



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 144 OF 2011

SAMSON KAZUNGU KALAMA.....PLAINTIFF/RESPONDENT

=VERSUS=

- 1. ROBERT SHUME**
- 2. KAZUNGU DZOMBO(BOYA-BOYA)**
- 3. NICHOLAS NGOLO GONA**
- 4. LUCY BUYA.....DEFENDANTS/APPLICANTS**

R U L I N G

Introduction

1. This court delivered its Judgment in this matter on 4th April, 2014 in which it ordered the Defendants to give vacant possession of the suit property.
2. The Defendants have now filed an application dated 26th May, 2014 in which they are seeking for an order of stay of execution of the decree pending the hearing and determination of the Appeal.

The Defendants'/ Applicants' Case:

3. The 1st Defendant swore an Affidavit in support of the Application on his own behalf and on behalf of the other Defendants.
4. In the Affidavit, the 1st Defendant has deponed that the decree by this court has prevented them from accessing their homes and crops and that their intended appeal against the Judgment has high chances of success; that unless the order of stay is granted, they shall be rendered homeless and that the Plaintiff has started demolishing their houses even before making an application for execution.

The Plaintiff's/Respondent's case

5. The Plaintiff/Respondent deponed that the Applicants were served with a 7 days' notice to vacate

- the suit property on 24th April, 2014; that after the lapse of the seven days, the Defendants/Applicants did not move out and he only moved into the suit property after one month.
6. The Respondent deponed that the Plaintiffs have not complied with provisions of Order 42 Rule 6 of the Civil Procedure Rules and therefore the orders being sought cannot be granted.
 7. It is the Respondent's deposition that it is him who is being prejudiced because he is unable to access his own land.

Submissions

8. The Defendants'/Applicants' advocates submitted that the Plaintiff has already demolished the Defendants' houses and that the Plaintiff has not complied with the law dealing with execution; that the warrants of demolition issued by the Deputy Registrar are irregular and that unless the order of stay of execution is granted, the intended appeal shall be rendered nugatory.
9. The Plaintiff's/Respondent's advocate submitted that the Application is fatally defective because the 1st Defendant has sworn an affidavit on behalf of the other Defendants without a written authority and that the Appellants have not complied with Order 42 Rule 6 of the Civil Procedure Rules.

Analysis and Findings:

10. The law relating to stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules. For an Application for stay of execution to succeed, the Applicant must show that he will suffer substantial loss and that the Application has been made without unreasonable delay. The Applicant is also required to provide security for the due performance of the decree or order.

11. The 1st Applicant has sworn an affidavit on his behalf and on behalf of the other Defendants in which he has stated that they will be rendered homeless unless the order of execution of the judgment of this court is stayed pending the hearing of the appeal.

12. The 1st Defendant/Applicant did not annex on his supporting a letter of authority allowing him to swear the affidavit on behalf of the other Defendants contrary to the provisions of Order 1 Rule 13(1) and (2) of the Civil Procedures. He cannot therefore purport to swear the affidavit on behalf of the other three Defendants for want of authority in writing. On that basis, the Application for stay of execution can only be in respect of the 1st Defendant/Applicant and not the other Defendants.

13. In my judgement of 4th April 2014, I stated as follows;

“The court visited the suit property. Although the 1st Defendant has a semi-permanent house, which he has rented out to the 4th Defendant, he does not live in the house. In fact, the 1st Defendant acknowledged that he lives in a different property all together. His mother lives on plot number 226, the same plot that his father was buried.”

14. The 1st Defendant/Applicant does not live on the suit property and no substantial loss will be suffered by him if the semi-permanent structure that is on the suit property is demolished. The 3rd Defendant was not living on the suit property as at the time the court visited the property while the 2nd and 4th Defendants never testified. None of parties have shown that they will be rendered homeless if the current application is dismissed. Indeed, the continual possession of the suit property by the Defendants is denying the Plaintiff to enjoy the fruits of his Judgement. It is the Plaintiff who is likely to suffer substantial loss unless the Defendants allow him to access the suit property.

15. The 1st Defendant/Applicant has also failed to show that the current application was filed within a reasonable period.

16. Considering that this court had ordered that the Defendants do give vacant possession of the suit property immediately, the application for a stay of execution should have been filed a few days later. Indeed, the 1st Defendant/Applicant has not denied that the Plaintiff served him with a notice of 7 days requiring him to move out of the suit property.

17. Even after being served with the said notice, the Defendants did not file the current application immediately. The Defendants waited until the Plaintiff/Respondent demolished the structures in the suit property a month later to move this court. That, in my view is an unreasonable delay considering the circumstances of this case.

18. Where the decree is in respect to recovery of land as in this case, an applicant need not provide security for the due performance of the decree. The subject matter is security in itself considering that whoever succeeds in the Court of Appeal will keep the land. Land, being an immovable asset, will always be there to satisfy the decree.

19. However in view of the fact that the 1st Applicants have not shown that they will suffer substantial loss and the unreasonable delay in filing the current Application, I dismiss the Application dated 26th May, 2014 with costs.

Dated and delivered in Malindi this 31st day of July,2014

O. A. Angote

Judge