



MARTHA ACHIENG ODHIAMBO.....PLAINTIFF

VERSUS

ELIJA KOGI GICHAGA.....1ST DEFENDANT

LABAN MWANGI GICHAGA.....2ND DEFENDANT

RULING

This Ruling relates to an Application by way of a Notice of Motion dated 6th November 2009 and filed on 9th November 2009.

The Motion is brought under the provisions of **Order L, rule (1)** and **Order XLI, rule 4(1)** of the **Civil Procedure Rules**, and is expressed to be supported by the grounds on the face thereof and the Supporting Affidavit of Laban Mwangi Gichaga (*the 2nd Defendant/Applicant*) who depones that the affidavit is sworn on his own behalf, and on behalf of the 1st Defendant/Applicant Elijah Kogi Gichaga. Apart from the said averment of the deponent there is no evidence or attachment from the 1st Defendant/Applicant to the effect that he has authorized the 2nd Defendant/Applicant to make the Affidavit on his behalf. The Supporting Affidavit does not, to that extent, comply with the requirements of **rules 4 & 5** of the **Order XVIII** of the **Civil Procedure Rules** that an Affidavit shall be drawn in the first person, and give the description and true place of abode and postal address of the deponent.

Be that as it may, a temporary order of stay of execution was granted by the court on 10th November 2009 for a period of 21 days and was extended to 2nd March 2010 when the Motion was argued inter partes before me.

The Motion was opposed by the Plaintiff/Respondents through an Affidavit erroneously titled **Further Affidavit** sworn and filed on 26th November 2009 denying all the averments by the Defendants/Applicants, including allegations of injury of

any one in the process of execution conducted under the supervision of the OCS Milangine Police Station as ordered by the court and that the motion herein was an abuse of the process of court.

The respective arguments by Counsel for the Applicants and Respondents will be apparent in the course of this Ruling. However before setting the respective arguments by Mr. Karanja-Mbugua learned counsel for the Defendants/Applicants and Mr. Mongeri learned counsel for the Plaintiff/Respondent, some background to the application is both useful and necessary. The Applicants are the Defendants in this action. The Respondents are the Plaintiffs.

According to paragraph I of the Plaint dated 3rd March 2009, the Plaintiffs are legal representatives and Administrators of the estate of one John Odhiambo Okuku, (*deceased*) and who is the registered owner of Title Number Nyandarua/Ngorika/347 (*the suit land*). According to paragraphs 4 and 5 of the plaint (*dated 3rd March 2009*) in late 2008 and early year 2009 the Defendants/Applicants apparently without any notice or warning to the Plaintiffs and for unexplained reasons invaded the suit land cut down trees and other vegetation thereon, damaged crops growing thereon, chased away the Plaintiffs'/Respondents' workers and erected their own structures on the suit land.

Faced with this formidable challenge, the Plaintiffs/Respondents filed suit by way of the plaint (*referred to above*) as well as a Notice of Motion under a Certificate of Urgency for orders of mandatory injunction directing the Defendants/Applicants by themselves, their agents, their servants to vacate the suit land. The Plaintiffs/Respondent also sought orders restraining the Defendants/Applicants from selling, alienating or otherwise whatsoever dealing with the suit land pending the determination of the suit.

By a Ruling dated signed and delivered on 23rd October 2009, the court granted the prayers sought under the Motion of 3rd March 2009. The Defendants/Applicants being aggrieved with that Ruling filed a Notice of Appeal dated 26th October, 2009. In the meantime execution proceeded in which in accordance with the Affidavit of the 2nd Defendant/Applicant, the Defendants/Applicants newly erected structures were in turn destroyed, and household goods and effects lost or stolen in the process of execution of the orders of court granted on 23rd October 2009. As already stated, temporary orders were granted initially for 21 days, but later extended to 2nd March 2010 when the matter was heard before me.

As already stated, the Motion is expressed to be brought under Order XLI, rule 4(1)

of the Civil Procedure Rules. The requirements of the Rule 4(1) of the said order were the subject of a detailed analysis in my Ruling in the case of CLASSIC MUSHROOMS LTD vs. THE EASTERN AND SOUTHERN AFRICA TRADE AND DEVELOPMENT BANK (*Milimani Commercial Courts - HCCC No. 537 of 2003*) (*unreported*). I need only say here that the Rule gives concurrent jurisdiction to the High Court and the Court of Appeal to grant orders for stay of execution, but on different criteria. For the Court of Appeal, the criterion is set out in Rule 5(2) of the Court of Appeal Rules, and I have no mandate to go into them. For the High Court the criteria is set out in rule 4(2) which states that no order for stay of execution shall be made under Rule 4(1) unless -

(a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay.

(b) such security as the Court orders for the performance of such decree or order has been given by the Applicant.

The orders for which a stay of execution was sought given on 23rd October 2009.

The Application for stay was made on 9th November 2009, some 17 days later, although a Notice of Appeal was lodged on 26th October 2009 some 3 days later. That was prompt - but no appeal or second appeal (*rule 4(1) of Order XLI*), operates as a stay, so an application made some 17 days later is an afterthought. It cannot be said to have been made promptly like the Notice of Appeal. The first criteria of rule 4(2) was not fulfilled by the Defendants/Applicants. So the Application fails on that leg.

Would the Application stand on the second criteria that the Defendants/Applicants would suffer substantial loss unless the application for stay of execution was granted? Mr Karanja Mbugua learned counsel for the Applicants referred the court to the decision of

my brother Hon. Musinga J., in the case of JOHN NGINYI MUCHIRI vs. JOHN KAMUNYA MUTAHI & 4 OTHERS (High Court Nakuru HCCC No. 583 of 1996) held -

"one's home, be it a castle or a ramshackle, depending on an individual's status in life is very important and of immense intrinsic value to him and I cannot think of any greater loss that a person would suffer than loss of one's home."

In the case of BUTT vs. RENT RESTRICTION TRIBUNAL [1982] KLR 417, the Court of Appeal held inter alia:-

(1) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

(2) - (3)

(4) the court in its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements.

So against this eloquent statement by Hon. Mr. Justice Musinga must be weighed in the special circumstances and unique requirements of each case. In this matter, Hon. Lady Justice Mugo found at pp. 3-4 of her Ruling, and unless otherwise disproved -

"that the applicants (Plaintiffs) claim and/or legal interest over the suit land is clearly supported by documentary evidence. The Respondents have not denied that they moved into the land during the post election violence that rocked Kenya early 2008 and dispossessed the Applicants of the same. The suit they rely on to deny the Applicants claim herein was filed 20 years ago and they have not shown why the same has not been concluded. That the Applicants have been enjoined as interested parties in the suit before the lower court or that the Respondents seek to have the sale of 1991 avoided does not, in my considered view, confer upon the Respondents any right as would entitle them to enter the suit land as they have done, taking advantage of the post election turmoil of 2008."

Until that finding is reversed by a contrary finding by the Court of Appeal, I would hold the Defendants/Applicants herein as the prime and sole author of their own misfortunes. The rule of law demands due process for the vindication of any right or claim however glaring or obvious one may claim or think the right is to him or to them. I would not, in the circumstances of this case, think that the Defendants/Applicants would suffer any more substantial loss than they have caused to or suffered by the Plaintiffs/Respondents. They would in my view also fail on the second criteria for grant of stay of execution.

As for security, none was offered, and the nature of the dispute does not lend itself to the Court imposing any order for security in order to bind the Defendants/Applicants to obey and discharge any final orders on the matter.

In a situation such as this one, I have no hesitation at all in stating that any litigant who takes upon himself or

themselves as in this case, to perpetuate such illegality comes to court with unclean hands, and the courts ought not to condone such acts, however aggrieved an Applicant may feel. He or she must wait and subject her or his claim to due process of law. The Courts will not brook illegality.

For those reasons, the Motion dated 6th November 2009 and filed on 9th November 2009 is dismissed with costs to the Plaintiffs/Respondents. I further direct that the orders of the court made on 23rd October 2009 be carried out in terms thereof.

Dated, delivered and signed at Nakuru this 11th day of March 2010

M. J. ANYARA EMUKULE

JUDGE