



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 156 OF 2010**

**JAMES OWUOR AMOLO**

**(Suing as the legal representative of**

**JACTONE AMOLO OYARE, deceased) ..... PLAINTIFF**

**VERSUS**

**PETER ADONGO OKONGO ..... DEFENDANT**

**RULING**

1. The defendant's/applicant's application dated 11<sup>th</sup> December 2015 brought under sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rules 1, 3 and 4 of the Civil Procedure Rules seeks orders that:-

**1. The honourable court be pleased to declare that the order staying execution of the decree in Migori SPM's court Misc. Application No. 37 of 2010 has lapsed in terms of the orders of this honourable court given on 5<sup>th</sup> October 2012 and 16<sup>th</sup> May 2014.**

**2. Costs of the application be provided for.**

The application is supported on the grounds set out on the body of the application and on the supporting affidavit sworn by Peter Adongo Okongo the defendant herein on 11<sup>th</sup> December 2015. The plaintiff/ respondent opposes the application on the basis of the replying affidavit sworn by James Owuor Amolo on the 24<sup>th</sup> February 2016.

2. The brief facts of this matter are that the present plaintiff's father one Jacktone Amolo Oyare filed the instant suit on 9<sup>th</sup> June 2010 seeking the cancellation of title number **Kanyamkago/Kajulu/488** which he claimed was registered in the defendant's name fraudulently. The defendant by a defence dated 2<sup>nd</sup> July 2011 contended he was validly registered as owner of the suit property following the revocation of the title registered in the name of the plaintiff on account of the same having been irregularly and fraudulently registered in the plaintiff's name. The defendant counterclaimed for vacant possession of the suit property. Apparently during the pendency of the instant suit the defendant initiated a land dispute claim before the Uriri Land Dispute Tribunal where an award was rendered on 15<sup>th</sup> July 2010 that the defendant vacates the suit land. The award was adopted in the Senior Principal Magistrate's Court at Migori Misc. Case

- No. 37 of 2011 on 19<sup>th</sup> April 2011 and a decree issued.
3. An application by the plaintiff to stay the execution of the decree issued in the Migori SPM's court was conditionally granted vide a ruling delivered by Hon. Lady Justice Korir on 5<sup>th</sup> October, 2012. Apparently by the time the ruling was delivered the original plaintiff had died prompting his personal legal representative to make the application dated 10<sup>th</sup> April 2013 seeking a review of the orders made by Hon. Lady Justice Korir on 5<sup>th</sup> October 2012. Hon. Justice Okong'o vide a ruling delivered on 16<sup>th</sup> May 2014 varied/reviewed the orders made by Hon. Lady Justice Korir and made the following orders:-
    - i. **The order of stay of proceedings and execution of the decree issued in Migori SPM's Court Misc. Application No. 37 of 2010 shall remain in force pending the hearing and determination of this suit.**
    - ii. **The time within which the plaintiff was to execute a bond in the sum of kshs. 100,000/= as a security for costs is extended by sixty (60) days from the date hereof.**
    - iii. **The time within which the parties were to comply with Order II and list this matter for hearing is extended by 120 days from the date hereof.**
    - iv. **The stay granted herein shall lapse automatically if this case is not set down for hearing within 120 days from the date hereof.**
    - v. **The costs of the application shall be in the cause.**
  4. The plaintiff in yet another application dated 24<sup>th</sup> February 2015 sought leave and was granted leave to enjoin one John Angino Oduke and Mary Awach in the present suit as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as the defendant had caused the subject matter of the suit to be transferred to them during the pendency of the instant suit and of an order restraining the defendant from wasting, damaging, alienating, constructing on and/or doing anything on the suit property pending the hearing and determination of the suit. The court also in its ruling delivered on 27<sup>th</sup> August 2015 permitted the plaintiff to amend the plaint to enjoin the new parties.
  5. The court record shows that the amended plaint enjoining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was filed on 30<sup>th</sup> September 2015. The record however is silent on whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were served with the amended plaint and neither have they appeared and/or filed any defence. Noting that the amended plaint seeks the cancellation of the title issued to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants names in regard to land parcel **Kanyamkago/ Kajulu/488**, the subject property in the suit it would be imperative for them to be served and afforded an opportunity to defend the suit.
  6. In the instant application by the defendant, the defendant premises his application on the grounds that the plaintiff did not comply with Hon. Justice Okongo's orders of 16<sup>th</sup> May 2014 which varied the orders granted by Hon. Justice Korir on 5<sup>th</sup> October 2012 and for that reason he sought the order of stay to be declared as having lapsed. The common order in the two rulings was that the plaintiff was to execute a bond in the sum of kshs. 100,000/= as security for costs. It is from the record unclear what form such a bond was to take. Was the plaintiff merely required to give an undertaking or was it a surety bond or personal bond? At the time Hon. Justice Okong'o delivered a ruling on the plaintiff's application dated 24<sup>th</sup> February 2015 he noted the plaintiff had not complied with his orders issued on 16<sup>th</sup> May 2014. The judge observed that he has allowed the application for stay of the decree and the eviction order that had been issued by the Migori court but further noted that Hon. Justice Makhandia had on 30<sup>th</sup> June, 2010 granted an injunction restraining the defendant from in any way or manner dealing with the suit property and which order had not been varied or set aside.
  7. In my view Hon. Justice Okong'o even though he found that the plaintiff had not complied with his orders of 16<sup>th</sup> May 2014 he nonetheless went ahead to grant the plaintiff leave to enjoin new parties and to amend his plaint principally on the basis that the defendant had caused the transfer of the suit property when there was in force an order of injunction restraining such an action.
  8. The contest in the present suit is the ownership of land parcel **Kanyamkago/Kajulu/488** which both the plaintiff and defendant claim ownership of. The defendant having caused the transfer of the property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant when there was an order barring such action in my view

altered the parameters under which the suit was to be contested. Invariably the directions that the court had given vide its ruling of 16<sup>th</sup> May 2014 as regards compliance with Order 11 Civil Procedure Rules could not be satisfied without bringing on board the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who by virtue of having become registered owners became necessary parties in the suit who stood to be affected by any order the court made and prompted the application by the plaintiff dated 24<sup>th</sup> February 2015. Equally the orders of stay and eviction from the Migori court had as it were become superfluous as the certificate of official search dated 17<sup>th</sup> December 2014 shows John Angiro Oduka and Mary Awach (2<sup>nd</sup> and 3<sup>rd</sup> defendants) had gotten registered as owners of the suit property on 13<sup>th</sup> June 2012 meaning the defendant had ceased to have any interest in the suit property and essentially even on 16<sup>th</sup> May, 2014 when the court reviewed and varied Hon. Lady Justice Korir's order of 5<sup>th</sup> October 2012 the defendant had ceased to be the owner of the suit property. The defendant in my view did not make full disclosure in the matter and in the present application he has not approached the court with clean hands. The order he seeks in the application cannot be of any effect as he virtually gave effect to the decree of the Migori SPM's court. He having already transferred the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, the latter are the persons who now have to show and demonstrate they have a good title to the suit property. It is them who would be entitled to seek an order of eviction against the plaintiff and not the 1<sup>st</sup> defendant.

9. The net result is that I do not find any merit in the defendant's application dated 11<sup>th</sup> December 2015 and I order the same dismissed with costs to the plaintiff.

**Ruling dated, signed and delivered at Kisii this 23<sup>rd</sup> day of June, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the defendant

**J. M MUTUNGI**

**JUDGE**