

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 39 of 1998

MAINA MBITI

MWAI MAINA

NGATIA MBITI.....APPELLANTS

Versus

GITHUI MBITI..... RESPONDENTS

RULING

The applicant **GITHUI MBITI** has previously moved this court by notice of motion seeking stay of execution of the decree herein and also seeking the status quo be maintained in respect of four (4) parcels of land. A ruling was delivered in respect of that application on the 16th November 2007. The court ordered that there be maintained status quo in respect of Parcel Nos. **MAGUTU/ RAGATI/679, 678, 699 and 700** pending the determination of **Appeal No. 211 of 2004**. As it is clear from that order the court did not grant the applicant stay of execution. Costs in respect of this case were taxed on 2nd March 2006. Since there wasn't any stay of execution, a notice to show cause was issued against the applicant. That notice to show cause came up for hearing on 15th April 2008. When the applicant through his advocate was called upon to show cause, the advocate addressed the Deputy Registrar on his contention that a stay was granted on 16th November 2007. The Deputy Registrar made a finding that the order of the court of that day did not grant stay of execution. He therefore ordered for warrant of arrest to issue against the applicant. The applicant has now moved this court by way of notice of motion dated 27th April 2008 seeking the setting aside or the review of the order of the deputy registrar committing the applicant to civil jail. It is deponed by the applicant and indeed it was argued by his counsel before court that execution was undertaken whilst there were orders for stay of execution. The applicant also argued that he was committed to civil jail without being granted an opportunity to show cause. The application was opposed. The advocate for the appellant herein deponed that the order issued by the court on 16th November 2007 did not stay the execution of the entire decree. He further stated that the costs were taxed in the presence of both advocates on 2nd March 2006. In respect of what occurred before the Deputy Registrar he deponed that as the matter was being argued before court the applicant took an opportunity to get out of the court room and despite attempts to look for him he was not found. It was deponed that to date the applicant is in hiding. That later submission is correct for the applicant in his affidavit did admit that he is living in hiding to avoid the execution of the warrants.

The applicant seeks a review or the setting aside of the orders of the Deputy Registrar of 18th April 2008 to the effect that a warrant of arrest do issue against him. The basis of seeking those orders are that firstly being court by its ruling of 16th November 2007 stayed the execution of the decree. The simple response to that argument is that the court did not stay execution of the entire decree. What the court however did grant was the maintenance of status quo in respect of the properties subject of the appeal. The applicant secondly sought those orders on the basis that the he was not given an opportunity to show cause when the matter came up on 18th April 2007. On that date it was coming up for the applicant to show cause why warrant of arrest should not issue. The applicant's advocate whilst submitting before the Deputy Registrar stated that he objected to the applicant being called upon to show cause. Having made that

statement the applicant cannot now say that he was not granted an opportunity to show cause. My finding is that the applicant's application has no merit and should be dismissed. As correctly submitted by counsel for the appellants there cannot be any stay of execution for costs. That was clearly the finding of the Court of Appeal in the case of **FRANCIS KABAA VS NANCY WAMBUI & ANOTHER Civil Application No. Nai 298 of 1996**. In the end therefore the applicant's notice of motion dated 27th April 2008 is hereby dismissed with costs being awarded to the appellants.

DATED AND DELIVERED THIS 6TH DAY OF JUNE 2008

MARY KASANGO

JUDGE