



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 68 OF 1986**

**IN THE MATTER OF THE ESTATE OF AGGREY OTIENO AMBALA – DECEASED**

**ODUOR HAWI AMBALA.....1<sup>ST</sup> APPLICANT**

**OGOLA KODHEK AMBALA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MARVIN OPIYO AMBALA.....1<sup>ST</sup> RESPONDENT**

**CHIZI ADHIAMBO AMBALA.....2<sup>ND</sup> RESPONDENT**

**PEREZ AMBALA.....3<sup>RD</sup> RESPONDENT**

**FAROOQ ASIF BUTT.....4<sup>TH</sup> RESPONDENT**

**RULING**

This Ruling is on the application dated 9<sup>th</sup> May 2019, which was amended on 12<sup>th</sup> July 2019.

1. The substantive reliefs sought are as follows;

***“2. That an order do issue allowing the Applicants to take possession and occupation of all those properties known as L.R. NO. 1160/912, L.R. NO. 1160/911, L.R. NO. 1160/910, L.R. NO. 1160/947, L.R. NO. 1160/948, L.R. NO. 1160/949, L.R. NO. 1160/950 and L.R. NO. 1160/951 without any hindrance from the Respondents.***

***2A. That in the event of any resistance from the Respondents or their servants or agent, the Officer Commanding Hardy Police Station should assist in effecting the Court Order.”***

2. It is the Applicants’ case that the orders they are seeking are premised on the Judgment that was delivered by the Court of Appeal in **Civil Appeal No. 116 of 2016**.

3. The Applicants pointed out that they were asking the High Court to enable the Applicants give effect to the judgment of the Court of Appeal.

4. It was the Applicants’ view that by granting the reliefs sought, the High Court would have upheld the dignity of both the High Court and the Court of Appeal.

5. The Applicants submitted that the Respondents were resisting the judgment and obstructing the Applicants together with Odhiambo Tabu Ambala, from taking possession of and occupying the properties which were lawfully theirs.

6. The Respondents’ actions were described as being very disrespectful to the Judicial System, as the said actions undermined the authority of the Court System.

7. In particular, the 4<sup>th</sup> Respondent was said to have said that he would not obey the judgment of the court, because he holds the view that he was entitled to the properties he was occupying.

8. The Applicants' view the conduct of the 4<sup>th</sup> Respondent as those of a person who has come to court with tainted hands, as he was behaving as if his alleged rights surpassed the authority of the Court.

9. This Court's attention was drawn to the Judgment of the Court of Appeal, wherein the Court had cancelled the titles held by **HADIJA BUTT** (who is the spouse of Farooq Asif Bhatt, the 4<sup>th</sup> Respondent).

10. The Applicants invited this Court to take a firm stand against the Respondents, whose conduct was seen as a challenge to the Constitutional Order of the Judicial System, and an attempt to undermine the decisions of the Court.

11. In answer to the application, the Respondents first submitted that this court lacks jurisdiction to entertain the application.

12. It is common ground that the case before this court was commenced as a Succession Cause. It therefore follows that the Court which was called upon to make a determination of the matters in issue did so in its capacity as a Probate and Administration Court.

13. The Respondents submitted that the Court's jurisdiction came to an end when the Court delivered its judgment.

14. In the case of the **ESTATE OF FESTO LIKHAYA SHILESERA, HIGH COURT SUCCESSION CAUSE NO. 285 OF 2004**,

Musyoka J. held as follows;

*“I must emphasize that a probate court effectively becomes functus officio once it has confirmed a grant, save for any relevant post-confirmation applications that the parties may file relating to such matters as review, rectification, among others.*

*The processes relating to transmission of the property to those entitled upon confirmation of the grant, moves to the Land Registries, Banks, Company Registries, et cetera, where the registrations of the interests have to be done. Those processes have nothing to do with the Probate Court, and so does the process of evicting trespassers from the estate property to which a beneficiary might be entitled to after confirmation of grant.”*

15. In this case the High Court had already delivered its Judgment. The Court did confirm the Grant.

16. Therefore, the Court had made known its decision regarding the manner in which the property of the deceased was to be sub-divided between the beneficiaries.

17. Once the Grant was confirmed, it conferred rights on the beneficiaries.

18. In the case of **REPUBLIC Vs COUNTY CHIEF OFFICER,**

**FINANCE & ECONOMIC PLANNING, NAIROBI CITY COUNTY EXPARTE DAVID MUGO MWANGI, MISC. CIVIL**

**APPLICATION NO. 222 OF 2016**, Odunga J. held as follows;

*“It must however be remembered that Court Orders are not made in vain, and are meant to be complied with.”*

19. The learned Judge went on to quote the following words of Ibrahim J. (as he then was) in **ECONET SIRELESS KENYA LTD. Vs MINISTER FOR INFORMATION &**

**COMMUNICATION OF KENYA & ANOTHER [2005] 1 KLR 828**,

*“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until the order is discharged.”*

20. In this case, I do not understand the Applicants to be seeking to re-open a case which had already been determined.

21. The Applicants are asking the High Court to give orders which will turn into reality, the judgment of the Court of Appeal.

22. In the meantime, the Respondents said that there was a pending application, at the Court of Appeal, seeking a review of the Judgment.

23. Whilst it is true that the Court of Appeal may choose to review the Judgment, the converse is equally possible.

24. And the fact that an application was pending before the court does not, of itself, imply that there was a stay of execution of the orders already made by the Court.

25. In the case of **NAFTALI RUTHI KINYUA V. PATRICK THUITA GACHURE & ANOTHER, CIVIL APPEAL NO. 44 OF 2014**, the Court of Appeal was handling a case in respect to which the doctrine of **lis pendens** under **Section 52** of the **Transfer of Property Act** was considered. The Court noted that the said doctrine prohibits a party from giving to other persons, the

litigation rights to the property in dispute, so as to prejudice the other party. The court stated that;

***“The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice.”***

26. The Applicants have failed to demonstrate how the doctrine of lis pendens is applicable to this case. I so hold because the case before the High Court was determined, as so also the appeal which was before the Court of Appeal.

27. The existence of an application for the review of the Judgment of the Court of Appeal did not give rise to the application of the doctrine of lis pendens.

28. The Applicants have expressly acknowledged that legal position. Therefore, there should be no difficulty in executing the Judgment.

29. The execution of a judgment delivered by the Court of Appeal should be undertaken by that Court. The Court of Appeal has the requisite Jurisdiction, authority and structures to execute its Judgment and Orders. It does not need the High Court to give orders on its behalf.

30. And even if the Respondents were to disobey the Judgment of the Court of Appeal, it is that Court that is clothed with authority to punish the contemnors appropriately.

31. As regards the request for an Order that the Officer Commanding Hardy Police Station should assist in effecting the orders issued by this Court, I wish to adopt the following words of

Hancox JA in the case of **KAMAU MACUHA Vs RIPPLES LTD, CIVIL APPLICATION NO. NAI. 186/1992;**

***“... in any event it would be unlawful to utilize the police in a civil action for the purpose of effecting or aiding private evictions or reinstatements.”***

32. Kwach JA explained as follows, in the same case;

***“The only valid criticism of the order of the Judge which I can see as of now, but which does not swing the scale one way or the other in this application, is the direction that the assistance of the police should be enlisted to secure compliance by the Applicant.***

***The police should never be involved in such matters as there is specific provision for the enforcement of an Injunction under Order 21 rule 28 of the Civil Procedure Rules.”***

33. The law ought to be obeyed because it is the right thing to do in any democratic civilized society.

34. And when parties have had a civil dispute determined by a court of law or by any other body lawfully authorized to render determinations, the parties ought to comply with the orders given, unless the orders have been discharged.

35. Compliance with lawful orders, however disagreeable you may find them, is imperative for the maintenance of law and order in society.

36. It should not require the presence of a police officer for parties to comply with orders of the Court, in civil cases.

37. In a nutshell, even if I had granted the first relief sought, I would still have rejected the request for an order requiring the Officer Commanding Police Station, Hardy Police Station, or any other police officer to superintend over the enforcement of such order.

38. In conclusion, I find no merit in the application; and it is therefore dismissed.

39. The Applicants are ordered to pay to the Respondents, the costs of the application.

**FRED A. OCHIENG**

**JUDGE**

**DATED, SIGNED and DELIVERED at KISUMU This 27<sup>th</sup> day of January 2020**

**T. W. CHERERE**

**JUDGE**