

DOUGLAS MEME PLAINTIFF

VERSUS

JUSUF MWITI & OTHERS DEFENDANT

RULING

In a judgment dated 1st February 2001 Etyang, J. dismissed with costs the applicant's suit against the 1st, 2nd, 3rd and 4th defendants. After nearly three years the applicant brought the instant application under Orders 3 rule 9A and 21 Rule 22 of the Civil Procedure Rules seeking two main orders, namely, leave to change his advocate and stay of execution of the decree and eviction order issued on 16th June 2004

“.....pending the hearing and determination of this application or until further issuance of orders by this Honourable Court.”

The applicant has deposed that he was not heard when the eviction order was made on 16th June 2004; that the order directing that possession be given to one John Mugambi was defective as the said John Mugambi is deceased. That if evicted, he (applicant) shall suffer loss and damage as he would be rendered landless.

In reply, the 3rd respondent through his counsel averred that the application ought to have been split and brought separately as the same seeks two distinct prayers. That the order of eviction was issued after the applicant and his counsel had been given an opportunity which they failed to seize.

These grounds were canvassed before me on 15th October, 2008. The applicant having filed what he terms “*Notice of withdrawal of advocate*” argued the application himself maintaining that he has occupied the land in question since 1969. That he has tea bushes on the land and further that he has no other land.

The first limb of the reliefs sought, namely, leave to change the firm of Kariunga Kirubua & Co. Advocates for Kiogora Arithi & Associates has been overtaken by events as the applicant has expressed his intention to act in person by filing the “*Notice of withdrawal of Advocate*”. I do not intend to say anything more regarding that aspect of this application.

Turning to the second prayer, ie, stay of execution, the applicant has cited the provisions of order 21 rule 22 of the Civil Procedure Rules. That provision deals only with stay of execution in situations where a decree has been sent to another court for execution.

It is not therefore available in this application. The court, however, has inherent powers to order for stay of execution in situations not covered under order 41 rule 4 of the Civil Procedure Rules or any other law.

But like the exercise of any discretion, the discretion to grant a stay other than under order 41 rule 4 aforesaid must be exercised judicially and on material placed before the court.

I have reproduced above the relevant prayer for stay of execution. The stay sought is for the period or life of this application. No useful purpose will be served by an order staying execution pending the hearing and determination of the instant application. An application for stay must be hinged on the happening of something substantive, for example pending the filing of appeal or depositing of funds or filing of another application.

The applicant has confirmed that he has not filed an appeal to challenge the judgment of Etyang, J.

Secondly, the judgment in question was delivered on 1st February 2001. The instant application was filed on 7th July 2004, nearly three years later. The explanation offered for the delay is that the applicant was serving a custodial sentence. That may be so. Indeed, Etyang, J. recorded that fact when he delivered the judgment.

However, the applicant has not indicated when he learnt of the existence of the judgment. An unexplained and inordinate delay of three years must disentitle the applicant of the discretionary orders sought herein.

Finally, there is evidence that the applicant and his family are no longer on the suit land having been evicted before the filing or hearing of this application. Once again the orders sought will serve no purpose.

For all these reasons, the application fails and is dismissed with costs to the 3rd respondent/defendant.

Dated and delivered at Meru this 20th day of January 2009.

W. OUKO

JUDGE