



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCC 415 OF 1998

ESTHER WANJIRU KAMAU.....PLAINTIFF

VERSUS

GEORGE CHEGE KAMAU.....DEFENDANT

RULING

By a Chamber Summons dated 10/12/2010, the applicant, George Chege Kamau, sought the following orders against the plaintiff/respondent :-

1. Spent

2. That the court do order that the subdivision of Dundori/Miroreni Block 2/56 by the plaintiff /Respondent is null and void and consequently the court do order the cancellation of Title Numbers Dundori/Miroreni Block 2/2289 and Dundori/Miroreni Block 2/2290.

3. That the plaintiff/Respondent be arrested and committed to imprisonment for disobedience of this court's order dated 29th September, 1999.

4. That pending the hearing and determination of this suit and application, an injunction do issue against the plaintiff/Respondent, her agents, servants or employees from alienating, selling, charging and /or in any way interfering with the suit land especially the subdivision known as Dundori /Miroreni Block 2/2290.

The application is expressed to be brought under Order 39 Rule 1(a), 2(2) and (3), sections 1A, 1B and 3A of Civil Procedure Act, supported by grounds found on the face of the application, an affidavit sworn by George Chege Kamau, dated 10/12/2010 and a

further affidavit sworn on 4/2/2011 . It is the applicant's case that on 29/9/1999, the court ordered a stay of execution in respect of orders issued in the judgement read on 28/6/1999 pending hearing of the appeal. The applicant filed the appeal **274/2006 George Chege Kamau VRS Esther Wanjiru Kamau**, challenging the said judgement and her appeal is yet to be determined. In the month of February 2010 the respondent went ahead to have the suit land Dundori/Miroreni Block 2/56 covering 4.5 HA subdivided into two plots that is, Dundori/Miroreni Block 2/2289 and 2/2290. The applicant was served with a notice to vacate the land in mid November 2010(GCK-1) and that is why he filed this application . The applicant contends that he was only served with the order issued on 29/9/1999 issued after he filed an application for injunction . Mr Kagucia the respondent's Advocate having sent a court order, to Mr Kagucia counsel for the applicant, on 26/1/2010 for his approval(GCK 3(a) & 3(b) but the counsel declined to sign it and vide the letter of 29/1/2010 addressed to the Deputy Registrar ,the counsel sought that the decree be placed before the judge for settlement of terms under Order 20 Rule 7(4) of the CPR (GCK-4) The terms were never settled and on 16/3/2010 the court confirmed that the order of stay made on 29/9/1999 and extracted on 27/6/2000 was still in force. It ordered the decree to be stayed pending the hearing and determination of the appeal. The applicant further contends at that the decree used to effect the subdivision had mistakes, was incompetent and all the transactions that followed were null and void.

In opposing the application, Esther Wanjira Kamau swore a replying affidavit dated 20/1/2011 in which she deponed that the application is brought in bad faith and intended to deny her the enjoyment of her judgement. She deponed that the subdivision of the suit land was done on the strength of the order given on 28/6/1999 and issued on 11/2/2010 and duly signed by the Deputy registrar and also based on the court of Appeal order made on 24/9/2004 in NKR Civil application No. 70/2004 (38/04 UR). She further deponed that the order of 29/9/99 was overtaken by the Court of Appeal order of 24/9/2004 in NKR CA 70/2004 where she was granted a go ahead to execute the judgement . She exhibited the said court order.

The order of stay that was issued by Justice Rimita on 28/6/1999 and issued on 29/9/99 was issued after an inter- partes hearing . The stay order was issued pending hearing of the appeal. There is no evidence that this order was ever set aside. The appeal is yet to be heard and determined . It seems that the Court of Appeal in making the order of 24/9/2004, was considering an application for stay from the same decision of Justice Rimita that was delivered on 28/6/1999. It is not clear why a similar application was made before the Court of appeal regarding the same issue of stay. The respondent did not exhibit the proceedings in the Court of Appeal for this Court to ascertain why an application which had been dealt with by Justice Rimita was being considered by the Court of Appeal again. I would agree with Justice Maraga's observation that in absence of any evidence to the contrary, the order of the court made on 29/9/1999 is still in existence and inforce, in which the execution of the decree of that court was stayed pending hearing of the appeal .

I have perused the court order purportedly relied upon by the respondent in proceeding with execution. It is the draft decree that was sent to the applicant for approval vide the letter dated 26/1/2010 (GCK3(a) but the applicant sought the same to be placed before the judge for settlement of terms. There is no evidence that the same was ever placed before the judge for that purpose. The decree used in execution is amended to read that it was so given on 29/9/1999 instead of 1998 and issued by the Court on 11/2/2010 instead of 11/2/1998. The alteration made to read in 1999 and 2010 respectively is not countersigned by the Deputy Registrar who signed it. It is worth noting that no order had been issued in 1998. There is material alteration on the decree that should have been clarified and I would agree with the appellant that the decree is suspect and does not seem to be authentic. It seems to be a forgery . It is even questionable that the Registrar of Lands who effected the subdivision could rely on such a questionable document to effect a subdivision of land.

The appellant seeks orders that the applicant be arrested and committed to civil jail for disobedience of the court order. In effect the applicant wants to have

the respondent cited for contempt, however, I find that the court has not been moved for grant of such orders. The substantive law governing contempt proceeding is section 5 of the Judicature Act. That section provides that the Court shall have power to punish for contempt like the High Court of Justice of England. In England, the Law of contempt is governed by Order 52 of the Supreme Court practice and Procedure Rules.

The applicant should have sought the leave of the court to commence contempt proceedings. Thereafter, he should have filed a motion and served it on the respondent to enable her respond. None of the above was done and the contempt proceedings being of a quasi-criminal nature, the detailed procedure should have been followed to ensure that Justice is done to all the parties. The orders sought at prayer 3, to have the respondent arrested and committed to civil jail cannot be granted.

Prayer 2 is final, in the nature of a declaration . It cannot be granted at this interlocutory stage. However, since the land has been subdivided contrary to a clear order of stay issued by the Court, it is in the interests of Justice that the substratum of this appeal being the suit land, be preserved .

The Court therefore grants prayer 4 of the Chamber Summons dated 10/12/2010 restraining the Respondent from interfering with the suit land pending hearing and determination of the appeal. Costs in the cause.

DATED AND DELIVERED THIS 11th DAY OF MAY 2011

R.P.V WENDOH

JUDGE

PRESENT

Ms Mugweru for Applicant

Mrs Kereri for Respondent

CC: Kennedy Oguma