



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION CAUSE NO.397 OF 2013

GEORGE ODUOR OLOKOAPPLICANT

VERSUS

GABRIEL SIMALI WESONGARESPONDENT

R U L I N G

1. The Application before me would be rather unusual in Probate and Administration Proceedings. It seeks the stay of Civil Proceedings elsewhere pending the hearing and determination of an Application for Revocation of Grant issued herein. The prayer sought in that Application of 4th February 2014 is:-

“(c) THAT there be stay of execution and further proceedings in Busia CMCC NO.138 of 2012 pending the hearing and final disposal of the objection proceedings filed herein vide the summons dated 13/11/2013 seeking revocation of the issued grant.

2. Gabriel Simali Wesonga (The **Respondent**) is the current registered owner of Marachi/Kingandole/1275 (the **Suit Property**) having acquired ownership thereof in transmission as a heir of Bonventure Simali Odwodi in Busia Succession cause No.138 of 2010 **The Estate Bonventure Simali Oduodi**.
3. Clothed with ownership the Respondent commenced Busia Civil Suit No.138 of 2012 **Gabriel Simali Wesonga –vs- George Oduor Oloko** (the **Civil Suit**) in which he sought an eviction order against the Applicant herein. The claim was presented on 15th May 2012. The Applicant filed Defence thereto on 08th June 2012.
4. From records availed to this Court, main hearing of the Civil Suit commenced on 28th August 2013 with the Plaintiff testifying and closing his case. Defence hearing was reserved for 13th November 2013. On that day Mr Wanyama appearing for the Applicant applied for an adjournment to enable him prosecute an application he had filed that morning on behalf of the Applicant seeking stay of further proceedings therein pending the hearing and determination of the Revocation Proceedings in the present matter.
5. The Civil Court declined to grant the adjournment and as the Defendant was not in Court deemed the Defence case as closed. Judgment therein was delivered in favour of the Respondent on 27th November 2013. Subsequently an Eviction Order was extracted by the Respondent and it is its enforcement that precipitated the current application before me.
6. Whichever way I look at the application, it does not find favour. Even if it were to be assumed that this Court, sitting as a Probate and Administration Court, can indeed order the arrest of execution of a Court order emanating from the Civil jurisdiction of the Subordinate Court, the substance of the Application is weak on merit.
7. The Applicants contention is that if he were to succeed in the revocation of the Grant of Letters of

Administration issued herein and those in Succession cause No.138 of 2010 then that would upset the Judgment of the Civil Court. That there would no longer be a basis for the eviction order issued against him. But the difficulty with this argument is that the Applicant had, right from the time of filing his pleadings, identified that the bulwark of his Defence lay in him successfully attacking the Respondent's title to the suitland. This is what he said in paragraph 4 of his Defence:-

“4. That consequently, even if the plaintiff was subsequently registered as a proprietor in the place of the defendant who is the only biological son of the first registered owner of L.R MARCHI/KINGANDOLE/1275, then he got so registered by fraudulent means and concealing material facts before and after taking out letters of administration vide Busia high court succession cause no.138 of 2010.”

Notice that the Defence was filed on 08th June 2012.

8. The Applicant would also have known that an attack on the Respondent's title could only be mounted in Probate and Administration Proceedings. And if the Applicant's appreciation of the law was somewhat hampered because he was lay, he could not be heard to complain of that handicap after 11th September 2012 when Counsel Wanyama started to appear on his behalf. The point this Court is making is that it is as early as 11th September 2012 (perhaps even earlier on the date of Defence, 08th June 2012) that the Applicant ought to have sought stay of the proceedings in the Civil Suit to enable him take a jab at revocation. He makes no explanation as to why he did apply for that stay timeously (see his Application for stay filed on 13th November 2013 in the Civil Suit).
9. Instead the Applicant waited about 14 months later, and after the close of the Plaintiff's case, to file the Application for stay. Even worse it was filed on the very date (13th November 2013) the matter was due for Defence hearing. It was hardly surprising that the Civil Court refused to accede to the Application for adjournment and found that **“The filing of the Application today morning is a show of utmost bad faith.”**
10. The events I have narrated, in brief, demonstrate that the Application now before Court is an attempt by the Applicant to make up for his own lapses in defending the Civil Claim. The Application lacks in bonafides.
11. In addition when the Application for adjournment was declined by Court on 13th November 2013, the Applicant's Counsel sought and obtained leave to Appeal against the Magistrate's order. But no follow through was made and no Appeal has been filed to date. And the explanation given for that failure to Appeal is not believable. This Court was told that the Lower Court proceedings were not readily available. But Counsel argued the Application for adjournment and was present when the Court delivered its short ruling in answer to that Application. Counsel's participation and presence would have enabled him craft a Memorandum of Appeal, a holding one if it needed to be that. If Appeal had been filed, then the Applicant would have had an opportunity to arrest delivery of the judgment by filing an Application for stay either before the same Court or to the High Court. Time was on his side. He had 14 days from the day the Court declined the adjournment up to the day it rendered judgment. He again failed to take advantage of a readily available avenue.
12. For the reasons given, and without considering more, I do hereby dismiss the Application of 4th February 2014 with costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 25TH DAY OF JUNE 2014.

IN THE PRESENCE OF:

MUTAHICOURT CLERK

.....FOR APPLICANT

.....FOR RESPONDENT