



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 145 OF 2008

JAMES MBURU KAMAU.....APPELLANT/APPLICANT

VERSUS

PETER MWANGI MBARIRE1ST RESPONDENT

JAMES MBURU KAMAU.....2ND RESPONDENT

FRANCIS WACHIRA NDUNGU.....3RD RESPONDENT

(Being an appeal from the Ruling the Trial court (Hon. Mr. Kingori – SPM) sitting at Nakuru on 14th day of August 2008 in Chief Magistrate's Court at Nakuru in civil Case Number 542 of 2005)

RULING

1. The appellant and applicant herein acting in person brought this application dated 4th April 2014 under **Order 51;40 (1) (2) (3) and (4) of the Civil Procedure Rules.**

He seeks several orders, the main ones being:

- (1) That this court do restrain the Respondents from cultivating and staying in the suit land known as **Nakuru/Cedar Lodge/61** pending the hearing and determination of the appeal is heard.
- (2) That an eviction order be issued against the Defendants/Respondents who are occupying the suit parcel of land pending the hearing and determination of the application.

2. In the supporting affidavit, the applicant states that he appealed from the trial court's judgment because he was not given a fair hearing and that the advocate representing him during the hearing did not file a defence on his behalf.

He further states that the defendants have obtained a title without consent of the relevant authorities and that they are about to sell the suit property and finally that mistakes of his advocates in the trial court should not be visited upon him.

He further deposes that execution of the trial courts judgment will render the appeal nugatory. He avers that he has the original title deed in his possession and that the defendants continued stay therein will prejudice him as he intends to subdivide the land amongst his children.

3. I have looked at the annexures to the affidavit in support of the application.

A copy of certificate of Official Search shows that the suit property **Nakuru/Cedar/Lodge/61 title deed** was closed on sub division on the 21st July 2008 and new subdivisions created new numbers 2000-2016.

4. The Respondents in their replying affidavit sworn by the 3rd respondent states that he bought the suit property in a **public auction** arising from execution of a decree in **Nakuru CMCC No 542 of 2005** and subdivided the same into 10 portions which he sold to various individuals who obtained title deeds to the subdivisions, and that therefore the original title deed does not exist, and the suit property does not exist after the subdivisions.

He states that the application is overtaken by events, and should be dismissed.

5. Mr. Ngure advocate for the Respondents, submitted that indeed there is an appeal against the Judgment of the lower court but no stay of execution pending the hearing of the appeal was ever granted to the applicant, and that in execution thereof, the land parcel was sold and subdivided, that the subject title was extinguished and titles to the subdivisions given to the Purchasers, hence the application has no merit.

6. The court has considered the trial courts Exparte Judgment entered by the court on the 10th May 2005. The claim was for a liquidated sum of Kshs.145,920/= plus interest against the applicant. The suit property was sold in a Public Auction in execution of the trial court's judgment in 2007 and a new title issued to the purchaser. The Court proceedings show numerous applications by the applicant in an attempt to set aside the Judgment all of which were denied. Application to stay execution of the decree was also denied. The appeal was filed on the 16th October 2012 and is against the trial court's Ruling dated the 14th August 2008.

7. According to the court records, the appeal was admitted for hearing on the 8th February 2013. It has not been set down for hearing and no explanation was given by the Appellant as to why he has not set it down for hearing.

The judgment and decree of the lower court having been executed and subject property in respect of the application having been sold to other parties, the application is thus been overtaken by events.

The orders of stay of execution, and eviction orders against the respondents can therefore not be granted.

The application has no merit and is dismissed. The circumstances of the matter dictate that each party do bear its own costs of the application.

Dated, signed and delivered in open court this 30th day of November 2015

JANET MULWA

JUDGE