



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 82 OF 2013

PETER KIM BAKER 1ST PLAINTIFF

ASHOK BALKRISHNA 2ND PLAINTIFF

VERSUS

SIDI KATANA BONGO 1ST DEFENDANT

BAHATI KATANA BONGO 2ND DEFENDANT

RULING

INTRODUCTION

1. By a Judgment delivered herein on 12th May 2017, the Court dismissed the Plaintiff's suit and allowed the Defendants' counterclaim as follows:-

(a) A permanent injunction be and is hereby issued restraining the Plaintiffs, their servants, employees, agents or anybody acting through them from interfering with the Defendants occupation of parcels of land known as Kilifi/Mtondia/1113 and Kilifi/Mtondia/1114

(b) An order be and is hereby issued to the Kilifi Land Registrar to cancel the Title Deeds that were issued to the Plaintiffs in respect of parcels of land known as Kilifi/Mtondia/1113 and Kilifi/Mtondia/1114 and replace them with the names of Katana Bongo Masha(deceased).

(c) An order be and is hereby issued to the Kilifi Land Registrar to rectify the register by cancelling the entries transferring the suit properties to the Plaintiffs.

(d) The Plaintiffs to pay the costs of the suit and the Counter-Claim.

2. The Plaintiffs are dissatisfied with the said decision and have since lodged a Notice of Appeal herein signifying their intention to appeal the entire decision to the Court of Appeal.

3. At the same time the Plaintiffs have filed the present application before me dated 22nd May 2017 in which they pray that this Court be pleased to order a stay of execution of the Decree and/or Orders granted in the Judgment delivered herein on 12th May 2017 pending the hearing and final determination

of the Appeal to be filed as against the said Judgment.

4. The Application is supported by the annexed affidavit of Peter Kim Baker and is premised on the following grounds:-

(i) That the Orders for cancellation of the title deeds and the direction given to the Land Registrar Kilifi have the drastic consequences of completely divesting the Plaintiffs of titles to the suit properties which titles they acquired as innocent purchasers for value and without knowledge of any prior fraud in the acquisition of the titles.

(ii) That the Plaintiffs have since filed a Notice of Appeal and it is in the best interest of justice that the Orders sought are granted to avoid rendering the intended Appeal nugatory.

(iii) That the Application has been filed without any undue delay and the Respondents shall not suffer any prejudice or harm if the Orders sought are granted.

(iv) That the Plaintiffs are willing to abide by any conditions as to the provision of security as may be appropriately directed by this Court.

5. In a Replying Affidavit sworn on 26th May 2017, the 2nd Defendant, Bahati Katana Bongo has on his own behalf and on behalf of the 1st Defendant who is his mother, objected to the grant of a stay of execution. It is the Defendants' position that the orders sought to be stayed were not drastic as stated by the Plaintiffs but were correct and appropriate in the circumstances of this case.

6. The Defendants aver that their entire family has greatly suffered ever since this matter was filed in Court in 2013 as they are unable to develop the land. They deny the Plaintiffs contention that they are in possession of the land and state that they have continued to live on the land and the Plaintiffs stand to lose nothing as they do not have anything on the ground.

7. The Defendants further contend that the findings of the Court that there was a case of open and deliberate fraud is not bound to change and the instant application is merely meant to delay the fruits of their Judgment which they obtained regularly and should be accordingly dismissed with costs.

8. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules under which this application is brought provides as follows:-

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

2. No order of stay shall be made under sub rule (1) unless:-

(a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and

(b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

9. In *Italal & Another –vs- Thornton & Turpin Ltd(1993) KLR 365*, the Court of Appeal(Gicheru J.A. Chesoni & Cockar Ag. JA) summarized the mandate of the Court under Order 42 Rule 6 as follows:

“The High Court’s discretion to order stay of execution of its orders or decree is fettered by three conditions, namely:- sufficient cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.”

10. In *Global Tours and Travels Ltd WC No. 43 of 2000(UR)* it was held that:-

“.....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

11. The Application before me has certainly been brought without undue delay having been filed some 10 days from the date of the Judgment sought to be appealed. The Applicants have put the total value of the suit properties at Kshs 13,857,780/=. It is their contention that they stand to lose this substantial sum of money which they paid as the purchase price together with a workshop they have built thereon if the stay sought herein is not granted.

12. A perusal of the Judgment however reveals that only a sum of Kshs 785,778/= was according to the Agreement of Sale dated 1st September 2009, to be deposited with the Vendor’s Advocates. The Agreement did not as the Honourable Justice Angote found in his Judgment specify when the balance of the purchase price was to be paid. In any event the Vendor with whom the Plaintiffs purport to have executed the Sale Agreement died according to the documents placed before this Court in June 2009 and could not have been available to execute the same on the date stated by the Plaintiffs. At paragraph 67 of his Judgment, the Honourable Justice Angote concluded as follows:-

“67. Having failed to show that Mzee Masha was alive as at 1st September 2009 and that he indeed received the 10% deposit and the balance of the purchase price that was paid to the firm of Omondi Waweru & Company Advocates, I find that Plot No. 1113 was fraudulently transferred to the Plaintiffs.

13. Arising from the foregoing and in view of the findings in the Judgment that the sum cited by the Plaintiffs never passed to the Estate of the late Mzee Masha who was previously the registered proprietor of the two parcels of land in dispute, I am not satisfied that the Plaintiffs have shown sufficient cause to warrant the orders sought.

14. In *Machira T/A Machira & Company Advocates –vs- East African Standard(No. 2) (2002) KLR 63*, it was held that:-

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed by the other, contrary to the sound principles for exercise of Judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his Judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Court’s, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

15. As the Court already found, the Defendants/Respondents have suffered as a result of the fraudulent manner in which the suit properties were transferred. The Court ordered that in the interest of justice, the suit properties do revert to the name of the deceased owner who died intestate. The Plaintiffs will therefore have an opportunity to contest if they so desire in the succession cause where the property will be listed as the deceased’s property. Otherwise the Plaintiffs/Applicants did not convince this Court that the Respondents have no means to compensate them if the Appeal succeeds.

16. In the end result, I find no merit in the application for stay of execution. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 29th day of November, 2017.

J.O. OLOLA

JUDGE



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