



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 66 of 2008

SAMUEL NYABIBA NYAKERI.....APPELLANT

VERSUS

PETER OKIABERA OMWENGA.....RESPONDENT

RULING

The Appellant filed a Notice of Motion Application dated 23rd March 2009 seeking the following orders:

- a) That this Application be certified urgent and be heard *ex parte* in the first instance (spent).
- b) Pending the hearing *inter partes* and pending determination of this Application there be a temporary stay of execution of the judgement and or decree in Eldoret CMCC No. 1454 of 2004 or any eviction of the applicant from his plot namely Nzoia Moi's Bridge Block 1 (Nzoia Sisal) 3406 (spent).
- c) The Order made on 17/3/2009 dismissing the Application dated 20/11/2008 be and is hereby set aside and the Applicants Application be reinstated for hearing on merits.
- d) That the order be served upon the O.C.S Matunda/D.O. Likuyani for enforcement.
- e) That costs be in the cause

The Application was supported by the sworn affidavit of John Walter Wanyonyi and it was founded on the grounds that counsel was under the mistaken impression that the matter was coming up for hearing on 27/3/2009 and the same was diarized for that day; that failure to attend court was not deliberate as such and the same was out of inadvertence; that the dismissal is prejudicial to the applicants in view of the stay orders issued by the court; and that the Application is made in good faith and without delay. Counsel for the Appellant deponed in his affidavit that he appeared in court on 20/3/09 for the hearing of an Application dated 20/11/2009 and the matter was adjourned to a date which he heard the judge mention as 27/3/2009. The order was extracted and it indicated that interim orders had been extended until 27/3/2009. He exhibited a page of his diary showing that he had diarised the date as 27/3/2009. He also annexed proceedings which showed that 20/1/2009 the parties appeared before court and the court ordered that the Application be heard on 17/3/2009 and extended interim orders until then. He depones that it was an honest mistake and not deliberate. The Respondent filed a replying affidavit on 6th April 2003. He depones that he has taken possession of Land reference number Nzoia Sisal/Moi's Bridge Block 1/3406 and that he is collecting rent. He exhibited tenancy agreements entered into between the tenants and himself on 20th March 2009. He deponed that he gained possession through the assistance of court bailiffs and the OCS of Matunda. He exhibited warrants of eviction and a letter from the auctioneer

showing that warrants have been executed.

Counsels submitted orally before me. Counsel for the applicant submitted that he is seeking prayers 2, 3, 4, and 5 of the motion. He submitted that counsel was under mistaken impression about the date of hearing. Looking at the extracted order of 20/1/2009 it stated that “interim order of stay of execution granted on 26/11/2008 is hereby extended to 27/3/2009. He urged the court to excuse the mistake of counsel and reinstate the Application for hearing. He submitted that mistake of counsel should not be visited on litigant. That the application to reinstate had been filed within time. 5 days after order of dismissal. He urged that interim orders be reinstated. Counsel relied on the following case law:

1. **Eldoret HCCC No. 209 of 2001: Rift Valley Bottlers vs. Stephen Kamau Kirunga**
2. **Nairobi HCCC No. 218 of 2003: Walter Gitau vs. East African Building Society**
3. **Nairobi HCCC No. 236 of 2005: Giro Commercial Bank Ltd vs. Jasvinder Singh Dhadialla.**
4. **Meru HCCC No. 65 of 2005: Invesco Assurance Co. Ltd vs. Cyrus Nganga Njuru and 2 others.**
5. **Kitale HCCC Misc. Civil App. No. 72 of 2007: Charles M Soo vs. Allan Karanja Wathigo.**

Counsel for the Respondent opposed the Application. His main contention is that the eviction order had been executed and there was nothing to stay. That the Respondent was now managing the property and was in possession. That counsel had not disclosed the diary entry for 17.03.2009. That the Application has been overtaken by events. That transfer has not taken place but eviction has taken place. That reinstatement will only affect transfer and not possession. The situation had changed and it could not be undone. Status quo as regards possession and management ought to remain with the Respondent. He urged that the Application should fail. He distinguished cases cited as inapplicable because they did not deal with scenarios where the subject matter had been overtaken by events. At the conclusion of submissions I made an interim order that status quo prevailing on that day shall be maintained and in particular the Respondent shall not enforce or effect any transfer of the property into his name or the name of any other person pending the delivery of the ruling.

I have considered the rival submissions of the parties and in particular the reason advanced by counsel for non attendance on 17/3/2009. It is possible that counsel was misled by the order that was extracted and issued on 27th January 2009. It talks of interim orders being extended until 27/3/2009. This was clearly mistake as it does not accord with the proceedings of 20/3/2009. It was however signed by the deputy registrar who did not notice this error. For these reason I am minded to excuse counsel for the non-attendance and to reinstate the Application so that it can be heard on merit. The Application dated 20/11/2008 that was dismissed sought a stay of execution of the judgment in Eldoret CMCC No. 1454 of 2004 pending hearing and determination of the appeal filed herein. I take cognizance of the fact that the decree has been executed partially and what remains is transfer of title. It therefore appears that the Application will be argued in light of changed circumstances. To dispense with this Application the following orders commend themselves to me:-

- 1) The order dated 17/3/2009 dismissing the Appellant’s Application dated 20/11/2008 is hereby set aside.
- 2) The notice of motion dated 20/11/2008 is reinstated for hearing.
- 3) Pending hearing and determination of the notice of motion dated 20/11/2008 there shall be stay of execution of the decree by way of transfer of the title Nzoia /Moi’s Bridge Block 1 (Nzoia Sisal) 3406 into the name of the Respondent or the name of any other person.
- 4) Costs of this Application shall be for the Respondent in any event. It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 27TH DAY OF AUGUST 2012.

M. K. IBRAHIM

JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF OCTOBER 2012.

F. AZANGALALA

JUDGE

In the presence of: Mr. Samba for the Appellant

Mr. Chalagat h/b for Mr. Momanyi for the Respondent