



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO 104 OF 1999**

**BEGI BOKURO ..... 1<sup>ST</sup> PLAINTIFF**  
**MORANCHA BOKURO ..... 2<sup>ND</sup> PLAINTIFF**  
**ASKA MOGOI OBAGA ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**MORANG'A ONCHWERI ..... DEFENDANT**

**RULING**

1. On the 23<sup>rd</sup> February 2010, this court allowed the plaintiff's application dated 2<sup>nd</sup> June 2005 through which the plaintiffs sought the following ORDERS:-

**a) That this Honourable court be pleased to order demolition of structures on land parcel No. Nyaribari Masaba/Kiamokama/316 to pave way for eviction of the defendant from the suit land.**

**b) That this Honourable court be pleased to dismiss application dated 29<sup>th</sup> May 2005 for want of prosecution.**

**c) That costs of this application be provided for.**

2. From the record, the application dated 2<sup>nd</sup> June, 2005 was duly served upon the defendant but the same was not opposed, hence the orders of this honourable court made on 23<sup>rd</sup> February, 2010.

3. On the 24<sup>th</sup> February 2010, the defendant filed the instant application by which he seeks to have the orders made on 23<sup>rd</sup> February 2010 set aside or varied pending the hearing and determination of this application.(sic) The application is premised on the grounds that appear on the face thereof. The application is also supported by the affidavit sworn by Morang'a Onchweri, the Defendant/Applicant. He depones that the main reason why he finds himself in the present predicament is that he was never served with the application dated 2<sup>nd</sup> June 2008. He also avers that he was also never served with the hearing notice for the 23<sup>rd</sup> February 2010. The deponent contends that if the orders sought are not granted, he will be evicted from the land known as **Nyaribari Masaba/Kiamokama/316 (the suit land)** which land belongs absolutely to the late **Onchweri Nyangenchi**. The Defendant/Applicant says he resides on the suit land.

4. This application is opposed vide the Replying Affidavit sworn by Begi Bokuro, the 1<sup>st</sup> plaintiff herein. He says that this suit was decided way back on 14<sup>th</sup> November 2000 and partial execution of

decree done with the 3 plaintiffs/applicants being registered as legal owners of the suit land. The deponent also says that the application herein is an afterthought whose sole purpose is to deny the deponent the fruits of the judgment entered on 14<sup>th</sup> November 2000. That in any event the applicant herein is guilty of inordinate delay in bringing the application dated 2<sup>nd</sup> June 2008. The deponent wants the application dismissed with costs.

5. Briefly, the facts giving rise to this application are that the plaintiffs filed this suit seeking (a) a declaration that they are the rightful owners of the suit land; (b) an order directing the defendant to sign all the necessary documents in respect of the suit land in favour of the plaintiffs and (c) costs of the suit and such other reliefs as the court may deem fit and just to grant.

6. On the 14<sup>th</sup> November 2008 the court entered judgment for the plaintiffs as prayed in the plaint and a decree was subsequently issued. By his application dated 29<sup>th</sup> August 2005 and filed in court on the 31<sup>st</sup> August 2005, the Defendant/Applicant sought, *inter alia*, an order setting aside the exparte judgment entered herein on 14<sup>th</sup> November 2000 and all subsequent orders. That application was apparently not prosecuted for a long time and by the application dated 2<sup>nd</sup> June 2008, the plaintiffs asked the court to issue an order dismissing the application dated 29<sup>th</sup> August 2005. The court granted the orders sought by the plaintiffs vide their application dated 2<sup>nd</sup> June 2005 on the 23<sup>rd</sup> February 2010, hence the present application. On the 25<sup>th</sup> February 2010 this court granted an interim stay of execution of the eviction orders granted on the 23<sup>rd</sup> February 2010.

7. Against the factual background given above, I have considered the submissions that were made before me by counsel on the 2<sup>nd</sup> February 2011. In opposing the application, counsel for the plaintiffs submitted that this application is misplaced and has been brought in bad faith. Counsel submitted that there was no opposition to the application dated 2<sup>nd</sup> June 2008 even though the applicant herein has always had counsel representing him. Counsel for the plaintiffs further submitted that the applicant was not being candid in saying in one and the same breath that his advocate was not served with the application dated 2<sup>nd</sup> June 2008 and at the same time that he himself was not able to trace his advocate in the year 2008 so as know the status of this case.

8. Finally, counsel for the plaintiffs submitted that this instant application is bad in law in that whereas the order sought is one of review, there is no application for review.

9. After considering all the above, I am of the considered view that the present application is a non-starter. The order sought was only meant to apply pending the hearing and determination of this application. There is no other prayer placed before the court for stay of execution beyond the hearing of this application. In the circumstances, I strike out the application dated 24<sup>th</sup> February 2010.

10. In the wider context of the facts of this case, I find that the applicant is not candid in presenting this case to court. I am satisfied and agree with submissions by counsel on behalf of the plaintiffs that this application is an afterthought. Admittedly the applicant has not honoured the obligation upon him of being present in court on a number of occasions, including the 14<sup>th</sup> November 2000 and 23<sup>rd</sup> February 2010. Such conduct on the part of the applicant paints a bad picture of the applicant who can easily pass for an indolent yet vexatious litigant.

11. Accordingly, I dismiss the application dated 24<sup>th</sup> February 2010 for lack of merit. Costs of the application to the plaintiffs/respondents.

12. It is so ordered.

**Dated and delivered at Kisii this 24<sup>th</sup> day of March, 2011.**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Minda for Okemwa (present) for Defendant/Applicant

Mr. Momanyi for Bosire (present) for Plaintiffs/Respondents

Mr. Bibu - Court Clerk