



IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 39 OF 2006

CHEMBE KATANA CHANGI.....PLAINTIFF/APPLICANT

=VERSUS=

1. MINISTRY FOR LANDS & SETTLEMENT

2. THE DIRECTOR OF LANDS ADJUDICATION & SETTLEMENT

3. JAMES M. MBAJI

4. THE ATTORNEY GENERAL

5. THE CHIEF LAND REGISTRAR.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction:

1. Judgment was delivered in this matter by Meoli J on 2nd April 2013 dismissing the Plaintiff's suit.
2. In the Plaintiff, the Plaintiff had averred that all the proceedings conducted by and or before the 1st Defendant through the District Commissioner, Kilifi, were a nullity.
3. The Plaintiff has now filed an Application dated 13th March 2014 seeking for the following orders:

(a) **THAT the Honourable court be pleased to issue an order of stay against the Defendants, by themselves, and/or their successors in Title, their agents, assignees, employees, servants, nominees or any one claiming through or under them from implementing the decision of the First Defendant, altering the duplicate adjudication register to conform with the determination/decision in the alleged Appeals to the Minister, certifying on the duplicate adjudication register that it has become final in all respects, sending details of the alterations and a copy of the certificate to the Fifth Defendant and/or specifically from registering the Third Defendant and/or any other person as the owner and/or proprietor of Plot Number 803 and 891/Mikahani/Mawemabomu/Chonyi Adjudication Section/Kilifi or portions thereof and/or issuing Title Deeds to the Third Defendant or any other person claiming through and/or under him in respect to Plot Number 809 and 891/Mikahani/Mawemabomu/Chonyi Adjudication Section/Kilifi or portions thereof pending the inter partes hearing of this Application and further pending the hearing**

and determination of the intended Appeal to the Court of Appeal against the Judgment of this Honourable Court delivered on the 2nd April 2013.

(b) THAT an order of temporary injunction do issue against the Third Defendant, restraining him by himself, agents, assignees, employees, servants, nominees or any one claiming through or under him from entering, cultivating, developing, hiring out or in any other means howsoever plots number 803 and 891/Mikahani/Mawemabomu/Chonyi Adjudication Section/Kilifi other than the portions measuring approximately 3 acres in respect of Plot number 891 and 4 acres in respect of plot number 803 he has been occupying and/or cultivating over the years pending the inter partes hearing of this Application and further pending the hearing and determination of the intended appeal to the Court of Appeal against the Judgment of this Honourable Court delivered on the 2nd April 2013.

The Plaintiff's/Applicants' case

4. In a rather long Supporting Affidavit, the Plaintiff/Applicant deponed that he is the owner of Plot numbers 803 and 891/Mikahani/Mawemabomu/Chonyi Adjudication Section, Kilifi, having inherited it from his father; that the 3rd Defendant's father purchased a piece of land measuring about three acres from Kalulu Mgaji who was the Plaintiff's neighbour on plot number 891 and that the 3rd Defendant's father cultivated beyond the land he had bought and encroached on his land.
5. During the adjudication process, it was deponed, the 3rd Defendant's father managed to have the portion of the Plaintiff's land which he had encroached on demarcated in his favour as plot number 868; that the Plaintiff commenced proceedings against the 3rd Defendant's father before the land Adjudication Committee; that the case was escalated to the Arbitration Board and decided in favour of the Plaintiff and that thereafter Mr. Mwangolo Nyachi Mbate encroached on the Plaintiff's parcel of land number 803 and he commenced proceedings against the Plaintiff.
6. The Plaintiff's case is that upon the dismissal of the objection by the Land Adjudication officer, the 3rd Defendant, not having been a party to any of the proceedings in respect of plot numbers 803 and 891 purported to prosecute an appeal before the 1st Defendant who allowed the appeal. It is the Plaintiff's case that the said appeal was incompetent. The Plaintiff has enumerated grounds showing why the appeal to the minister was incompetent.

The 3rd Defendant's/Respondent's case:

7. The 3rd Defendant's Advocate filed Grounds of Opposition in which he averred that this court is *functus officio* and that a Notice of Appeal was filed without any concomitant application for stay of execution pending appeal.

Submissions:

8. The Plaintiff's counsel submitted that if the orders sought in the Application are not granted, the third Defendant is likely to be issued with the title deed for 50 acres of plot number 891 and more than 10 acres of plot number 830 which land belongs to the Plaintiff. Counsel relied on the case of **Madhupaper International Limited VS Kerr (1985) KLR 846 and Raccati Business College of East Africa Limited Vs Kyanzavi Farmers Limited (2010) e KLR** in seeking for an injunction order pending appeal.
9. On the other hand, the 3rd Defendant's counsel submitted that this court is *functus officio* having delivered its Judgment; that this court lacks the jurisdiction to grant a stay of execution pending appeal or an injunction pending appeal and that the orders being sought can only be granted by the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules.

Analysis and findings:

10. The Applicant is seeking for two orders. A stay of execution of the Judgment of this court pending appeal and or an injunction pending appeal.
11. The merits of the Plaintiff's case were determined by this court in its Judgment of 2nd April 2013. In the said Judgment, the court dismissed the Applicant's suit. The suit had sought to declare the decision of the minister allocating the suit properties to the 3rd Defendant a nullity. The dismissal of the suit therefore took the parties to the position that they were in before the suit was filed.
12. It is true that once the trial court decides the suit on merit, it becomes *functus officio*. The trial cannot revisit the issues that were before it in a subsequent application. Revisiting the issues that were ventilated in a trial would amount to a trial court sitting on its own appeal which is improper.
13. The only occasion that the trial court can deal with a matter it has already heard and determined is during the execution process or when an Application for review of the Judgment has been filed pursuant to the provisions of Order 45 or when an Application for stay of execution pending appeal has been filed pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
14. There is no provision in the Civil Procedure Rules allowing a party against whom Judgment has been entered to file an Application for injunction pending appeal.
15. The absence of such a provision, in my view, is for good reason. It will be an absurdity for the trial court to grant to a party an injunction after delivery of Judgment considering that one of the principles that must be established by an Applicant in such an Application is to show that he has a prima facie case with chances of success.
16. Once a Judgment has been delivered, there will be no pending suit. It therefore follows that a party challenging a Judgment cannot at the same time show by way of an application that he has a prima facie case with chances of success. A trial court which attempts to deal with such an application, as I have already stated above, will be sitting on its own appeal.
17. The often quoted case of **Madhupaper International Limited Vs Kerr (1985) KLR 840** dealt with a pending appeal to the Court of Appeal in respect to an application and not a suit. In that case, the Court of Appeal held that where a Judge dismisses an Application for interlocutory injunction, he has jurisdiction to grant to the unsuccessful Applicant an injunction pending appeal against the dismissal.
18. It is the Court of Appeal that should grant to a party an injunction pending appeal pursuant to the provisions of Rule 5(2) (b) of the Court of Appeal Rules. Under that Rule, the Court of Appeal can grant to the Applicant the prayer if the court is satisfied that the Appeal may be rendered nugatory and if the Appeal has chances of success. On the other hand, the law does not grant the trial court the lee way to make such pronouncements because the court, as it were, becomes *functus officio* after determining the suit. Indeed, the question that arises when the trial court attempts to deal with an application for injunction pending appeal is what parameters the trial court should employ to determine whether to grant or not to grant such an application.
19. The law however allows the trial court to stay its Judgment pending appeal if it is satisfied that substantial loss may result to the Applicant unless the order is made and if the Application has been made without unreasonable delay. The Applicant is also supposed to offer security as the court may order for the due performance of such a decree.
20. The Plaintiff's advocate has submitted that unless an order of stay of execution of the Judgment of this court is granted, then the Plaintiff is likely to lose his land to the 3rd Defendant.
21. The Judgment of this court only struck out the Plaintiff's suit. It is therefore inconsequential whether the said Judgment is stayed or not because the Judgment did not grant any directions to the Defendants herein. If the 1st Defendant is implementing its decision, it is not because this court told him to do so. The 1st Defendant will be implementing what was there before the suit was filed.
22. In any event, this Application was filed eleven months after the decision of this court. In my view, a delay of eleven months to file an Application for stay of execution without giving any plausible explanation is inordinate and unreasonable. The Application should have been filed immediately after the dismissal of the suit.
23. For those reasons, I dismiss the Plaintiff's Application dated 13th March, 2014 with costs.

Dated and delivered in Malindi this 10th day of October 2014.

O. A. Angote

Judge