



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 74 of 2006

ITONDE KILOVO

MATHUVA MUTIO

MUSYOKA MUTIO

REUBEN MUTIO

MUMBUA NDOME

MBOLU KATUME

MATIVO KATUME

KISENGE NDEMWA

MBOYA ITONDE::: DEFENDANTS/APPLICANTS

VERSUS

PETER MULWA MATHEKA:::PLAINTIFF/RESPONDENT

RULING

1. The Application before me is dated 19.3.2007 and is premised on Order XLI Rule 2 of the Civil Procedure Rules. The Applicants seek orders that the decree for costs in RMCC 42/2005 (Kilungu) be stayed until the Appeal herein is heard and determined.

2. The grounds in support are as follows:-

“a. The dispute involves land which is occupied by more than 9

families who have more than 50 members having permanent improvements on the land valued at over more than two million shillings (2,000,000/=) and having lived on the land for over 100 years.

b. The Appeal was filed on 2nd June, 2006 against the Decision of Embu Appeals Committee in Appeal No. 77 of 2005.

- c. *The decree being executed was drawn on 31st January 2007 and referred to the Tribunal for execution on 21.3.2007.*
- d. *There are good grounds of appeal on a point of law.*
- e. *If the Order of stay is not granted this application and the appeal will be rendered nugatory.*
- f. *If the Respondent takes possession of the land and the appeal is successful he will not be able to return the land to the applicants intact.*
- g. *The Resident Magistrate is in the process of referring the decree to the panel of elders to execute the decree which is contrary to the law. Thus the mode of execution is not in accordance with the Civil Procedure Rules. The Applicants are ready to give security for the costs.*
- h. *The Applicants have been waiting for a notice from the Court that Rule 8(a) has been complied with to enable them prepare the appeal for hearing.*
- i. *The Resident Magistrate has no jurisdiction to refer the Award back to the Tribunal to execute the decree. The Trial Magistrate was also assessed costs which is not part of the decree.*
- j. *That if the Respondent takes over the land, he intends to demolish the buildings that are on the land and alienate the land and in the event of Appellant succeeding the Respondent shall not be able to restore the land and compensate the Applicants as the damages resulting would be very high and not within the ability of the respondent to satisfy.”*

3. From the Supporting Affidavit sworn on 19.3.2007 by Joseph

Musyoka Mutio on behalf of the Appellants, I gather that on 5.6.2007, the Embu Principal Appeals Committee made its decision and awarded a certain disputed parcel of land to the Respondents. The Kilungu Resident Magistrate read the award to the parties on 8.6.2006 and adopted it as its decree in **RMCC No. 42/2005**. A certificate of costs after taxation was issued by the same court on 29.2.2007 and on an unclear date, the Chairman, Kilungu Land Disputes tribunal, one F. Kilonzo wrote to parties and invited them to appear before him on 21.3.2007 at 10.00 a.m. for the Tribunal members to implement the award of the provincial Land Appeals Committee.

4. Mr. Kisongoa’s contention is that the learned Magistrate at Kilungu had no mandate to tax costs for the litigation before the Provincial Land Appeals Committee. In any event, that no costs were awarded by the Committee.

5. Further, that the Land disputes Tribunal had no mandate to execute a decree issued by the Resident Magistrate’s Court.

6. In Replying Affidavit sworn on 18.4.2007, the Respondent, Peter Mulwa Matheka depones that the land in dispute was purchased by his father, Timothy Matheka in 1969 and as the legal representative of his father’s estate, he is entitled to the land. That the Application was brought inordinately and no substantial loss would be occasioned to the Appellants who do not occupy the land. That in any event, the decree was executed on 16.2.2007 and 21.3.2007 and there is nothing to be stayed.

7. I have considered the Application and the submissions on behalf of the Respondent. Order XLI Rule 4(2) of the Civil Procedure Rules provides as follows:-

“(1)....

(2) *No order for stay of execution shall be made under*

sub Rule (1) unless-

a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

8. Although the Application was brought a year or so after the award, it is not in doubt that there was a similar application for stay before the Kilungu Resident Magistrate’s Court and it was only after the Appellants failed that they came to this court.

9. As regards substantial loss, it is not denied that the Appellants are not on the suit land and the averment by the Respondent that they were evicted by 21.3.2007 has not been denied. Of course, I agree with Mr. Kisongoa that the procedure adopted in doing so is not only wholly unknown to the Land Disputes Tribunals Act. No. 18 of 1990 but also to the Civil Procedure Rules. However, that procedure has not been challenged substantively before me. What is before me is a pray for stay of execution of the order granting possession to the Respondent and the other granting him costs. If the order of possession has been implemented what is there to stay in spite of my misgivings about the procedure used? I submit nothing and the remedy for the Applicants to that extent lies elsewhere.

10. In any event, if the Applicants have lost possession, an order of stay is in vain and cannot be used to reinstate possession.

11. Turning to the issue of the decree for costs, again the procedure adopted by the Resident Magistrate’s Court is strange. No costs were awarded by the Provincial Appeals Committee and it is wholly unclear by what jurisdiction costs were taxed and awarded to the Respondent. To that extent, to be asked to pay Kshs. 124,120/= on an unclear decree for costs is certainly unfair and the Appellants will suffer substantial loss.

12. I will therefore allow a stay of execution of the decree for costs dated 29.1.2007 pending hearing of the Appeal herein. Costs thereof shall abide the Appeal and the Application dated 19.3.2007 is allowed only to that extent.

13. Orders accordingly.

Dated and delivered at Machakos this **29th** day of **October 2008**

Isaac Lenaola

Judge

In the present of: Mr. Kisongoa for Applicant

No appearance for Respondent

Isaac Lenaola

Judge