



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL CASE NO. 53 OF 2012. (OS)

THE INTERNATIONAL CHILDCARE

TRUST (KENYA) ::: PLAINTIFF.

VERSUS

DAVID JAMES MBOGO ::: DEFENDANT.

R U L I N G.

The applicant herein The International Childcare Trust (Kenya) brought a notice of motion dated 23rd July, 2012 seeking stay of execution of decree obtained in Kitale High Court Civil case No. 121 of 2007 pending the hearing and determination of the suit herein. The respondent herein David James Mbogo was the plaintiff in Kitale HCCC No. 121 of 2007. In that suit, the defendants were Alfred C. Asikoyo, Stephen O. Ekisa, RoseMary W. Kamau and John Allison. The respondent herein in whose favour the decree was issued in Kitale HCCC No. 121 of 2007 started the process of executing the decree. The applicant herein who was not a party to Kitale HCCC No. 121 of 2007 has now moved the court for an application seeking to stay the execution of the decree in that suit pending the hearing and determination of the suit herein. The applicant contends that it is in occupation of the suit property which was the subject of Kitale HCCC No. 121 of 2007 as well as the subject of the present suit. That the applicant has been in occupation of the suit land since 1992 and has made development on it. The developments on the property include a Children's Centre which takes care of vulnerable children, a Clinic, a Community and Vocational Training Centre. The applicant contends that the developments were carried out with the full knowledge of the respondent and that if the stay of execution of the decree is not granted, the applicant will suffer irreparable loss which will not be compensated in monetary terms.

The respondent opposed the application based on replying affidavit sworn on 31/10/2012 in which

he contends among others that the applicant's occupation of the suit land has no basis and that the present application is an abuse of the process of the court. The respondent contends that the enforcement of the decree in Kitale HCCC No. 121 of 2007 will not render the present suit nugatory. The respondent also contends that the current application is res-judicata as the present applicant was actively involved in prosecution of Kitale HCCC No. 121 of 2007 which finally was decided in his favour.

I have considered the application herein as well as the opposition to the same by the applicant. The issue of this suit being res-judicata was raised by the respondent herein in his application of 31/10/2012. The issue was put to rest vide this court's ruling of 29/4/2013. I do not therefore wish to dwell on the same issue. The only issue for determination is whether this application should be sustained. The application has been brought under the provisions of Sections 1B, 3, 3A and 63 (e) of the Civil Procedure Act. These provisions are invoked when the court is being asked to make orders which are necessary for the ends of justice or to prevent abuse of the process of the court. In the present case, the court has not been informed that there is any abuse of the process of court by the respondent. There is no contention that the respondent herein has a decree in his favour arising from Kitale HCCC No. 121 of 2007. This decree has never been stayed or appealed against. The applicant has all along maintained that it was never a party to Kitale HCCCC No. 121 of 2007.

From the pleadings in this suit, it is alleged that the respondent fraudulently had the suit land registered in his name. This allegation is yet to be ascertained. The way matters stand is that the respondent is the registered owner of the suit land pursuant to a decree in HCCC No. 121 of 2007. It will not be fair to stay execution of the decree in that suit through a separate suit. The mere fact that there are vulnerable children being taken care of on the suit land cannot make the court to order stay of execution of a decree issued in a separate case. The suit herein will not be rendered nugatory of stay of execution of the decree in Kitale HCCC No. 121 of 2007 is not granted.

The plaintiff/applicant is seeking orders that the suit property is registered in the name of the respondent in trust for the applicant. If the applicant finally succeeds in its case, its suit will not be rendered nugatory as claimed. I find that this application has no merits. The same is hereby dismissed with costs to the respondent.

It is so ordered.

[Dated, signed and delivered in open court on this 1st day of August, 2013.]

E. OBAGA.

JUDGE.

In the present of M/s. Munialo for Mr. Kiarie for respondent.

Court Clerk – Rumaita.

E. OBAGA.

JUDGE.

1/8/2013.

