



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Case 47 of 2008

GEDION BAITHINE KIUNGA.....APPELLANT

V E R S U S

THE CATHOLIC DIOCESE OF MERU TRUSTEES.....1ST DEFENDANT

THE LAND DEMARCATION OFFICER MERU NORTH DISTRICT...2ND DEFENDANT

THE LAND ADJUDICATION OFFICER MERU NORTH DISTRICT...3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

CIVIL PROCEDURE AND PRACTICE

- o Stay of execution and proceedings – grounds for, Order XLI, Rules 4(1) and 4(2) of the Civil Procedure Rules**

R U L I N G

This Ruling relates to an application by way of a Notice of Motion dated 28th May 2008, and filed on 30th May 2008. The Applicant/Appellant sought orders of temporary injunction against the 1st Respondent restraining them from building constructing and/or evicting the appellant from Land Parcel **No. AMWATHI IIA/MUTUATI/737** Adjudication Section and interfering with his peaceful occupation therein pending the hearing and determination of the application.

The Applicant/Appellant also sought three further orders:-

- (a) A stay of further proceedings in Maua **PMCC No. 403 of 2004** and the taxation scheduled for 12.06.2008.
- (b) A stay of the ruling and orders delivered in **Maua PMCC No. 153 of 2004** dated 17.04.2008 pending the hearing and determination of the application or until further orders of court.
- (c) Costs of the application be provided for.

The Motion is supported by the Affidavit of the applicant and the grounds on the face thereof.

In opposition to the Motion, the Respondent, Catholic Diocese of Meru Registered Trustees has filed a

Replying Affidavit by Rev. Fr. Matthew Kaimenyi sworn on 18th June 2008 and filed on 19th June 2008. The essence of the Replying Affidavit is that the Application is misconceived, frivolous, incompetent and laden with material non-disclosure and that the applicant should not be allowed to enjoy the pure waters of equity which he does not deserve.

The application herein is premised upon the provisions of Order LXI Rule 4 (1) and (2) of the Civil Procedure Rules. Rule 4(1) of the said Order merely provides that no appeal will serve as a stay of proceedings or other orders of court. Rule 4(2) of the Order lays down three conditions upon which the court will grant a stay of proceedings pending an appeal. These conditions are that:

- (1) The court is satisfied that substantial loss may result to the applicant unless the order (of stay) is made;
- (2) The application has been made without unreasonable delay; and
- (3) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given by the applicant.

I have examined the Applicant's Motion of 29th September 2008 at two levels: firstly on the basis of the above provisions of Order XLI, rules 4(1) and 4(2) secondly on the basis of its merits.

On the first level, the orders sought to be stayed were made on 17.04.2008. The 1st Application for stay was made on 28th May 2008. On 6th June 2008, I declined to grant a stay of the orders of the lower court, and I also declined a stay of the taxation of costs.

On 21st October 2008, the 1st Respondent, by an Affidavit sworn on 21st October 2008, by Rev. Fr. Matthew Kaimenyi, stated what he had deposed to in the Replying Affidavit to the Applicant's Motion of 28th May 2008, the only improvement to the earlier Replying Affidavit being attachment of the lower court's order striking out the suit. My brother Hon. Justice Ouko issued a stay of warrants of arrest issued on 25th September 2008 pending the hearing and determination of the application.

On the first ground for granting an order of stay, that substantial loss would be occasioned to the applicant unless the orders are granted, I regret that the applicant has not acquitted himself on that ground. It is clear from the Replying Affidavit of Rev. Fr. Mathew Kaimenyi that the Applicant is confusing the position of land **AMWATHI/MAUA/737** with that bought and developed by the 1st Respondent, **AMWATHI/MAUA/4699** and reserved for the use and development of Mutuati Parish Catholic Church. It is clear from the attachments to Fr. Kaimenyi's Replying Affidavit of 18th June 2008, that the Applicant has absolutely no interest in the parcel No. 4699 which the 1st Respondent bought from one John M'Ethioki M'Maeria way back on 28th May 2003. One cannot suffer loss from what does not belong to him or is not his. The application fails on the first test.

On the second test, whether the application was brought within a reasonable time the applicant has not brought one but several applications without prosecuting in full the earlier one. An application made on 29.09.2009 for orders made on 17.04.2008 more than five months cannot be said to have been made without unreasonable delay. The applicant fails on that ground as well.

The applicant has offered no security either in costs or damages which may ultimately be binding upon him. He merely wants to bamboozle his way round with a hope that he would escape the process of court and scrutiny thereof. In this too, the applicant fails the test.

Lastly on the merits of the application, the applicant fails. It seems to me that where a suit is struck out as this one was, an order striking out the suit cannot be stayed. There is no suit to stay, only orders consequential to the order may be stayed, not the suit. The only avenue or remedy open to the aggrieved party is either to apply for revival of the suit, or file a fresh suit.

In this particular matter the suit ought not to have been instituted without the consent of the Land Adjudication Officer. The court is forbidden from entertaining such suit under Section 30 of the Land Adjudication Act and such suit is **void ab initio**. It is a nullity, and once struck out, I doubt that an appeal would give it life without any evidence from the lower court that it was a competent suit. To all intents of purposes it was not a competent suit in light of section 30 of the Land Adjudication Act. Consequently no orders arising from the striking out of such a suit can be stayed.

The Applicants application of 28th May 2008, and 25th September 2008 and 28th September 2008 are an abuse of the court's process and are all dismissed with costs to the 1st Respondent.

For the avoidance of doubt any and all interim orders granted howsoever herein are hereby set aside and vacated.

There shall be orders accordingly.

Dated, signed delivered at Meru this 16th day of October 2009

M. J. ANYARA EMUKULE

JUDGE