



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL 238 OF 2009

1. ABDULLAHI SHEIKH MOHAMED
2. JOHN MBURU IHUGUAPPELLANTS
VERSUS
DAYALAL RAMJIRESPONDENT

RULING

The Appellants lodged an appeal on the 14th December 2009 against the decision by the Senior Resident Magistrate in Chief Magistrate's Court Civil case No. 2861 of 2009 delivered on 9th December 2009.

In the said Ruling appealed from the aforesaid Honourable Court struck out the plaintiff's entire suit on grounds of inter alia, jurisdiction. The Respondent had taken up Preliminary objections on various points of law.

The court held inter alia that no consent had been obtained under the provisions of Section 30(1) of the Land Adjudication Act before the institution of the suit and also that the suit property was valued more than Kshs.6,000,000/- beyond the pecuniary jurisdiction of the court which was Shs.3 million at the most.

The Appellants have now filed this application for stay of execution of the Ruling and order delivered in the said suit which dismissed the suit and therefore the Interim Orders that were in force at the material time.

The application is opposed. I have considered the applications, the rival affidavits and submissions.

The plaintiffs' suit was for the following orders:-

- 1. A permanent injunction restraining the Defendant from interfering in any way with Plots No. 1 UNS – BCR PLOT – D and Grant No. LR No.40488 respectively.**
- 2. A declaration that the plaintiff are the rightful owners of Plot Nos. UNS.BCR Plot – D and Grant No. L.R. 40488.**

It is clear that once the suit was struck out, then nothing remained of the Suit and there are no orders that are executable against the Appellants. It was their own suit which was struck out and /or dismissed. As a result the Interim order which may have existed automatically became vacated or discharged. In terms of Order 41, Rule 4, there is no order capable of being executed. It is not like the Appellant's applied for injunction pending appeal which is a totally different procedure altogether.

I do hold that in the circumstances of the case, the applicants will not suffer any substantial loss as there is no executable decree or order. Also, the said ruling does not by itself render the appeal nugatory.

The application is not sustainable in law and the same is hereby dismissed with costs to the Respondent. Any Interim orders granted herein are vacated and/or discharged.

Dated and delivered at Mombasa this 28th day of June 2010.

M. K. IBRAHIM
J U D G E

Coram

Ibrahim, J

Court clerk – Kazungu

Mr. Muhuni for the Respondent

Ms. Wangari for the Applicant

Ruling delivered in their presence.

Ibrahim, J