



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KOOME, ASIKE-MAKHANDIA & MURGOR J.J.A.)

CIVIL APPLICATION NO. E11 OF 2020

BETWEEN

COASTLAND PROPERTIES LTD.....APPLICANT

AND

VIPINKUMAR NATHALALA SHAH.....1ST RESPONDENT

SOUTH COAST BEACH PROPERTIES LIMITED.....2ND RESPONDENT

OMAR SAID MWATAYARI.....3RD RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal arising from the Judgment and Decree of the Environment and Land Court of Kenya

(Hon. A.Omollo, J.) dated 16th September 2020 in **ELC No. 276 of 2014**

Consolidated with ELC No. 277 of 2014

RULING OF THE COURT

Before us is a notice of motion dated 22nd October, 2020, brought under **Section 3A & 3B** of the Appellate Jurisdiction Act, Rule 5(2)(b), 42 and 43 of the Court of Appeal Rules, 2010, and any other enabling law seeking in the main:

“3. THAT this Honourable Court be pleased to stay execution of the Judgment delivered on 16th September, 2020 by Honourable Justice A. Omollo and the Decree issued on 7th October, 2020 by the Environment and Land Court of Kenya at Mombasa in ELC No. 276 & 277 of 2004(Consolidated) pending the hearing and determination of the intended Appeal and costs of the applicant be provided for.

The gist of the application emanates from the fact that the 3rd respondent sued the 1st and 2nd respondents seeking orders of cancellation and revocation of their title, and that he instead be registered as the proprietor of the two parcels of land known as Kwale/Kinondo 733 and 734 (hereinafter “*the suit property*”). The 3rd respondent claimed that the 1st and 2nd respondents obtained the suit property fraudulently.

Following the filing of the suit, in no time the 3rd respondent obtained an ex parte judgment on 16th September, 2005. Thereafter the suit proceeded by way of formal proof. The 1st and 2nd respondents thereafter made an application to set aside the said ex parte judgment which application was not successful prompting them to file an appeal in this Court vide **Mombasa Civil Appeal No. 46 of 2008**.

The appeal was successful and as a result, the ex parte judgment and all consequential orders of the High Court were set aside. Effectively this meant that the purported title obtained by the 3rd respondent pursuant to the High Court judgment became nullity. Consequently, the status reverted to what existed immediately prior to the filing of the suit, in that the 1st and 2nd respondents’ titles to the suit property remained intact. In the meantime, the applicant who was in occupation of the suit property by virtue of an innocent purchaser for value and without any notice, was ordered to vacate the same within 90 days. This order provoked the applicant who was not a party to the initial proceedings to file an application to be enjoined in the suit which application was allowed. The matter then was set down for hearing and a

judgment delivered by **Justice A. Omollo** dismissing the 3rd respondent applicant's claims to the suit property.

Being aggrieved by that judgment, the applicant filed a notice of appeal on 23rd September, 2020 and subsequently lodged the notice of motion under consideration. The applicant's case in support of the motion is that it has satisfied the twin principles for the grant of relief under Rule 5(2)(b) of the Rules of this Court. Firstly, that the draft memorandum of appeal annexed to the application demonstrates that the intended appeal is arguable with high chances of success; and second that if the stay sought is not granted the intended appeal will be rendered nugatory as the suit property shall be transferred to the 1st and 2nd respondents. It relied on the case of **Ciena Plains Company Limited & 2 Others Vs Ecobank Kenya Limited [2018] eKLR** and the case of **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR** to reinforce the above principles that guide the Court in the exercise of its discretionary mandate under Rule 5(2)(b) of the rules of the Court.

On the other hand, the 1st and 2nd respondents submitted that the applicant had no interest whatsoever whether proprietary or otherwise in the suit property capable of being protected by an order of stay. It was further submitted that the decree that was sought to be stayed had already been executed and that respondents had already taken possession of the suit property and the changes effected at the Lands Registry to reflect the respondents' ownership of the suit property. Indeed, they annexed respective searches reflecting this new development. They maintained that given the circumstances if the order sought was granted, it will be in vain.

Having considered the records in the light of the pleadings, authorities and submission of counsel, we are satisfied that the application has been overtaken by events. It is admitted that the decree sought to be stayed has indeed been executed and the respondents have been put into possession of the suit premises. Further changes in the register in respect of the suit property held at the land's office have been effected to reflect the position currently obtaining, if the certificate of official search annexed to the supplementary affidavits filed a few days to the hearing of the application, is anything to go by. It is instructive that though the applicant was served with the supplementary affidavit with this detail, it did not see the need to counter it. The only inescapable conclusion that can be drawn from the set of fact is that intended appeal has been overtaken by events and therefore, there is nothing to stay.

The application accordingly fails and is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M. K. KOOME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR