



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 207 OF 2013**

**WACHU RANCH (D.A.) COMPANY LIMITED..PLAINTIFF/RESPONDENT**

**VERSUS**

**ALEX MWALIMU BAYA & 549 OTHERS...DEFENDANTS/APPLICANTS**

**RULING**

1. By a Plaint filed herein on 19<sup>th</sup> November 2013, the Plaintiff Wachu Ranch(D.A) Company Limited sought Judgment against the 550 Defendants herein for:-

***(a) A permanent injunction to issue restraining the Defendants by themselves, employees and/or agents from remaining on LR No. 13600 belonging to the Plaintiff.***

***(b) A permanent mandatory injunction compelling the Defendants by themselves, servants, agents to demolish and remove all the illegal construction within the Plaintiff's parcel LR No. 13600 and to demolish all the buildings and illegal erections interfering with the activities of the Plaintiff.***

***(c) Eviction and/or removal of the Defendants from the suit property.***

***(d) A permanent injunction against the Defendants restraining them not to interfere with the Plaintiff's parcel of land.***

***(e) Costs of the suit and interest thereon at Court rates.***

2. The basis of the Plaintiff's claim was that it was the registered owner of the said parcel of land measuring approximately 29,911 Ha located within Tana River County having been allocated the same for purposes of ranching by the Government in the year 1976. It was the Plaintiff's case that the Defendants had subsequently on diverse dates encroached upon the suit property and thereby made it impossible for the Plaintiff to carry out its intended activities on the land.

3. All the Defendants filed a joint Statement of Defence in which they averred that the Plaintiff is not the registered proprietor of the suitland; and that, the Plaintiff's registration as the proprietor of the suit property, if at all, was irregular, unprocedural and illegal and that in any event, they have been in possession of the suitland long before the year 1976.

4. In his Judgment delivered on 25<sup>th</sup> November 2016 the Honourable Justice Angote then seized of the matter allowed the Plaintiff's suit and granted virtually all the orders sought in the Plaint.

5. Aggrieved by the decision of the Learned Judge, the Defendants lodged a Notice of Appeal herein on 8<sup>th</sup> December 2016.

6. Subsequently, on 24<sup>th</sup> January 2017, the Defendants filed the Notice of Motion application before me seeking a stay of execution of the Judgment and/or decree of 25<sup>th</sup> November 2016 pending the lodging, hearing and determination of the intended appeal.

7. The Plaintiff is on its part opposed to the grant of the orders of stay. In Grounds of Opposition filed herein on 9<sup>th</sup> June 2017, the Plaintiff sought to oppose the Application inter alia on the grounds that:

***(i) The application is incompetent as the deponent of the Affidavit in support thereof one Bakari Ngeneza Mwamugunda lacks the requisite authority from the co-defendants to depone to the said affidavit.***

***(ii) The application was brought two months after the delivery of the Judgment and such delay is inordinate and inexcusable as the same has not been explained.***

***(iii) That the Notice of Appeal filed herein has since been deemed as withdrawn under Rule 83 of the Court of Appeal Rules as no Appeal has (been) instituted to-date; and***

***(iv) That the Applicant has not proved the conditions requisite for being granted a stay of execution pending appeal.***

8. I have considered the application and the response thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the Parties.

9. As was held by Ringera J(as he then was) in ***In the Matter of Global Tours and Travels Limited Nairobi High Court Winding Up Cause No. 43 of 2000(Unreported):-***

*“.....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 capaciously 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.”*

10. The Application before me was filed some two months after the decision sought to be appealed was rendered. Looking at the circumstances of the case however, I do not find that this amounted to inordinate delay on the part of the Applicant. The decision was rendered on 25<sup>th</sup> November 2016 and the Notice of Appeal was duly filed on 8<sup>th</sup> December 2016. Given the many peculiarities of the month of December in terms of legal practice where many Advocates close office for Christmas Holidays and the attendant Court Vacation, the filing of this application on 24<sup>th</sup> January 2017 cannot in my view constitute inordinate delay. In any event counsel for the Applicant has explained that he was out of the country on

25<sup>th</sup> November 2016 when the Court rendered its decision. I find no reason to doubt that assertion and therefore hold that the Application was filed without delay.

11. In regard to the question of the likelihood of substantial loss being occasioned to the Applicants in the event the orders sought are not granted, I find the Applicant's supporting affidavit rather sketchy in terms of detail. At the relevant paragraphs 6 to 9 of the Affidavit sworn by Bakari Ngeneza Mwamugunda on 16<sup>th</sup> January 2017, the Applicants state as follows:-

*6. That the execution of the said decision and/or decree is so imminent thus making this application extremely urgent.*

*7. That I verily state that if the said orders sought in our application are not granted, our intended appeal shall be rendered nugatory and/or academic since the execution of the orders herein is so imminent.*

*8. That I verily state that our residence, farms and operations shall be greatly affected by the execution of the decree herein.*

*9. That I verily state that we shall be highly prejudiced in the event of our appeal succeeding in the Court of Appeal yet the decree herein has been executed against us.*

12. The relief of stay of execution pending appeal is guided by three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules. One of these is the requirement that the Court be satisfied that substantial loss may result unless stay of execution is ordered. As **Gikonyo J observed in Antoine Ndiaye –vs- African Virtual University(2015)eKLR:-**

*“...substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution. There is ample judicial authority on this issue but I need not multiply them except to cite the case of Kenya Shell Limited –vs- Benjamin Karuga Kigibu and Ruth Wairimu Karuga (1982-1988) where the Court of Appeal stated that:-*

*“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay.”*

13. Indeed as the Court observed in **Machira t/a Machira & Company Advocates –vs- East African Standard(No. 2) (2002) KLR 63**

*“In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars.... Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.....”*

14. In the matter before me, the Applicants merely state that they will suffer substantial loss if the orders of stay are not granted. No evidence whatsoever was put before me in demonstration of the fact that such loss may arise. Accordingly I decline to grant a stay of execution herein.

15. The application dated 24<sup>th</sup> January 2017 is consequently dismissed with costs to the Respondent.

**Dated, signed and delivered at Malindi this 7<sup>th</sup> day of December, 2017.**

**J.O. OLOLA**

**JUDGE**



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