



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 125 OF 2009

KALUMASS COMPANY LIMITED.....1ST APPLICANT

MASSIMO SPINELLIALLESSANDRO.....2ND APPLICANT

=VERSUS=

EMMANUEL CHARO TINGA.....1ST RESPONDENT

COUNCILLOR ALI DIDI.....2ND RESPONDENT

R U L I N G

1. What is before me is the Plaintiff's Application dated 22nd September 2015. The Application is seeking for the following orders:-

(a) THAT this Honorable court be pleased to grant an order of stay of proceedings in this case pending the hearing and determination of an appeal against the two Rulings made on 17th September 2015 whereby this Honourable Court ordered that the Plaintiffs' case had been closed and dismissing the application by the Plaintiffs' counsel for the Honourable Mr. Justice Angote to disqualify himself from presiding over the case.

(b) THAT the cost of this application be in the cause.

2. The Application is premised on the grounds that the Applicant has already preferred an appeal against the Rulings of this court made on 17th September 2015; that the appeal should be heard first and that if this matter proceeds, a Judgment may be delivered by this court before the determination of the appeal thus rendering the pending appeal a pure academic exercise.

3. In response to the Application, the Respondent deponed that the Application lacks merit in view of the fact that proceedings have closed and that it is only the submissions that are awaiting to be filed.

4. The Respondent further deponed that the current Application ought to be heard by the Court of Appeal and that this court is functus officio having made its orders of 17th September 2015.

5. I have considered the submissions and the authorities which have been filed by the advocates for both parties.

6. The Plaintiffs' advocate proceeded with this matter on 17th September, 2015 in which she called one

witness, PW4. The Plaintiff's counsel then applied for adjournment to call more witnesses, which application the court declined to grant.

7. The Plaintiffs' counsel made another Application asking this court to recuse itself from hearing the matter. Once again, the Application by the Plaintiffs' counsel was disallowed by this court.

8. The court proceeded to close the Plaintiff's case. When the matter came up for Defence hearing at 2.30 pm, the Defendants' counsel closed his case without calling the Defendant or any witness.

9. The court then directed the parties to file and exchange written submissions.

10. What is therefore pending in this matter is the submissions by the parties, whereafter the court is supposed to deliver its Judgment based on the pleadings and the evidence on record.

11. It is true that the Plaintiff has a right to file an appeal against the two Rulings of this Court delivered on 17th September 2015. It is only the Court of Appeal that can determine whether the Court erred in declining to adjourn the matter on 17th September 2015 and thereafter to recuse itself.

12. Having directed the parties to file submissions, I am of the view that the Plaintiffs' advocate should abide by those directions and raise the issues she is now raising after the decision of this court.

13. Having declined to adjourn this matter on 17th September 2015, I am of the view that the order of stay that the Plaintiff is now seeking will have the same effect that the Court was preventing, that is, delaying the finalisation of this matter.

14. Indeed, the intended appeal based on the grounds that have been raised in the Plaintiff's Application will not be of an academic exercise because those are the same grounds that the Plaintiff may use to challenge the Judgment of this court.

15. In view of the fact that this court has not delivered Judgment in this matter, I do not see the substantial loss that the Plaintiff shall suffer if the Application for stay is not allowed. The Plaintiff has therefore not met the requirement of Order 42 Rule 6 (2) of the Civil Procedure Rules which states that an order of stay of execution can only be made if the court is satisfied that substantial loss may result to the applicant unless the order of stay pending appeal is made.

16. For those reasons, I dismiss the Application dated 22nd September, 2015 with costs.

Dated and delivered in Malindi this 1st day of **April**, 2016.

O. A. Angote

Judge