



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELCA. NO.118 OF 2014

(An appeal from the ruling/order issued on 10th July, 2014 by Hon. Mutua PM, in Nyeri CMCC NO.612 of 2007)

SAMUEL NGUNJIRI MUTHUMA.....APPELLANT

VERSUS

PETER KIBUI NYUGUTO.....1ST RESPONDENT

JOHN MWAURA WAWERU.....2ND RESPONDENT

RULING

1. The appellant, **Samuel Ngunjiri Muthuma**, brought the notice of motion dated **26th September, 2014** seeking an order for stay of execution of an order made/issued on **10th July, 2014** in **Nyeri CMCC NO.612 of 2007** regarding sale and/or alienation of **LR. No. Muhito/Gaturia/294** (hereinafter “the suit property”) pending the hearing and determination of the appeal herein.
2. The application is premised on the grounds that the suit property was wrongly sold in execution of a decree that was of no legal consequence (was null and void ab initio); that the suit property formed part of the estate of **Ngima W/O Muthuma alia Ngima Muthuma** who died in 1975; that when the property was sold in execution of the decree referred to herein above, representation had not been made in respect of the estate of the deceased (no lawful transfer or transmission in respect of the suit property had been conducted); that the applicant was appointed the administrator of the estate of the deceased on **15th July, 2014** (vide Nyeri High Court Succession Cause No. 605 of 2014). The appellant contends that the entry made in 2007 in the proprietorship section of the suit property (to reflect him as the registered owner of the suit property was made fraudulently and/or criminally).
3. Arguing that it is in the interest of justice for the order sought to be granted, the appellant points out that his application for stay of execution of the ruling/decree herein was refused by the lower court.
4. The application is supported by the affidavit of the appellant sworn on **26th September, 2014**. In that affidavit the appellant has reiterated the grounds on the face of the application and deposed that no prejudice will be occasioned on the respondents if the application is allowed unconditionally.
5. In reply, the 2nd respondent filed the grounds of opposition dated **13th October, 2014** and the replying affidavit sworn on **26th November, 2014** and filed on **27th November, 2014**.
6. In the grounds of opposition herein, the 2nd respondent contends that the orders which are the subject matter of the current application are incapable of being stayed (they were negative orders of dismissal of the appellants’ application before the lower court). Terming the application an abuse of the court process,

the 2nd respondent further contends that the application has been overtaken by events.

7. In the replying affidavit, the 2nd respondent has deposed that the application is without merits; that the orders sought to be stayed are incapable of being stayed; that the orders sought to be dismissed were lawful and plausible and that the appellant did not prefer an appeal against the decision of the lower court that formed the basis of the application he now wants stayed.

8. Concerning the appellant's contention that by the time the suit property was sought in execution of the decree of the court hereto, letters of administrators had not been obtained in respect of the estate of the deceased herein, it is contended that that issue cannot be raised at this point and by the appellant who is accused of being the architect of the fraud or criminal conduct he now alleges in the transfer and/or transmission of the suit property from the estate of the deceased person herein (Ngima w/o Muthuma).

9. Terming the orders sought speculative, the 2nd respondent has deposed that he has not made any application for eviction of the appellant from the suit property.

10. In view of the foregoing, the 2nd respondent urges the court to dismiss the application with costs to him in order to bring litigation in respect of the suit property to an end.

11. On **10th February, 2015** when the suit came up for hearing counsel for the appellant **Mr. Muthoni** explained that the plaintiff had entered into some agreement with the 1st respondent which he later abandoned. Consequently the 1st respondent sued him and obtained a judgment against him. Reiterating the appellant's contention that the suit property formed part of the estate of the deceased person herein and that no succession cause had been filed before the property was transferred, the appellant is undertaking to refund the 2nd respondent the purchase price and that if stay is not granted there is likelihood of suffering.

12. In reply, **Mr. Macharia** for the 1st respondent stated that in opposing the application, he would entirely rely on an affidavit he swore on **1st October, 2014**. He pointed that the grant attached to the application herein was issued on **15th July, 2014** while the order being challenged through this appeal were made on **10th July, 2014** and submitted that the appellant had no capacity to bring and prosecute the current application.

13. He also pointed out that the order being appealed from is not annexed or attached to the application to enable the court to appreciate its nature. Maintaining that the order appealed from was an order for dismissal of an application by the appellant, counsel wonders whether an order of stay can issue in respect of dismissal of an application. He contended that in law such order cannot be stayed.

14. Concerning the allegation that the suit property formed part of the estate of the deceased person herein, counsel pointed out that by the time the suit property was sold in execution of the decree hereto, it was registered in the name of the appellant. Wondering how it would have taken the appellant over seven years to realize that the suit property was irregularly registered in his name, counsel submits that the issue of ownership of the suit property does not arise.

15. Terming the appeal as lacking in merits, Mr. Macharia submitted that it has no chance of success. In this regard he pointed out that the decree that led to the sale of the suit property has not been challenged. The appellant is also said to have failed to demonstrate that unless the order sought is granted he will suffer irreparable loss.

16. The pleadings by counsel for the appellant are also challenged on the ground that they offend **Order 9 Rule 3** of the Civil Procedure Rules.

17. Terming both the appeal and the current application as non-starters, counsel urged the court to dismiss the application with costs to the respondents.

18. Counsel for the 2nd respondent, **Mr. Kimunya**, associated himself with the submissions by counsel

for the 1st respondent and submitted that there is no justification for stay because his client was a purchaser for value without notice of the alleged irregularity.

19. Arguing that the alleged irregularity could only have been occasioned by the appellant, counsel for the 2nd respondent further submitted that the application does not meet the threshold for granting an order for stay. In that regard, he argued that the appellant has not demonstrated that unless the orders sought are granted he will suffer irreparable injury. The balance of the purchase price of the suit property amounting to Kshs. 800,000/- is said to be available. With that amount, it is submitted that the appellant can purchase an alternative parcel of land. Counsel also submitted that the appellant has been indolent in pursuing his alleged rights in the suit property.

20. In reply to the 1st defendant's contention that he was improperly on record for the appellants' in this application and the appeal, Mr. Muthoni explained that he made an application to come on record in the lower court which application was allowed.

Analysis and determination

21. Since the capacity/competency of the appellant's advocate is challenged, the first point of call in determining this application is to determine whether the firm of Peter M. Muthoni is properly on record for the appellant. This determination is necessary because it is not in dispute that the firm is not the one which represented the appellant in the lower court. That being the case, their representation of the appellant is subject to **Order 9 Rule 9** of the Civil Procedure Rules which requires that a new firm of advocates coming on record after judgement is delivered, must seek leave of the court to act for a party or file a consent.

22. With regard to this question, having perused the lower court file, I can confirm that the issue was raised in the application whose decision is the subject matter of the appeal herein.

Concerning that issue the trial Magistrate held:-

"I find and hold that the firm of Peter M. Muthoni & Company advocates is improperly on record and the application is incompetent-See Mbogo v. Asiroyo & 3 others (2004)1 KLR 697."

23. There is no evidence that the ruling of the lower court to that effect was either reviewed and/or set aside. To that extent, I find and hold that the assertion by counsel for the appellant that he was allowed to come on record by the lower court on behalf of the appellant is a lie and in breach of the advocates duty to the court under **Section 1A(3)** of the Civil Procedure Act.

24. There being evidence that the advocate on record has not complied with the law concerning change of advocates after judgment, the question to answer is what is the fate of pleadings and/or proceedings conducted by such an advocate?

25. In answering this question I adopt the decisions in the case of **John Langat v. Kipkemoi Terer & 2 others** Kericho HCC No.21 of 2013 where it was held:-

"where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intended to act in person as the case may be No such orders was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant and therefore the appeal and the application are incompetent."

26. The decision in the case of **Monica Moraa v. Kenindia Assurance Company Ltd** Kisii HCC No. 43 of 1999 is also instructive on the fate of none compliance with **Order 9 Rule 9** of the Civil Procedure rules. In that case it was held:-

“From the above order 9 at rule 9 it is mandatory after judgment has been entered for a new firm of advocates to seek leave to act for a party or file a consent to that effect after delivery of judgment.”

27. Having found the application and the appeal to be incompetent, I find and hold that it cannot form the basis of the orders sought.

28. On the question of costs, having found the advocate for the appellant to have been in breach of his duty to court under **Section 1A (3)** of the Civil Procedure Act, I condemn him to personally meet the costs of this appeal, the current application and the application before the lower court.

Dated and delivered at Nyer this 23rd day of March, 2015

L N WAITHAKA

JUDGE

In the presence of:

Ms Odipo holding brief for Mr. Muthoni for the Applicant

No appearance for the 1st respondent

No appearance for the 2nd respondent

Lydiah – Court Assistant