



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 1067 of 1991

IN THE MATTER OF THE ESTATE OF KAPPOYA MOSIRO – (DECEASED)

RULING

The Application for determination before the court is Notice of Motion dated 17th August, 2005 filed under section 65(e) and 3A of Civil Procedure Act and Orders XXXIX Rules (1) and (2), Order XXI rule 22 and Order XLIV of the Civil Procedure Rules.

The prayers sought is for interim stay of execution of the orders granted on 3rd June, 2005 and to review, set aside and/or vary the orders made by Koome J on 3rd June, 2005.

The said application is supported on the grounds set forth on its face and supporting affidavit of Elijah Kapoya Ole Mosiro, one of the applicants (3rd Applicant) herein.

The properties in dispute are known as KJD/Kitengela/1992 and Ngong/Ngong/11077. It was claimed by the Respondents that the registrations of the Applicants on the aforesaid properties be cancelled. The said claim along with other related claims were granted.

The applicants aver that 14 residential units and frontal shops referred to be existing on Ngong/Ngong/11077 are non-existent on such land.

It is also contended that at the time of hearing of the application culminating to the issuance of the orders in question, the applicants had withdrawn the instructions from the counsel on record. Thus they were not represented without their fault.

I may observe that the averments of withdrawal of instructions are not substantiated. If they had withdrawn the instruction, the applicants ought to have filed Notice to that effect or given instructions to other counsel. Till the same is done, the service on the Advocates on record is sufficient and proper as per law. I thus reject that contention.

The applicants further aver that the 3rd applicant is the absolute registered owner of the parcel of land bearing No. Ongata/Rongai/26 (The Certificate of Lease thereof annexed as 'EMK II').

The shops or residential plots as alleged do not exist thereon and thus he avers that the respondents are trespassing on his property.

The Respondents deny those averments and rely on their Replying affidavit, thumb printed by both of them on 17th October, 2005.

They aver that the order No.6 clearly refers to “14 residential units and 3 frontal shops on Ngong/Ngong/11077 and from any other assets of the estate”. In paragraphs 16 to 20 of their affidavits they have averred, in short, that the property Ongata/Rongai/26 was allocated to the deceased and as at 27th June, 1992 it was still in the names of the deceased in the register of Olkejuado County Council. They relied as regards this averment on a letter dated 28th June, 1996 from Government Security Services Ltd. The said affidavit also annexed the plans from architects erecting the rooms and shops which is dated April, 83. The rents to the said plot were also paid by the deceased, two receipts for the years 1987 and 1988 in the names of the deceased from Olkejuado County Council are annexed as Ann.’KK4’).

On death of the deceased, the dependants agreed that rents from the residential rooms and shops shall be collected by one Simon and Richard, a brother to the 3rd Applicant.

Thereafter, without knowledge of the dependants, the 3rd Applicant got himself registered as owner of the said plot as shown in certificate of lease dated 8th May, 1996 and before the said certificate’s issuance, he issued notice to all the tenants not to pay rents to the aforesaid persons appointed by the dependants.

With these facts it was alleged that the application herein is malicious and vexatious.

I directed in addition that both counsel file further affidavits to show the location of the disputed 14 residential units and 3 frontal shops.

I have considered the background of this matter, Ruling of Githinji J (as then he was) dated 24th March, 1999 as well as the Ruling in question made by Koome J. on 3rd June, 2005.

After the grant of probate was confirmed to the Respondents, Grace Nasieku Kapoya and Ruth Wanjiru Kapoya (in pursuance to the Ruling of Githinji J, aforesaid), these executors filed an application under Rule 49 and 43 of P & A Rules seeking orders, viz;

“to remove, deregister the cautions, restrictions and/or inhibitions as well as cancellation of any entries and order to cancel any entries in the register in respect of properties known as KJD/Kitengela/1992 and Ngong/Ngong/11077.”

It also sought interalia, an order that the Applicants herein do render a true and just account of their collection of rental income and other monies from 14 residential units and 3 frontal shops on Ngong/Ngong/11077 and from any other asset of the estate.

The ruling specifically mentioned the collection of rental income accruing from Title No.Ngong/Ngong/11077 and the court gave order No.6 in respect thereof. There was no mention of property on Ongata/Rongai/26 or any rental income accruing from the said property. The court’s attention was only drawn to the two properties, while it made the order.

In the premises aforesaid, I am of an opinion that the orders made by the court, cannot be extended to the parcel of land known as Ongata/Rongai/26. That shall amount to stretching of the order which shall be unjustifiable and definitely be improper.

I do not think the court order needs to be reviewed as what it was ordering was rental income as specified in prayer no.6 only. It does not extend to any other income or property not specified by the applicants. Hence, I reject the interpretation of the order sought to be contended by the executors/Respondents herein.

If they intend to include the land Title No.Ongata/Rongai/26, they could make an application seeking specific orders in respect thereof.

I may also add that neither the applicants herein nor the Respondent/Executors assisted me to identify the property on which the rented premises are situate.

Thus except that I find that the Ruling of Koome J. did not refer to the parcel of land known as Ongata/Rongai/26, I do not make any other orders on the application.

Each party to bear its own costs.

Dated and signed at Nairobi this 7th day of October, 2008.

K.H. RAWAL

JUDGE

7.10.08