



NO. 358

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL CASE NO. 39 OF 2010

LAWRENCE NYAMBASA KIMIKINYI)
MARTHA KERUBO KIANGA).....PLAI
NTIFFS

-VERSUS-

BANCHIRI NYATETE
MOREBU.....DEFENDANT

RULING

Through **Messers GJM Masese Esq**, the applicants took out an application dated 10th may, 2010 in the nature of Notice of Motion. It was expressed to be brought pursuant to **Orders OXXI rule 22(1), OXLI rule 4(1) and (2) of the Civil Procedure rules and sections 3, 3A and 63(e) of the Civil Procedure Act**. In the main the applicants sought for stay of execution of this court's decree pending the hearing and final determination of the declaratory suit filed in this court. They also prayed for costs.

The grounds in support of the application are that the applicants were the registered owners of land parcel **Nyaribari Chache/B/B/ Boburia/796** "***the suit premises***", the subject matter of the decree. The applicants have filed this suit seeking to have the decision of Kiogoro Divisional Land Disputes Tribunal and the resultant decree declared null and void. In the circumstances it is only fair and just that the execution of this court's decree be stayed pending the hearing and final determination of the suit. Otherwise the applicants would suffer irreparable loss if the decree was to be executed. The interests of justice and balance of convenience favoured the retention of the status quo currently obtaining on the ground and finally that the respondent will not suffer any loss if the status quo was maintained.

The affidavit in support of the application sworn by the 1st applicant merely reiterated and elaborated on the grounds aforesaid. Suffice to add that the applicants were son and wife respectively of the late **Kianga Obare** deceased and the first registered owner of the suit premises. Following the death of **Kianga Obare** they got registered as proprietors of the suit premises by way of transmission pursuant to **Kisii H.C.Succession Cause number, 255 of 1991**. They never had any disputes with the respondent until about 2006 when she filed a complaint with the Kiogoro Divisional Land Disputes Tribunal. The tribunal returned the verdict in her favour and the same was adopted as a judgment and decree of the Chief Magistrate's court, Kisii on 3rd September, 2009. Thereafter the applicants commenced judicial Review proceedings in the nature of Certiorari but the court declined to grant such leave and indeed struck out the application on the grounds that it was filed out of time. The respondent was now in the process of executing the court's decree. If the decree is executed, they will have been condemned unheard and will suffer irreparably as they shall be deprived of their land.

In reply, the respondent deponed that the application was misplaced and non-starter as it is filed in the wrong court. It was brought under the wrong provisions of law. Otherwise the decree sought to be stayed was properly and lawfully obtained.

When the application came up for interpartes hearing before me on 2nd November, 2010, parties agreed to canvass the same by way of written submissions. Such submissions were eventually filed and exchanged. I have carefully read and considered them.

As correctly observed by the respondent, this application is hopelessly incompetent and a non-starter. The decree and order sought to be stayed is not indicated in the application nor is it annexed to the application. It is not enough to merely pray “...***THAT this court be pleased to issue a stay of execution of its decree until the Declaratory suit in the High court is heard and determined...***”. It behoves the applicants to identify the order or decree, the date of such decree or order and when it was issued. It should not be left to the court to grope in darkness in trying to identify the decree or order sought to be stayed. Indeed it is always advisable that the decree or order sought to be stayed be annexed to the application. That has not happened in the circumstances of this case. The way the prayer is framed suggests that it is this court's order and or decree that is sought to be stayed. As at now and from the record, no such decree exists in this suit that is capable of execution. This suit has just been filed and no proceedings have been undertaken that could have resulted in a judgment and decree capable of being stayed. It is obvious therefore that the application is seeking to stay a non-existent decree.

The application too is expressed to be brought under **Order XXI rule 22(1) of the Civil Procedure rules**. However that order and rule can only be invoked in situations where a decree passed by one court is passed over to another court for purposes of execution which is not the case obtaining here.

Again the application is premised on **order XLI rule 4(1) and (2) of the Civil Procedure rules**. This provision is also not available to the applicants. It applies only where the court that passed the decree is being asked to stay it or where the appellate court to which an appeal has been preferred is requested to stay execution pending the hearing and determination of the appeal that has been filed. None of the above situations obtain here.

Nor can **section 3 and 3A of the Civil Procedure Act** come to the end of the applicants. One can only invoke those sections if there is a lacunae in the **Civil Procedure rules** that cannot take care of the application filed by the applicants. There is no such Lacunae.

The end result of this application is that it is incompetent and is accordingly struck out with costs to the respondent.

Ruling dated, signed and delivered at Kisii this 31st January, 2011.

ASIKE-MAKHANDIA

JUDGE