



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLN NO.400 OF 2003

IN THE MATTER OF LAND REFERENCE NO.NAROK/CIC MARA/LEMOTIOK/54

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

(CHAPTER 22 OF THE LAWS OF KENYA)

JOHN KIPLANGAT BARBARET.....1ST PLAINTIFF/RESPONDENT

CHRISTOPHER KIPTONUI MERITIM.....2ND PLAINTIFF/RESPONDENT

WILLIAM MAKILOT SANG.....3RD PLAINTIFF/RESPONDENT

JOSEPH KIPKOSGEI MARITIM.....4th PLAINTIFF/APPLICANT

SIMON KIPLANGAT NGERECHI.....5th PLAINTIFF/APPLICANT

KIMUTAI ARAP KENDUIYWO.....6th PLAINTIFF/APPLICANT

PHILIP KIPKURUI CHESIMET.....7th PLAINTIFF/RESPONDENT

BARTA TESOT.....8th PLAINTIFF/RESPONDENT

CHEMIYWA ARAP CHEPKELAT.....9th PLAINTIFF/RESPONDENT

**Suing on behalf of themselves and on behalf of and as representatives for the members of
SEGEMIAN COMMUNITY and whose names are set out in schedule 1 hereto annexed)**

VERSUS

ISIAH KIPLANGAT ARAP CHELUGET.....DEFENDANT/RESPONDENT

RULING

The application before me for determination is a Notice of Motion dated 17th February 2011. The application is brought under Section 1A, B, 3, 3A, 34 and 80 of the Civil Procedure Act and Order 22 Rule 25 and Order 45 Rule 1 of the Civil Procedure Rules. The applicant is seeking for orders that:-

1. THAT pending the hearing and determination of this application this honourable court be pleased to temporarily stay execution of the decree herein as against the applicants.
2. That this honourable court be pleased to find and declare that the applicants were improperly enjoined in it as suit as plaintiffs without their knowledge, consent or authority
3. That this honourable court be pleased to order that the decree should not be executed against the applicants.
4. That consequently this honourable court be pleased to order that the applicants' names be struck off the pleadings, judgment and decree herein.

This application is based on the grounds and the affidavit of Kimutai Arap Kenduiywo and Joseph Kipkosgei Maritim. The affidavit sworn by Kimutai Arap Kenduiywo in his Supporting Affidavit stated that he was the 6th plaintiff. He stated that the 7th Plaintiff /Respondent instituted this suit in the High Court at Nairobi as against themselves as 4th 5th and 6th Plaintiff. He stated that the suit was instituted under their names as the 4th 5th and 6th plaintiffs without their consent or authority to the firm of M/s Agina in Nairobi and that the hearing proceeded in 2003 to 2009 where 6 witnesses and 4 witnesses testified for the plaintiffs and the respondent respectively. He states that they were not aware of the proceedings in the matter until when the parties were ordered to file their submissions pending judgment. He continued that as a result, the 3 applicants never participated actively or otherwise in the proceedings either as parties or witnesses. He further stated that the respondents had forged affidavits in support of its originating summons under the applicants names but without any consent or execution. That the respondents have now moved to execute for costs as against applicants, arising from the final determination and subsequent dismissal of the originating summons by the court on 6th October 2009 and are now at the risk of execution of costs in Misc No. 400 of 2003 whereas they never laid a claim against the 7th Respondent. That the applicants are elderly and never have they used signatures in execution and/or attestation of any document but instead been using thumb prints to date.

The 4th plaintiff/applicant Joseph Kipkosgei Maritim swore that the suit was principally instituted by John Kiplagat Barbaret. He stated that they had been in a dispute with Isaiah Kiplagat Cheluget which dispute started way back in 1979 when the defendant destroyed houses a school and a church sending the plaintiffs away. That the demarcation of land had not been done by then the defendant therefore processed a title in his favour. In the year 2002 the plaintiffs went to M/s Agina & Associates and instructed him to stop the survey process pending resolution of the boundary dispute. That when they filed claim No.44 of 1999 the 1st 3rd 7th and 9th plaintiffs had a claim then registered as No. 43 of 1999. That since they had a case involving the issue of boundary dispute they decide to form a committee that would pursue the matter relating to the boundary dispute. The officials were: John Kiplangat Barbaret as the chairman Philip Chesimet as the treasurer and Makolit Sang as the secretary. This appointment was during the tribunal hearings. That unknown to them, the said individuals went to Agina & Associates and gave instructions for the suit to be instituted and they got to know of the existence of the suit when they were advised that the suit was pending submissions. That immediately judgment was delivered the advocates on record filed and application was heard and disposed of by a ruling on 1st November 2010 and thereafter the taxation of the bill of costs and ruling was delivered on 3rd February 2011. That after taxation they managed to get the pleadings filed in this case and to his shock he found an affidavit allegedly sworn by himself on 12th May 2003. He states that the signature appended in the affidavit was a forgery. He stated that Kimutai Arap Kenduiywo was personally known to him and that he knew that he never went to school and ordinarily used thumb prints in his documents. He stated that he has never had a claim in the nature of adverse possession against the defendant herein and there is no way he could have presented to court a claim he did not have. He further states that the claim against the defendant is a boundary claim. He avers that the respondents forged the affidavit and did not bother to seek their consent

or instructions prior to using the names. That they now have costs in the excess of Ksh 900,000/=that is to be paid to the defendant. He states that he is apprehensive that the defendant may move to levy execution any moment soon in which event they stand to suffer substantially more so given that they did not participate in a suit which was filed without his knowledge and authority and prays that this court makes an order to the effect that the decree herein should not be executed against them and in the interim execution be stayed.

This application is opposed. The 3rd Respondent William Makilot Sang swore a Replying Affidavit on 6th April 2011. In his affidavit he stated that he was the secretary of the Sagamian Community Litigation Committee in charge of overseeing this case on behalf of the other members. He also stated that he is surprised that the 4th and 6th plaintiff's applicants have disowned these proceedings when they have always actively participated in the meetings, contributing funds for legal fees and attending courts for hearing. Another respondent Philip Kipkurui Chesimet stated in his affidavit that he was the one in charge of overseeing this case on behalf of the other members. He denied that the applicants signatures were forged since he witnessed them sign their own affidavits in support of this case.

John Kiplangat Barbaret swore also a Replying Affidavit on 6th April 2011. In his affidavit he stated that he was the chairman of the community and that the 4th Plaintiff had sold his share of the suit land and no longer lives in the suit land. That the 9 plaintiffs were appointed by the 700 members of the land to file the suit on their behalf and that they had been meeting regularly and the applicants have also been attending the meetings until judgment was delivered. That members had been contributing legal fees and they did so until judgment was delivered in which they lost the suit and that is when the applicants stopped making their contributions. He denied that the applicants' signatures had been forged and stated that all the nine plaintiffs went into Mr Agina's Chambers to sign their affidavits and that he is now surprised that the applicants could now turn back and say that their signatures had been forged. He further stated that the applicants have been attending hearings since 2003 to 2009 when judgment was delivered and they cannot therefore say that they were not aware of the case. He annexed photographs showing the 4th and 6th Plaintiffs standing outside the now supreme court. That the applicants were in court when judgment was delivered on 6th October 2009. He states that since they were dissatisfied with the judgment they appealed and that the applicants are appellants in the pending appeal and believes that the motive of the applicants was to avoid paying costs through improper process.

On 20th November 2011 the 2nd and 9th Plaintiffs filed a statement of grounds of opposition in which they stated that the application was an abuse of the court process and complete with falsehoods. That the averments in the pleadings were outright perjury and that they relied on the affidavit of John Kiplangat Barbaret.

The applicants filed a supplementary affidavit through Kimutai Arap Kenduiyo on 17th April 2012. They stated that he did not participate or authorise the plaintiffs herein to use his name in the suit that he had never entered a classroom and could not read and write and that he signed documents through thumb print. He also stated that the taking of photographs outside court or anywhere else in Nairobi as alleged cannot to be concluded to mean that they were a party or were aware of a suit.

Parties attended in court on 11th April 2013 and reiterated the contents of the pleadings that had been filed in court. Mr Morintet for the applicants relied on the applicants affidavits and submitted that their main reason for filing this application is that the applicants did not instruct Mr. Agina to commence proceedings. That they came to know of the suit at the execution stage. That they perused the court record and found forged affidavits. That the applicants have filed documents to show that they have used their thumb prints all along to sign documents and that their ID card numbers differ from those in the affidavits

filed by Mr Agina. That they were into pushed into a ditch during taxation. Mr Gacheru for the respondents submitted that the applicants participated in the suit all along and at the hearing. That the application was filed after they lost the taxation. He asked this court to look at the affidavits of the defendants filed on 9th February 2012 at paragraph 6 where the defendants stated that they not only signed the documents but attended strategic meetings. Mr Morintet in response stated that there was no affidavit from Mr Agina to show that he received instructions and that the photographs are not full proof that he was given instructions.

I have read the affidavits and considered the submissions made in court by the parties. The issues in contention in this application are:-

- i. Whether the applicants should be granted temporary stay of execution of the decrees against the applicants?
- ii. Whether the 4th, 5th and 6th plaintiffs/applicants were improperly enjoined as plaintiffs yet they had not given their consent to the participation of the suit that was dismissed on 6th October 2009?
- iii. Whether the applicants names should be struck off the pleadings, judgment and decree?

I note that the applicants have approached this court through Order 22 Rule 25 and Order 45 Rule 1 of the Civil Procedure Rules. Order 22 Rule 25 states that *“where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed the court may on such term as to security or otherwise as it thinks fit stay of the decree until the pending suit has been decided.*

The judgment in this suit was delivered on 6th October 2009 and as the 1st Plaintiff /Respondent John Kiplangat Barbaret stated in his replying affidavit that there is an appeal pending at the Court of Appeal. I find that the applicants have come late in the day yet they have not explained the inordinate delay of four (4) years for them to make this application for stay of execution. The applicants have not even annexed a copy of the decree in their application as required by law. It is trite law that courts only deal with the legal consequences of pleaded facts. This court recently ruled in the case of **Nyamondi Ochieng Nyamogo - vs-Telecom Kenya Limited** that ***“Granting a stay is a judicial discretion, I will exercise this discretion on the basis of the facts laid before me and the legal principle. This discretion is fettered by the three conditions firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would suffer from refusal to grant a stay and thirdly the applicant must furnish security”*** The applicants have failed to meet the set conditions and therefore I decline to grant the orders sought for stay of execution of the decree. The application is also brought under Order 45 Rule 1 states that ***“Any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is hereby allowed and whom from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any sufficient reason desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”***

The applicants have not meet the requirements to warrant the order for review which is ;-

1. The discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced in time.
2. On account of some mistake or error apparent on the face of the record
3. For any sufficient reason

It is apparent that the applicants have not raised any of the grounds afore stated save that they have made allegations that they were not aware of the suit that had been filed in court.

It is interesting that the applicants have come to court seeking for orders of stay of execution and review yet they have not outlined their reasons or sufficient cause or grounds to warrant prayers sought. It is also

incredible that for seven years the applicants who were neighbours, holding meetings claim not to have been aware of this suit and only came to realise the same at the submissions stage. I ask myself, what steps did the applicants take when they were informed that they were required to put in their submissions before the court could pronounce its judgment? To say they were caught in the ditch during taxation is not persuasive at all. The issue of being improperly enjoined is a matter the applicants should have raised very early in this suit when they allege they got to know of the existence of the suit existence. Much s counsel states that we cannot rely on the photographs I find them very persuasive .The applicants also refer to affidavits which they state were forged but fail to state what they have done if indeed an offence was committed by the respondents and Mr Agina as counsel who represented them. From the foregoing, I find no merit in the application I decline to grant the prayers as sought and dismiss this application with costs to the Respondents.

Orders Accordingly.

Dated, signed and delivered this 31st Day of May 2013.

R.E OUGO

JUDGE

In the Presence of:-

.....Applicant

.....Respondents

.....Respondent/Defendant

.....Court clerk