



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ENVIRONMENT & LAND CASE NO. 384 OF 2014
(FORMER HCCC NO. 119 OF 2012 (O.S.))

MUSA CHEBI WAISWA PLAINTIFF/APPLICANT

VERSUS

CHRISTINE ANYANGO OTUNGA..... DEFENDANT/RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 18/4/2013, brought by MUSA CHEBI WAISWA, (the applicant) seeking an order of this court staying execution of the decree and all proceedings of Mumias Senior Resident Magistrate's Civil Suit number 410 of 2009, pending the hearing and final determination of this suit. There is also a prayer that costs of the application be provided for. The application is supported by two affidavits; one by the applicant sworn on 18/4/2013 and another by the applicant's father HAMISI CHEBI KATIMU, sworn on the same day 18/4/2013.
2. The application is opposed and CHRISTINE ANYANGO OTUNGA (the respondent), has filed a Replying affidavit sworn on 25/2/2014.
3. The applicant's case is that his father, HAMISI CHEBI KATIMU, purchased a piece of land measuring approximately one (1) acre from OFUTUMBO OKOREKETO, (now late) sometime in 1994 and settled thereon together with his family including the applicant. The applicant's father moved out of the land in 2004 and left the applicant living on the land where he lives to-date. The land was then known as NORTH WANGA/MAYONI/954. Later, the land was sub-divided into parcel Nos. 1127 and 1128. Parcel No. 1127, was further sub-divided to give rise to parcel numbers 1926 and 1927 with parcel No. 1926 now registered in the name of the respondent. The parcel measures approximately 1.45 Hectares. The portion of one (1) acre the applicant occupies is on Title No. NORTH WANGA/MAYONI/1926, which is in the name of the respondent.
4. In 2009, the responded herein moved the Principal Magistrate's Court at Mumias against HAMISI KATIMA ATIKA, seeking to evict him from parcel No. NORTH WANG/MAYONI/1926 and obtained a decree from that court, dated 2/8/2011, directing that the defendant therein, HAMISI KATIMA ATIKA, be evicted from the suit land.
5. On 12/5/2012, the applicant took out an Originating Summons seeking a declaration to the effect that he has acquired adverse possession. He has filed the present application seeking a stay of execution of the decree in the SRMCC No. 410/2009, until the hearing and determination of the present suit. His father has filed an affidavit supporting the applicant's application, saying that the suit at Mumias was heard ex-parte despite the fact that he moved out of the suit land in 2004, and

therefore, a wrong party may be evicted if the decree is executed.

6. In opposing the application, the respondent has stated that there is a decision of the court against the father to the applicant which has not been challenged, hence the applicant's application is a non-starter. It is also the respondent's case that the applicant's father could not pass a title to the applicant, as he did not have a good title himself to pass. The respondent has also dismissed the affidavit of HAMISI CHEBI KATIMU, saying that it is not helping in the applicant's application.

7. Parties filed written submissions through their respective advocates which are on record.

8. I have considered the application herein, the affidavits in support and those in opposition, and respective submissions by counsel on both sides. The applicant seeks a stay of execution of decree in Mumias SRMCC No. 410 of 2009, not in the Magistrate's court but in this suit. The reasons he has proffered are that if that decree is executed, then it will be him who will be evicted since his father left the suit land in 2004. He argues, that he has acquired a right of his own over the suit property, and if evicted, he will have been evicted without being heard.

9. I would have dismissed this application for the reason that it seeks to stay execution of a decree of a competent court through a different suit when that suit and decree remain unchallenged. However, this application presents a peculiar and troubling situation that I have to consider.

10. The applicant in this suit is an adult son of the defendant in SPMCC No. 410 of 2009. The applicant alleges that his father left the suit property in 2004, five years before the suit in the Magistrate's court was filed. If that be true, it has not been explained why the applicant's father was sued instead of the applicant himself who would be the person to be evicted.

11. The applicant's father had stopped being a trespasser. On the other hand, if the applicant's father had not moved out of the land by 2004, why then was the applicant herein not joined in the proceedings before the Magistrate's court since he would equally have been a trespasser! Could the respondent have sued the applicant's father and deliberately left out the applicant, and now wants to use the decree issued against his father to evict the applicant? These are troubling questions whose answers the court could neither find in the affidavits in support of and opposition to the motion, nor in the submissions by counsel for the parties.

12. For those reasons, I am prepared to overlook procedural technicalities and do substantive justice, by giving the applicant an opportunity to be heard purely on the basis of the peculiar nature of this case. The Principles of Natural Justice demand that a party should not be condemned unheard. If in the end I do justice to both parties by allowing the applicant to be heard, this court will have fulfilled the spirit of our Constitution, and in particular Article 159 (2)(d) which provides that:-

“Justice shall be administered without undue regard to technicalities...”

Had the respondent joined the applicant in the Mumias Resident Magistrates case, my view would have been different.

13. For the foregoing reasons, the application dated 18/4/2014 is hereby allowed and execution of the decree and all the proceedings of Mumias Senior Resident Magistrate's Civil Case No. 410 of 2009 against MUSA CHEBI WAISWA is hereby stayed until the hearing and final determination of this suit.

Costs shall be in the cause.

Dated and delivered at Kakamega this 28th day of October, 2014

E. C. MWITA

JUDGE