



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. NO. 291 OF 1998

KAMWE MATHARE DEVELOPERS LTD.....PLAINTIFF/APPLICANT

V E R S U S

ESTHER WANJIRU KIARIE.....1ST
DEFENDANT/RESPONDENT

EUNICE MUTHONI DANSON.....2ND
DEFENDANT/RESPONDENT

MBURU MUCHOKI.....3RD
DEFENDANT/RESPONDENT

JOSEPH MUYA.....4TH
DEFENDANT/RESPONDENT

JOSEPH MACHARIA.....5TH
DEFENDANT/RESPONDENT

MBURU GATIMU.....6TH
DEFENDANT/RESPONDENT

KAMONDE GITAU.....7TH
DEFENDANT/RESPONDENT

PETER KIBERA.....8TH
DEFENDANT/RESPONDENT

NJOGU MAKARA.....9TH
DEFENDANT/RESPONDENT

WAMBUI KIBURA.....10TH
DEFENDANT/RESPONDENT

KARIUKI WAIRIMU.....11TH
DEFENDANT/RESPONDENT

NJUGUNA MWANGI.....12TH
DEFENDANT/RESPONDENT

RULING

The background of this application is that by plaint dated 2nd January 1998 the Applicant sought orders of eviction against the Respondents in regard to parcel No.36/V/21 in the present suit. On 14th November 2003 the Respondents, in an Amended Originating Summons, sought to be declared to have acquired the suit land by adverse possession. An order was made by the court to consolidate the two suits. The matter was then heard and on 10th March 2009 judgment was delivered. The Respondents suit was dismissed and the Applicants claim that the Respondents do vacate the suit land was upheld.

It does appear that the Respondents were aggrieved by the decision of the court and filed a Notice of Appeal to the Court of Appeal. They did not however seek any stay. I agree with the Applicants that the mere filing of the Notice cannot operate as a stay of execution of the decree or order of the court. Order 42 rule 6 of the Civil Procedure Rules refers.

In the present application, the Applicants have applied under rule 9(2) of the Auctioneers (Amendment) Rules 2009 and section 3A of the Civil Procedure Act for an order that the OCPD Kasarani Police Station (it should be Division) be directed to supervise and provide security to S. K. Ndegwa Auctioneer during eviction of the Respondents as ordered on 27th May 2010. It is intended that the Police will maintain law and order during the exercise. This is because the Applicants have variously tried to evict the Respondents without success.

The Respondents oppose the application. One of the grounds is that the Applicants do not have a validly obtained decree that can be executed. They rely on Order 20 rule 7 and the decision in **Rubo Kimnetich Arap Cheruiyot –Vs- Peter Kiprop Rotich, HCCC No. 133 of 1993 at Eldoret** in which it was held as follows:-

“that a decree has to be drawn, approved and signed and sealed by the court. It is drawn by a counsel as a draft for approval by the other party and subsequently by the court. Once it is approved, it is then signed and sealed by the Registrar of the court”.

Their case is that their counsel was not served with any draft decree for approval and therefore that the purported decree that is sought to be executed is not valid. In response, George Gatheca Kinyanjui swore a supplementary affidavit to say that their advocates (Messrs. Mbaluka & Co. Advocates) wrote a letter dated 30th April 2009 to the Respondents advocate (Odindo Opiata Advocate) enclosing in duplicate copies a draft decree for approval within seven days. When the letter was not responded to, the Applicants advocates on 14th May 2009 wrote to the Deputy Registrar asking that he approves the decree. The decree (“GGK-3”) was then approved and issued on 14th May 2009. On 4th April 2009 the eviction order that is sought to be executed was allegedly issued. It is “GGK-5”. Was the eviction order issued before the decree was issued, or there is a problem with the dates?

The Respondents complain that the letter inviting them to approve the draft decree was not served on their counsel. The only evidence on record is that the letter was written. I agree that, on the face, the letter (“GGK-1”) does not show evidence of receipt by the Respondents advocate or even that it was sent. Better still, there is no evidence that the draft decree was served on the Advocate for him to approve. One would have expected a return of service in this regard. The omission to serve the draft

means that the decree sought to be executed is not valid and the objection to the application on this basis is therefore merited. Execution is premature (**Justus Wekesa Wanyonyi –Vs- Maurice Namiti Kokonya, H.C. Civil Appeal No. 6 of 2003 at Bungoma**).

The other objection was on the basis that the decree sought to be executed is more than one year old and therefore a notice to show cause ought to have been sought. Reliance was placed on Order 22 rule 18 (1) (a). There is no dispute that the decree was issued on 14th May 2009. The present application was made on 27th July 2010, over one year later. There was need to seek a notice to show cause. This assumes the decree was regular.

This, I think, is enough to dispose of the application. The same is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2011

A. O. MUCHELULE

J U D G E