



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 64 of 1986

JAMES KURIA MAINA 1ST APPLICANT

SAMUEL MBOGO KAIGUA 2ND APPLICANT

GODFREY WAITHAKA 3RD APPLICANT

VERSUS

KAIGUA MBOGO 1ST RESPONDENT

WILSON GITAU KAIGUA 2ND RESPONDENT

STANLEY MUIGAI KAIGUA 3RD RESPONDENT

JOSEPH MBOGO KAIGUA 4TH RESPONDENT

JOHN KIHONGE KAIGUA 5TH RESPONDENT

MARY WAMBUI KAIGUA 6TH RESPONDENT

RULING

By an application dated 31st March 2005 the applicants sought orders to have Mary Wambui Kaigua, Joseph Mbogo, Stanley Muigai and Wilson Gitau deliver up vacant possession of the land parcel Loc. 116/Mbugiti/ 1011 hereinafter referred to as “*the suit premises*” to James Kuria Maina in accordance with the Decree issued by this court on 18th November 1991. They also sought that the District Surveyor, Thika do confirm the boundaries and beacons of the suit premises, the officer commanding Police Division, Thika Station do supervise the execution of these orders, that Wilson Gitau Kaigua and John Kihonge Kaigua and Mary Wambui Kaigua be detained in prison for a period that the court may deem fit for resisting and obstructing the execution of the decree and finally that the costs of the application be provided for.

The grounds in support of the application were that this court issued a decree dated 18th November 1991. Subsequent to the decree, land parcel Loc. 16/Mbugiti /69 was surveyed, subdivided and resultant titles including the suit premises issued to the applicants. That Wilson Gitau Kaigua and others whom I will hereinafter refer to as “*the respondents*” acting in cohorts without justifiable cause have resisted and or obstructed the completion of the execution of the decree by preventing the applicants from taking

possession of the suit premises. The application was further supported by the affidavit sworn by the 1st applicant which in the main merely elaborated on the grounds in support of the application aforesaid.

The respondents did not file a replying affidavit to the application. Instead through Messrs Njagi Wanjeru & Company Advocates they filed a Notice of Preliminary Objection to the application to the effect that the said application was fatally defective by virtue of order XXI rule 18(1) of the Civil Procedure Rules and should therefore be struck out. Secondly they claimed that the application was fatally incompetent and indeed fundamentally misconceived by virtue of the demonstrably manifest of the subject judgment dated 18th November 1991 and should therefore be struck out with costs.

When the application came up for hearing Mr. Wanjeru, learned Advocate for the respondents took up the preliminary objection. He submitted in support thereof that the prayers sought in the application are essentially for eviction of the living respondents. In terms of Order XXI rules 88, 89 and 90 of the Civil Procedure rules this court is required to fix a date for investigating the matter and upon fixing such a date, summons shall issue to the parties resisting the eviction. No such procedure had been followed in the circumstances of this case. Under order XXI rule 18, Notice to show cause had not been issued as required. Accordingly the application was premature, faulty and ought to be dismissed.

Mr. Isindu, learned advocate for the applicant responded by stating that the applicants made an application dated 31st March 2005 as required by rule 86 of Order XXI of the Civil Procedure rules. That application amounts to a complaint by the applicants of the resistance and obstruction by the respondents. The court then fixed the hearing of the application on 13th June 2005 as required by rule 86(2) thereof. That the application had come up for hearing severally but the respondents had not filed anything to challenge the complaints in the application. Finally, he submitted that on this day, the court was meant to investigate the complaints and make necessary orders.

I have considered carefully the preliminary objection raised by the respondents and the rival oral submissions. I do not wish to deal with the issue of the decree sought to be executed being dead by affluxion of time and also the need to take out a Notice to show cause in terms of Order XXI rule 18(1) of the Civil Procedure Rules. Those issues were ably canvassed before Kasango J and in a ruling dated 28th September 2008 effectively dealt with. I do not therefore wish to revisit the issue as I have been cheekily invited by the respondents in their grounds of the preliminary objection.

The applicants' complaint in the main is that the respondents are resisting and obstructing the final execution of the decree. They have refused albeit wilfully to deliver up vacant possession of the suit premises in terms of the court decree issued herein on 18th November 1991. Order XXI rules 86 and 87 of the civil procedure rules deal with similar situations as it obtains in this case. Order 86(1) of the civil procedure rules provide that where a decree for possession of immovable property is resisted or obstructed by any person, the decree holder may make an application to the court complaining of such resistance or obstruction. Upon the application being filed, the court shall fix a date for investigating the matter and shall summon the party against whom the application is made to appear and answer the same. If the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment debtor, or by some other person at his instigation it shall direct that the application be put in possession of the property and where applicant still resists or obstructs in obtaining possession, the court may also, at the instance of the applicant, order the judgment debtor, or any person acting at his instigation, to be detained in prison for a term which may extend to thirty days.

From the oral submissions the respondents' complaint would appear to be that the applicant has not complied with the above procedural requirement, hence the application is premature. However this appears to be a complete departure from the grounds of preliminary objection filed. Be that as it may, I will proceed to consider the issue nonetheless. On the other hand the applicants maintain that they have complied with the procedure in filing the instant application. Having carefully perused the record herein, I am inclined to agree with the advocate for the applicants. Order XXI rule 86(1) of the civil procedure rules talks of the decree holder filing an application to the court complaining of such resistance or obstruction. The applicants herein are decree holders. They have filed the application dated 31st March

2005 complaining that the respondents have frustrated their efforts to take possession of the suit premises due to them on account of a court decree. The application was served on the respondents. However to date the respondents have not filed any papers in opposition to the application. To my mind therefore the applicants made the instant application as required by the aforesaid order and rule. In other words the application amounts to a complaint by the applicants of the resistance and obstruction by the respondent to the execution of the decree.

The court then fixed the application for interpartes hearing on 13th June 2007. It is at this stage in my view, that the court would have interrogated the respondents on their resistance and or obstruction. The application having been fixed for hearing, the respondents were served with the application with a hearing date thereon. Accordingly in terms order XXI rule 86(2) of the civil procedure rules, the court had thereby fixed a date for investigating the matter and summoned the respondents against whom the application is made to appear and answer the same. The respondents' would have answered the complaint by filing replying affidavit(s) if any. They did not.

Contrary to the submissions by Mr. Wanjeru, I do agree that the instant application amounts to an investigation in terms of order XXI rule 86(2) of the civil procedure rules. On the day of the hearing of the application interpartes, the court would have investigated the complaint before depending on the material placed before it and made a determination thereon. It is then that it could make appropriate orders having carefully listened to the applicants and the respondents' response if any.

The upshot of the foregoing is that I find no merit in the preliminary objection and is accordingly dismissed with costs to the applicants.

Dated and delivered at Nyeri this 21st day of May 2009

M. S. A. MAKHANDIA

JUDGE