



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Appeal 76 of 2002

TABLA KHASOHA M'MAITSI APPLICANT

V E R S U S

JAMES KEGODE for Mbaya Primary School RESPONDENT

R U L I N G

The application before me was brought pursuant to the provisions of *section 21* of the Government Proceedings Act, as read together with the provisions of *section 3* and *3A* of the Civil Procedure Act.

It is an application for stay of further execution, as well as for the repayment to the applicant, of the value of the goods which had been attached in the process of an earlier execution exercise.

In order to better appreciate the nature and scope of the application, it is necessary to re-visit the history of the suit herein.

The respondent to the application, **DEBLA KHASOHA MMAITSI**, had a land dispute with **MBAYA PRIMARY SCHOOL**. The said dispute was first taken before the Lugari Land Disputes Tribunal in 1997.

After giving a hearing to the parties, the Tribunal gave an award that was in favour of the applicant herein. However, as the respondent was dissatisfied with the award of the Tribunal, she filed an appeal before the Provincial Land Disputes Appeals Committee.

The Appeals Committee upheld the decision made by the Tribunal.

Following the decision by the Provincial Appeals Committee, the respondent to this application lodged yet another appeal; this time the appeal was made to the High Court.

After giving due consideration to the appeal, the Hon. G. B. M. Kariuki, J. held that the Provincial Appeals Committee had gone;

“beyond the ambit of its powers in purporting to adjudicate on the issue of title to land and the contract. It had no jurisdiction and its decision is null and void.”

Having allowed the appeal on the grounds that the Provincial Appeals Committee had acted ultra vires its powers, the learned judge awarded to the respondent herein, the costs of the appeal.

Thereafter, the costs were taxed and allowed in the sum of KShs.61,580/=.

Following the taxation of costs, the respondent took out execution proceedings, which culminated in the attachment of property belonging to the applicant, **JAMES KEGODE**.

The attachment is said to have been effected through a proclamation, on 18/4/2007. Thereafter, the returns filed by Mr. Michael Otiangala, the Court Broker who carries on business as Kuronya Auctioneers, show that the attached goods were sold by public auction on 30/4/2007.

The Court Broker gave a detailed breakdown, which showed that the six head of cattle which he had attached, fetched a total of KShs.32,500/=. The returns filed by the Court Broker also indicate that his costs for the process of execution amounted to KShs.21,821/=.

Having deducted the costs of the execution process, the Court Broker indicated that he had paid to the advocate for the respondent, the sum of KShs.14,000/=.

By an application dated 8/5/2007 the applicant sought orders for the restoration of the goods which had been attached. He also sought the setting aside of the judgment, with a view to having the matter proceed to hearing thereafter, so that it could then be determined on its merits.

On 7/6/2007 the applicant filed the application dated 6/6/2007. Now, whilst the application dated 8/5/2007 had been made by the applicant in person; the application dated 6/6/2007 was filed by his advocates, M/s Munyendo, Muleshe & Company Advocates.

As at the date when the application dated 6/6/2007 was being canvassed before me, the other application which had been filed earlier was still pending. That fact prompted the respondent to submit that the later application was bad in law. The reason advanced by the respondent for that contention was that the two applications were of a similar effect.

It was the respondent's submission that the application dated 6/6/2007 ought not to have been prosecuted when the application filed earlier (dated 8/5/2007) was still pending.

To my mind, if the respondent felt that the application dated 8/5/2007 ought to have been disposed of before the application filed later could be heard, the respondent ought to have taken up that issue before the applicant began prosecuting the application dated 6/6/2007. At that stage, the court could then possibly have either stayed the latter application or alternatively, the applicant could have been put to an election, if the court formed the considered opinion that the two applications were of the same effect.

The mere fact that there are more than one application of a similar nature, in one case, would not by itself, automatically render one or the other of these applications bad.

In this case, the application dated 8/5/2007 was for the restoration of the goods already attached, and for the setting aside of the judgment. Whereas, in the application dated 6/6/2007 the applicant seeks the stay of further execution, and the value of the goods which had been attached.

In my considered view, the two applications are not of a similar effect, as the current application, even if successful, cannot result in the setting aside of the judgment or the return of the attached goods.

The respondent deems the present application as a mere afterthought on the applicant's part. On the other hand, the applicant insists that the application is not an afterthought.

On my part, I note that the costs were taxed and allowed in the sum of KShs.61,580/=. Thereafter, the execution process realized a sum of KShs.32,500/=. out of which the Court Broker's costs amounted to KShs.21,821/=. Consequently, the Court Broker remitted a sum of KShs.14,000/= to the advocates for the respondent.

Of course, I am aware of the fact that the respondent's advocate only acknowledges receipt of KShs.13,000/=.

But assuming that the Court Broker did remit KShs.14,000/= to the respondent's advocates, that would imply that KShs.47,580/= was still outstanding, on account of the taxed costs payable to the respondent.

Unless the respondent chooses not to execute for the outstanding costs, there is every possibility that further execution could be levied against the applicant. Therefore, it cannot be an afterthought for the applicant to seek orders to stay further execution against himself..

But will not the grant of an order for stay of further execution imply that the respondent would be unable to recover the costs awarded to her?

The applicant's contention is simply that the execution process was wrongfully directed at **JAMES KEGODE** personally, instead of at the office which the said **JAMES KEGODE** was occupying at the time when the proceedings were ongoing before the Tribunal, the Appeals Committee and the High Court. It is therefore my considered view that an order which precludes the execution against **JAMES KEGODE** personally will not be a bar to the execution against **MBAYA PRIMARY SCHOOL**. In effect, there would be no bar to the recovery of the costs per se, as the respondent could still direct the execution process against the school.

The respondent submitted that the application could only be determined fairly if the Court Broker who executed the attachment and sale of the applicant's cattle, was made a party to the application.

However, the applicant insists that the Court Broker was not enjoined to the application as he had already released the proceeds to the respondent's advocates.

Insofar as the advocates for the respondent have acknowledged receipt of KShs.13,000/= from the Court Broker, it follows that the refund of these funds can only be made by the respondent.

But if the whole execution process were to be declared unlawful or wrongful, there may well arise legitimate issues as to who would pay back to the applicant, the value of the goods which had been attached, and whose proceeds were then retained by the Court Broker on account of his costs. In other words, the orders which the court may make, may well be limited, in the event that the Court Broker was not a party to the application.

However, such a limitation would not render the whole application bad.

For now, I am satisfied that unless there is a stay of further execution against the applicant **JAMES KEGODE**, in his personal capacity, there is a real risk that the respondent may cause such execution to be effected. If that happened whilst there is a possibility that the entire process of execution against the applicant personally was wrongful, that would be highly prejudicial to the said applicant.

As it is, there is still pending an application to set aside judgment. In these circumstances, I find and hold that it is in the interest of justice to stay further execution against the applicant, until further orders of this court.

Meanwhile, it is emphasized that the fact that one executes documents in his official capacity, (say as chairman of an organization such as a school, club or society) does not render him personally liable for orders made against the body on whose behalf he appended his signature. It would therefore be interesting to see how the respondent herein will go about justifying the execution which was levied against **JAMES KEGODE**'s personal property, as opposed to the property of the school, of which he was chairman.

Costs of the application dated 6/6/07 shall abide the hearing and determination of the application dated 8/5/2007, as well as any other applications which the parties herein may be minded to bring with a view to resolving the issue as to whether or not the attachment was wrongful.

Finally, liberty is given to both parties to apply.

Delivered, dated and signed at Kakamega this 12th day of May, 2008

FRED A. OCHIENG

J U D G E