

REPUBLIC OF KENYA

High Court at Bungoma

Environmental & Land Case 65 of 2010

BENJAMIN OSORE MABUNDE PLAINTIFF

VERSUS

JOSEPH WEKESA WATULO DEFENDANT

RULING

This application is dated 12th April 2011. The applicant sought 4 orders. Order 1 & 2 was already determined at the interim stage. They sought to have the application certified as urgent and interim orders of stay granted pending the determination of the application inter partes. Order 3 seeks stay pending determination of suit while prayer 4 is for costs.

The application is based on the grounds on the face of it and the supporting affidavit of Benjamin Osore Mabunde – the applicant. The application is opposed and the respondent has filed a replying affidavit to challenge the prayers sought. In arguing the application, the applicants counsel, Mr. Areba asked the court to rely on the documents filed. Mr. Makali for the respondent on his part submitted orally asking the court to dismiss the application.

The applicant asks this court to stay the orders obtained in Bungoma CMCC NO. 585 of 2009. The basis of stay is because it is not granted, the orders in this suit if he is succesful will affect the earlier orders in the determined suit.

In his supporting affidavit, the applicant has attached pleadings the suit CMCC No. 585 of 2009. The respondent got eviction orders against the applicant. The proceedings were taken exparte and judgement delivered. The applicant sougth to set aside the exparte proceedings but that application was struck off. The applicant argues further that at the time of striking off, the suit was already filed. At paragraph 9, he swears that the respondent is holding the land parcel No. E. Bukusu/S. Kanduyi/2000 in trust for the applicant. It is his belief that the court can stay the execution of the judgment/decree and all consequential orders in Bungoma CMCC NO. 585 of 2009. In the supplementary affidavit, he states the applicant/suit is not *res judicata*. He has stayed in the land for over 17 years and has constructed a permanent house on it.

The respondent on his part submits that the applicant encroached on his land (suit land) and when he discovered this, he filed suit No. HCC 3 of 2004 which was transferred to lower/subordinate court for determination vide CMCC 585 of 2009. This suit was determined in his favour and the applicant has not varied the orders by way of appeal or otherwise. He thus submits that the applicant cannot get orders in the present suit to stay orders/decree in another suit. Mr. Makali submitted that the suit is *res judicata* as the matters/substance is in issue is similar to the previous suit CMCC NO. 585 OF 2009.

He further submitted there is no decree in the present suit capable of being stayed. That the application is misconceived, abuse of the court process and brought to stifle the rights of the respondent.

The applicant has not filed an appeal in a higher court to challenge the order striking out his application for setting aside the judgment. The applicant did also not file another application seeking to set aside the judgement. From the pleadings annexed, the application was struck out on technicalities which gave him room to bring another application. The applicant instead opted to file the suit. Can this court grant the orders?

The court will consider under what circumstances the court can grant stay and if this is one such circumstance. Under Sec. 6 of the Civil Procedure Act, a court may stay proceedings where subject matter

in issue is substantially the same in a previously instituted suit or proceedings between same parties. In the instant case, the earlier instituted suit is already concluded so no proceeding to be stayed. The effect of which that present circumstance does not fall under order section 6. Order 21 rule 22 refers to stay of execution of decrees where sufficient cause is shown which includes going back to the court which issued the decree or the appellate court. This court did not issue the decree sought to be stayed, it is not a court for which the decree has been sent to be executed through it neither is it approached in its appellate jurisdiction as the case may be. It is therefore difficult for it to grant the stay sought for the reason given above. I agree that there is no decree in the present suit capable of being stayed as was put by the applicant. The applicant has other provisions of the law under which it can seek to stay his eviction from the suit land and the present option he has chosen is not one of them.

I therefore find this application as an abuse of the court process and the same is dismissed with costs to the respondent.

RULING DATED, SIGNED, READ and DELIVERED in open court this 12th day of March 2013.

A. OMOLLO

JUDGE.