REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 25 OF 2018

KALOLENI MUSLIM MOSQUE COMMITTEE.....1ST PLAINTIFF

KISUMU MUSLIM ASSOCIATION.....2ND PLAINTIFF

VERSUS

SEVENTH DAY ADVENTIST LIMITED.....1ST DEFENDANT

NATIONAL LANDS COMMISSION.....2ND DEFENDANT

RULING

INTRODUCTION

Seventh day Adventist (hereinafter referred to as the applicant) has come to court for orders that there be a stay of execution of the judgment of this honourable court delivered on 23rd October 2020 and any consequential decree pending the hearing and determination of the appeal against the Judgment dated 23rd October 2020. That pending the hearing and determination of this application and appeal against the judgment delivered by this Honourable court on 23rd October 2020, the Plaintiff's and or any person acting under them be restrained from alienating, entering, trespassing upon, taking possession and or in any manner interfering with the 1st Defendant's peaceful occupation of the land parcel, KISUMU MUNICIPALITY/BLOCKS 5/40. That the order extracted by the plaintiffs on 27th October 2020 be recalled and set aside and the Deputy Registrar do issue a decree that has been approved by all parties to this suit.

The application is made on grounds that prior to this suit and the delivery of the judgment in this suit on 23rd October 2020, 1st Defendant/Applicant held title and possession of the suit property KISUMU/MUNICIPALITY/BLOCK 5/40.

That this honourable court in its decision delivered on 23rd October 2020, allowed the plaintiff's case and ordered that the plaintiffs had a Legitimate Expectation to be allocated the suit parcel of land and thereafter ordered that for the cancellation of the Allotment Letter issued to the 1st Defendant on 2nd August 2010, Lease dated 20th December 2020 and certificate of Lease issued on 24th December 2010.

That the 1st Defendant/Applicant is dissatisfied and or aggrieved with the said judgement and has lodged and served a Notice of Appeal against it. That the 1st Defendant/Applicant's Appeal is arguable and stands high chances of success and unless the cancellation of the said documents is stayed pending the hearing of this application and/or appeal, this application and or appeal may be rendered merely academic and nugatory.

That the Plaintiffs have illegally and unlawfully extracted a court "order" and they may execute the same as a decree against the 1st Defendant at any time from now thus causing the 1st defendant/Applicant irreparable loss and damage.

That it is in the best interest of justice and fair play that the orders sought herein are granted as the 1st Defendant may lose title and possession his property.

In the supporting affidavit of Evans Mageto Gichana, the Chairman of Development in the 1st Defendant/Applicant's Church in Kisumu, he states that he is in possession of all relevant documents and particulars relating to the matters in issue in this suit on behalf of the Applicant by virtue of his said position.

That prior to the institution of this suit and delivery of judgment herein against the 1st Defendant on 23rd October 2020, the 1st Defendant held a certificate of Title over the suit parcel and was in possession of the suit property KISUMU MUNICIPALITY/BLOCK 5/40.

Judgment in this suit was delivered on 23rd October 2020, wherein the honourable court ordered inter alia that the Plaintiffs had a Legitimate Expectation to be allocated the suit parcel of land by the Commissioner of Lands and the County Government of Kisumu. This honourable court further held that the Allotment Letter issued to the 1st Defendant on 2nd August 2010, the lease dated 20th December 2020 and Certificate of lease issued on 24th December 2010.

The 1st Defendant is aggrieved and or dissatisfied by the said decision of the Honourable Judge of the Environment and Land Court at Kisumu that was delivered on 23rd October 2020 herein, hence the 1st Defendant has instructed its advocate on record to appeal against the said decision.

The plaintiffs have proceeded to illegally and unlawfully extract an "Order" issued on 27th October 2020 without sending a draft decree for approval to the advocates for the other parties including the 1st Defendant's advocates, as required Under Order 21 Rule 8 (2) of the Civil Procedure Rules (2010)

They have protested the illegal and unlawful manner in which the plaintiffs have extracted the said "order" and pray that the same be recalled. He has an arguable appeal with high chances of success in that the court overlooked important issues of law and fact.

The 1st Defendant took possession of the suit property after having evicted the illegal occupants thereof in execution of the decree in the Environment and Land court at Kisumu Case No. 806/2015; Seventh Day Adventist Church (East Africa Ltd) Victory Church – vs Caleb Ouma & 5 Others, where the Defendants were being represented by Ms. Amondi & Co. Advocates.

The suit is pending the hearing of an appeal in the Court of Appeal filed by Ms. Amondi & Company Advocates for the Appellants/Defendants and who are also claiming the possession of the suit property as against the 1st Defendant herein. Unless restrained the Plaintiffs intend to forcefully and illegally take occupation of the suit property pending the hearing and determination of the appeal.

He is ready to abide by any reasonable conditions this Honourable Court may deem fit to impose. This application has been brought without inordinate delay.

In the replying affidavit of Harun Rashid Gullah, he states that the application for stay is founded on wrong provisions and principles of the law as the same hinging under rule 5 (2) (b) of the Court of Appeal Rules ought to have been canvassed at the Court of Appeal and not before the same judge who delivered the subject judgment. That the grounds enumerated in support of the said application particularly in reference to arguability and nugatory clause are thresholds applicable at the Court of Appeal and not the High Court sitting as the Land and Environment Court and in any case the same have not been discharged. The appellants have failed to demonstrate that their appeal as captured in the draft memorandum of appeal is arguable and with any chances of success.

That the appeal is hinged on the erroneous presumption and misinterpretation of the law to imply that the special conditions under section 3 of the Governments Lands Act (Cap 280) granted the Commissioner of Lands powers to enter into, allocate and grant a lease agreement in 2010. That the only person who could make such dispositions of un alienated public land before 2002 was the

President and the act at section 7 barred the Commissioner of Lands from purporting to exercise such Presidential powers. That any alienation initiated by the Commissioner of Lands had to follow an open procedure through auction as envisaged under sections 9-18 of the Government Lands Act (Cap 280) Laws of Kenya. To the extent that the applicants are hell bent on the erroneous belief that the Commissioner of Lands could in 2010 unilaterally allocate them public land amounts to a serious misapprehension of the law and an instant confirmation that the intended appeal is a non-starter and with no likelihood of success whatsoever.

That the intended appeal is also premised on the flimsy argument that the Learned Judge misapprehended the principles applicable in invoking legitimate expectation without expounding on how the judge erred in elucidating the three (3) questions as well captured in R(Bibi)- V Newham London Borough Council (2001) EWCA Civ 607 (2002) 1 WLR 237 at (19) and adopted in Keroche Industries Ltds - v-–Kenya Revenue Authority & 5 Others (2007) eKLR.

That pursuant thereto, it is instructive to note that in respect to legitimate expectation, the judge correctly pointed out the aspect of commitment of a public authority by establishing through communications dating from 1987 in documents produced that indeed the Commissioner of Lands had committed and was willing to allocate the said land to the respondents after clarification of the question of the charging of the suit property to the Standard Chartered Bank.

That the National Land Commission (the predecessor of the Commissioner of Lands) went contra the commitment by instead honouring the application allegedly done years later by the applicant in 2010 before hurriedly issuing them a lease certificate within three (3) months thereafter.

That the mere fact that the draft decree/order has not been served upon the other party before extraction does not in itself qualify the same for invalidation as the decision rests with the deputy registrar who is not bound by the proposal by respective counsel.

That the applicants have not demonstrated the nugatory clause or otherwise any substantial loss that they are likely to suffer in event of failure to grant orders of stay as in any case the respondents are and have always been in possession of the suit parcel to date.

That it is dishonest for the applicants to suggest that eviction of the artisans gave them possession as the object was basically to safeguard the aspect of status quo ante pending the hearing and determination of the main suit which was in their favour and they are now in physical and actual possession.

ANALYSIS AND DETERMINATION

Similar applications for Grant of stay of execution pending appeal have been made before this court and the court has made determination depending on the facts of the case which always vary. The power of the court to issue stay pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states 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 appeal case of 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 to 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 for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that 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.

(3) …

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) …

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye vs. African Virtual University* [2015] eKLR.

10. In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements. As to what substantial loss is, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

The parties herein filed and exchanged submission that I have carefully considered and do find that the judgment was made on the 23rd of October 2020 and the application for stay pending appeal was made on the 29th of October 2020 and therefore there is no inordinate delay in filing the application. On the issue of substantial loss, I do find that the 1st defendant has not demonstrated the substantial loss likely to be suffered as no valuation report has been availed to court and no evidence of any development has been provided by the applicant in any other manner. The upshot of the above is that the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 10th DAY OF DECEMBER, 2021.

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE