 5 (currently known as No. 3221), No. 442 (currently known as No. 316), No. 747 (currently known as No. 385) and No. 37 Ngalalia (being the subject properties of the Appeal herein with the Honourable Court for safe-keeping pending and subject to the hearing and final determination of the Appeal herein.

b. The Honourable Court be further pleased to make and or grant such other and or further order(s) as it may in the interests of justice deem expedient and or necessary.

c. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 2nd Appellant who has deponed that on 17th February, 2012, the parties herein agreed that a stay of execution of the Award of the Honourable Tribunal in CTC No. 297 of 2006 (*Nairobi*) should be entered pending the hearing of the Appeal.

3. The 2nd Appellant deponed that later on, they learnt that the 1st Respondent had been placed under liquidation; that when they met the liquidator, he informed them that he was to pursue the issuance of the

Titles in respect of the subject properties of the appeal in the name of the 2nd Respondent and that there is real danger of the liquidator in the course of carrying out his duties, issuing the Title documents in respect of the appeal to the 2nd Respondent.

4. In response, the 1st Respondent's liquidator deponed that he was appointed the liquidator on 25th March, 2011; that the Application cannot be determined in isolation without having due regard to the case before the Tribunal and the appeal and that prior to filing the case in the Tribunal, the Appellants ought to have conducted a search to ascertain the status of the titles.

5. The liquidator deponed that even before filing the case at the Tribunal, the plots in question had already changed hands and that the Appellants are fully aware of the status of the said title.

6. The liquidator finally deponed that he has never received the Title documents in question and that the titles in question were issued way before the filing of the case in the Tribunal.

7. The 2nd Respondent deponed that the Applicants have never taken possession of any of the plots mentioned in the Application, except Plot No. 417 and that all the plots in question were transferred before the claim was filed at the Tribunal.

8. The Applicants' counsel submitted that the liquidator has not exhibited any evidence to show the nexus between the titles in his Affidavit and the subject properties of the Appeal; that the status of the suit properties during the Tribunal case was that no titles, other than in respect of plot number 417, had been issued and that the Respondents were enjoined from issuing titles in respect of the subject properties in the appeal.

9. Counsel submitted that it has not been denied that the 2nd Respondent is in possession of the titles which are in respect of the subject properties of the Appeal and that the 2nd Respondent will not suffer any prejudice if he is to deposit the said title with the court pending the hearing and determination of the appeal.

10. In response, the 1st Respondent's advocate submitted that the 1st Respondent does not have the physical or legal custody of the suit land and that during the hearing of the suit before the Tribunal, it transpired that the suit land had been transferred to third parties and titles issued; that the said third parties are not parties in these proceedings and that orders cannot be issued in vain.

11. The 1st Respondent's counsel submitted that the Applicants have not established that they have a prima facie case with chances of success for the orders that they are praying for to issue.

12. In the suit against the Respondents in the Tribunal, the Applicants alleged that they are the administrators of the late John Mathew Nzuki who was a member of the 1st Respondent; that by virtue of an agreement of sale dated 16th January, 1985, the late Nzuki purchased from the 2nd Respondent membership number 460 which entitled the deceased to plot number 417 together with all the subsequent plots that were to be allocated by the 1st Respondent and that the deceased was entitled to Plot Nos. 5 (L.R. No. 3221), 417 (L.R. No. 3098), 442 (L.R. No. 316), 747 (L.R. No. 385) and 37.

13. According to the Applicants' statement of claim, the deceased took possession of the said plots and put up a house on plot number 417.

14. The Applicants accused the Respondents of fraudulently transferring or attempting to transfer the deceased plots. The Applicants sought for a declaratory order and for an order of injunction restraining the Respondents from transferring or issuing titles in respect to the suit land.

15. After hearing the dispute, the Tribunal found that the claimant is not entitled to plot number 5, Plot No 442, plot number 747 and Plot No. 37 and that he was only entitled to plot number 417. The Tribunal

further held as follows:

“We have also noted that a number of these membership plots have since changed hands and been transferred to persons who are not parties to this suit. Accordingly, the 1st Respondent Society shall now take appropriate action to effect or validate the transfers by the 2nd Respondent as the 2nd Respondent may so wish as we have found that he never transferred these other membership plots to the deceased.”

16. After the said Award, the Applicants herein filed the current Appeal and the Application for stay of execution. That Application was allowed by the consent of the parties on 17th February, 2012.

17. The effect of the consent of 17th February, 2012 is that the 1st Respondent, or its liquidator, cannot implement the decision of the Tribunal pending the hearing and determination of the Appeal.

18. The Applicants are seeking for an order to compel the liquidator of the 1st Respondent and the 2nd Respondent to deposit the original Title documents in respect of plot numbers 5,442, 747 and 37 in this court pending the hearing of this Appeal.

19. Having obtained an order staying the Tribunal’s Award, it is not necessary, in my view, for this court to hold the Title documents the subject of the Appeal.

20. I say so because any transaction in respect to the suit properties after the stay of the Tribunal’s Award will be rendered null and void in the event the Appeal succeeds.

21. In any event, considering that the Tribunal observed in its Award that some of the plots have since changed hands, this court cannot direct the Respondents to hand over the original Title Deeds which might not be in their possession in the first place.

22. However, considering that the issue of whether indeed the Applicants are entitled to the suit properties will be determined by this court, the court can still declare as a nullity any transaction involving the suit properties if it is proved that the suit properties were transferred to the 2nd Respondent or third parties fraudulently, whether before or after the matter was lodged in the Tribunal.

23. Due to the uncertainty as to the person who is holding the original Title Deeds in respect to the suit properties, the order being sought by the Applicants cannot issue.

24. In the circumstances, I dismiss the Application dated 11th November, 2013 with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE