



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 178 of 2012

SIMEON MWANGANGI KIITI APPLICANT/APPELLANT

VERSUS

- 1. JOSHUA MBONDO MUKII**
- 2. MICHAEL KIVUITU MUKII**

3. MUTISYA NZIOKI RESPONDENTS

4. *(Being an appeal from the Ruling and Orders of the Chief Magistrate Hon Maryanne Murage (CM) in Machakos Chief Magistrate Case No. 125 of 2007)*

(Before B. Thurania Jaden J)

RULING

The application dated 2/11/2012 is brought under **Article 159 (2) (d) of the Constitution, Order 51 Rule 1, Order 42 Rule 6 Civil Procedure Rules, Sections 3A and 63 (c) and (e) of the Civil Procedure Act and all enabling provisions of the law.**

The application seeks the following orders:-

- (i) THAT the memorandum of appeal filed herein be deemed to have been properly filed.**
- (ii) THAT there be stay of execution of the Ruling and Orders of the Lower Court dated, 26th September 2012 pending the hearing and determination of the appeal herein.**

The applicant **Simon Mwangangi** swore an affidavit in support of the application on 2/11/2012. According to the said affidavit, the Applicant bought land parcel No. **Masii/Kithangaini/324** in the year 1977 from the 1st Respondent, **Joshua Mbondo Mukii** who was the registered owner of the land. That the Applicant took vacant possession of the land but the 1st Respondent became reluctant in effecting the transfer of the title to the land. The 2nd Respondent who is a brother to the 1st Respondent filed a claim before the **Land Disputes Tribunal, Mwala** which ruled that the suitland be subdivided between the 1st Respondent and the 2nd Respondent. The award of the Tribunal was adopted as a judgment of the court and the 2nd Respondent commenced the execution process and an application for eviction was filed before the lower court and the same allowed. An application by the Applicant to have the eviction orders against her stayed was dismissed by the lower court, hence the present application.

In opposition to the application the 2nd Respondent swore a replying affidavit on 22/11/2012. The Respondents deny having sold the suitland to the Applicant. It is further denied that the Applicant was

given vacant possession of the land. According to the Respondent, the Applicant advanced 1st Respondent Kshs.14,500/= which money was to be refunded with 20% interest.

The Respondents have asserted that the Applicant lives on his own land parcel No. **Masii/Kithangaini/325** but cuts trees and rents out the suit property to third parties. It is conceded that there was a suit filed before the **Land Disputes Tribunal, Mwala** which the 2nd Respondent won and was to get 2/3 share of the suit land. That the award of the Tribunal was adopted by the court and execution commenced which under provisions of **Order 22 rule 29 (1) Civil Procedure Rules** which provides:-

“where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.”

It is further averred by the Respondents that there was no appeal from the decision of the Tribunal and no Judicial Review proceedings were instituted. That the Applicant is a trespasser and no irreparable harm would be occasioned to him.

The Memorandum of appeal was termed by the Respondent as defective as the same was filed without the order being appealed from and urged the court to make an order for security for costs of the appeal.

The firm of **Kilonzo & Co. Advocates** appeared for the Applicant while the firm of **F.M. Mulwa Advocates** appeared for the Respondents.

During the hearing of the appeal the Applicant’s counsel relied on the grounds stated in the application and the supporting affidavit.

The Respondent’s counsel relied on the replying affidavit.

It is not in dispute that the 1st Respondent is the registered owner of the land; that the **Land Disputes Tribunal, Mwala** made orders for the subdivision of the land and gave the 2nd Respondent two thirds (2/3) of the land, that the award of the tribunal was adopted as a judgment of the court and execution of the same commenced and eviction orders issued by the lower court.

The Respondents uncontroverted evidence is that there was no appeal or any Judicial Review proceedings filed to challenge the Tribunal’s decision. The Tribunal’s decision was made in the year 2007 and adopted as a judgment of the court the same year. It seems the eviction orders issued on 26/9/2012 is what awoke the Applicant from a long slumber.

Order 42 rule 6 (2) provides as follows:-

“No order for stay of execution shall be made under subrule (1) unless-

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Although the application for stay herein has been made without delay, this court is not satisfied that the applicant stands to suffer substantial loss. I say so because the decision of the tribunal still stands and therefore the Applicant is a trespasser in the suit land and his removal from the suitland was a matter of time.

Although the issue of the filing of the decree or order appealed from has been raised, a certified copy is on the record although the same is not signed. This is however curable.

With the foregoing, the application has no merits. Consequently, I dismiss the same with costs to the Respondent.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of May 2013.

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B. THURANIRA JADEN

JUDGE