



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 24 OF 2011

JAMES NTOO OLE RATIA.....APPELLANT

VERSUS

KISIMA OLE SAKAU.....RESPONDENT

RULING

The Notice of Motion dated 1st March, 2011 is brought by one Kisima Ole Sakau. He seeks a stay of the court's Order in **Narok Cmcc No. 151 of 2010, James Ntoo Ole Ratia Vs Kisima Ole Sakau**. The grounds upon which the application is brought are found on the face of the application, an affidavit in support of the application dated 1st March, 2011 and a further affidavit dated 16th February 2011. He was represented by **Igunza advocate**. The application was opposed and James Ntoo Ole Ratia, the Respondent herein, filed a replying affidavit dated 9th March, 2011. The Respondent was represented by Mr. Kiptoo.

The Applicant deponed that he has filed an appeal against the order of the trial court in **Senior Principal's Narok Civil Case No. 151 of 2010** where the trial court issued an order of permanent injunction restraining the applicant who was the defendant therein, from trespassing, claiming or interfering with Plot No. 5 Murua Trading Centre, pending the hearing of the suit. According to the applicant, the said orders were given prematurely without hearing him; that the respondent used the said orders to demolish his structures on 28th February, 2011 given the dispute Plot part of L.R. contrary to section Mara/Murua/47. He contends that unless the orders are stayed, he will suffer irreparable loss. He claims to have been in possession of the land for the past 17 years on which he has built structures and that if the stay is not granted, he will suffer irreparably.

Mr. Igunza submitted that the order that was extracted by the Respondent is not what the court issued and it is that order that the Respondent used to go and demolish the applicant's structures. He urged that both the appellant and Respondent claim ownership of the land in question and the issue of ownership can only be determined after a full hearing. He also urged that there is another appeal pending before this court in which the applicant is challenging the Narok County Council's decision to allocate the land to another in **Criminal Appeal No. 105 of 2009**.

In opposing the application, the Respondent deponed that both himself and the applicant are beneficiaries of plots issued by the County Council of Narok, whereby the applicant was allocated plot Nos. 6 and 7 and the Respondent Plot No. 5. He exhibited copies of the allotment letters; The members of Murua Group Ranch agreed that each member allow for hiving out part of his land to make room for a trading centre which was transferred to Narok County Council to hold in trust for the members. Both the applicant and Respondent are members of Murua Group Ranch. That the applicant apart from developing his 2 portion plots 6 and 7, has also laid claim to the Respondent's plot No. 5. He annexed photographs showing how the applicant has deposited building materials and denying the Respondent access. That is

what prompted the Respondent to file Narok Senior Principal Magistrate's Civil Case No. 151 of 2010 in which he sought interim orders of injunction pending the hearing and determination of the suit. After an inter-partes hearing, the court granted the orders (**JNO6**); That the order was served on the applicant who ignored it and that is when the Respondent filed another application dated 17th February 2011, seeking eviction of the applicant from the plot, and on 17th February 2011, the firm of Auctioneers was allowed to evict the applicant. The applicant mobilized people to prevent the said eviction. The auctioneer's affidavit was exhibited.

There is no doubt from what has been deponed to by the two disputing parties herein, that they both claim ownership of the same plot, No. 5, issued by Narok County Council. That issue cannot be determined on an application. At this stage, what is in issue herein is the order issued by the Resident Magistrate, Narok on 31st January, 2011. It reads as follows;

“THAT a permanent Order of injunction be and is hereby issued restraining the Defendant, his agents, servants and or authorized persons from trespassing, laying claim, depositing building materials, denying access, interfering harassing or in any other way dealing with all that parcel of land known as Plot No. 5 MURUA TRADING CENTRE belonging to the Plaintiff pending the hearing and determination of this suit.”

The Respondent contends that the order was issued by the court after an inter-partes hearing. However, the Respondent did not exhibit the court's ruling to determine whether both sides were heard or not. To the contrary, the Applicant contends that the order was issued before he was heard. The only conclusion this court can reach, in the absence of a court's ruling, is that the order was granted ex-parte.

The next question is what orders did the Respondent seek before the Lower Court? The chamber summons application before the Narok court is dated 26th April, 2011 in which the Respondent sought orders as follows;

“(1) THAT service of this application be dispensed with in the first instance for reasons of its urgency.

(2) THAT the Defendant, his agents, servants and or any authorized persons be and are hereby restrained by way of temporally order of injunction from trespassing laying claim, depositing building materials, denying access, interfering, harassing or in any other way dealing with all that parcel of land known as Plot No. 5.MURUA TRADING CENTRE belonging to the Plaintiff pending the hearing and determination of this application inter-parties and thereafter pending the hearing and determination of this suit.”

The order that was prayed for was for a temporary injunction. It is inconceivable how the order extracted became a permanent order of injunction. Besides, a permanent order of injunction can only be issued after a full hearing of the case. It is surprising that the Magistrate could issue such an order at an interim stage. To add to that, the Respondent went ahead to seek orders of eviction even before the case was concluded. That can only be done after the case is heard to its conclusion. If the Appellant was in contempt of the court orders, the avenue open for the Respondent was to commence contempt proceedings against the applicant. I find that there was abuse of the court process and bad faith exhibited in the orders sought and issued by the trial court. On the basis of what is on record, I do find that the applicant's appeal has high chances of success. The issue at hand involves ownership of land and if stay is not granted, the applicant will suffer substantial loss.

For the above reasons, I hereby stay the Lower Court's order as prayed, pending the hearing and determination of this appeal. Costs will abide the appeal.

DATED and DELIVERED this 10th day of June, 2011.

R. P. V. WENDOH
JUDGE

PRESENT:

In person – Appellant

Mr. Kiptoo for the Respondent

Kennedy – Court Clerk