



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CIVIL SUIT 131 OF 2000

JOSEPH W. OWIDI

RAILI OWIDI.....PLAINTIFFS

VERSUS

WAFULA SITIAKO.....DEFENDANT

AND

MARY WACHANA.....OBJECTOR

RULING

The application before me is for stay of execution pending the hearing and determination of the appeal preferred against the ruling dated 4/6/2007.

The said ruling was made in objection proceedings which had been brought by the applicant herein, in an endeavour to halt the execution of a Decree which she felt would violate her legal rights to a property which was not the subject matter of the dispute between the parties to the suit herein.

In that regard, it is important to first dig out the background to the action herein. First, it is clear that the property which is the subject matter of the dispute between the plaintiff and the defendant is **LR. NO.TRANS NZOIA/MAKUTANO/31**, which measures 2.428 Hectares.

It is common ground that the plaintiffs were the registered proprietors of that property, (which will henceforth be cited as “*the suit property*”)

It is the applicant’s case that as she was not a party to the suit herein no order should have been issued which could affect her rights to L.R. NO.TRANS-NZOIA/MAKUTANO/47.

At this juncture, it is important to point out that the applicant is the wife to the defendant. However, in bringing this application the applicant insists that she must be recognized as a femme sole, who therefore has every right to bring the application as a co-owner of **L.R. NO. TRANS-NZOIA/MAKUTANO/47**. In effect, the applicant seeks to be looked at from the perspective of being a co-owner to the property, as opposed to being considered simply as the defendant’s wife.

It is the applicant's case that the learned trial judge did not appreciate that the case was about a boundary dispute or about an encroachment upon the plaintiffs' property.

As that issue will need to be determined by the Court of Appeal, the applicant expressed the view that it was important for this court to give orders for the maintenance of the status quo until the issue will have been determined. In the event that this court did not halt the further execution of the Decree, the applicant feels that the appeal would be rendered nugatory. Her reason for so saying was that the further execution of the Decree would result in the demolition of permanent structures which the applicant has put up on **L.R. NO. TRANS-NZOIA/MAKUTANO/47** (which shall hereinafter be cited as "**parcel No.47**").

It is the applicant's case that when the District Surveyor was giving effect to the order numbered (b) in the Decree, he encroached onto parcel No.47, which was not the subject matter of the suit herein. If that property was to be affected by orders issued in this suit, the applicant submitted that it was only fair that she should first have been granted a hearing.

In opposing the application, the plaintiff first pointed out that the applicant had neither sought to set aside the Decree in contention, nor had she sought to be enjoined into this suit. Therefore, the plaintiff argued that even if the court did grant the orders sought in this application, the same would not give to the applicant an opportunity of putting forward her case in this suit.

I must say that I found that submission to be double – edged. On the one hand it appears to support the plaintiff's position that if the applicant did not become a party to the suit, or if she did not seek the setting aside of the Decree, the orders for stay of execution would not give her an opportunity to put forward her case.

On the other hand, the applicant appears to have a point, when she blames the plaintiff for wanting to execute a Decree which would affect the rights of the applicant to parcel No.47, yet the plaintiff had not sought any relief either against the applicant or against parcel No.47.

Whereas the plaintiff submitted that a person who was not a party to the suit could not take away the rights bestowed upon him by the Decree, it is important to acknowledge that any person claiming to be entitled to or who has a legal or equitable interest in the whole or a part of any property against which execution is being levied, can object to the execution process. Such a person would not need to be a party to the suit before he can institute objection proceedings.

In considering the applicant's earlier application, the Hon. Karanja J. observed that;

“the only issue for determination here is whether the objector's right over Plot No.47 are going to be affected by the execution of the decree herein.”

The learned judge then expressed the view that as the parcel No.47 had only been registered in the names of the defendant and the objector almost four years after this suit was filed, the transfer was done in bad faith.

It was also the finding of the learned judge that: -

“even assuming that the objector has a good claim on Plot No.47 which did not actually feature anywhere in this case, then she is a joint owner with the defendant. Even assuming their share 50:50 the defendant's interest in the property would still be sufficient to satisfy the plaintiff's decree without affecting the objector's rights.”

The plaintiff has reiterated that the Decree herein does not mention parcel No.47. To my mind, that is precisely why the applicant brought this application, as she wishes the plaintiff stopped from carrying out execution in such a manner as to affect the property that was not the subject matter of the Decree.

If, as the applicant says, the execution would result in the demolition of her permanent structures,

which are on parcel No.47, then it is definitely in the interest of justice to stay such execution until such time as the plaintiff confirms that in executing the Decree, he will not affect the interests or rights of the applicant over parcel No.47.

The plaintiff submitted that execution had been carried out. To that end, the plaintiff exhibited a letter from the District Surveyor, Trans-Nzoia District, dated 30th May 2006 stating that the court order had been executed. If that be the position, then the plaintiff need not be unduly concerned with an order for stay. I say so because the plaintiff could only be prejudiced by an order for stay of execution, if there was yet something left to be carried out in the process of executing the Decree.

When the plaintiffs say that they are being deprived of their right to enjoy the fruits of the Decree, that can only mean that the execution is yet to be completed.

Having given due consideration to the application, I am satisfied that the applicant has lodged a Notice of Appeal against the decision delivered by this court on 4th June 2007. Whereas, the copy of the Notice of Appeal annexed to the applicant's affidavit is not admissible in evidence, as it had not been commissioned by a Commissioner for Oaths, the plaintiff did not controvert the applicant's deposition regarding the filing of the Notice of Appeal. To my mind, it is only if the plaintiff had rebutted the applicant's contention, that a Notice of Appeal had been filed, that the applicant would have been obliged to prove otherwise.

In arriving at the decision to strike out the Notice of Appeal, which was not commissioned, but nonetheless retaining the affidavit on record, I am guided by the decision of the Hon. Sergon J. *in* **CULTIVATE TECHNOLOGIES LTD Vs. SIAYA DISTRICT COTTON FARMERS CO-OPERATIVE UNION [2004] 1 KLR 693**, wherein, at page 695, the learned judge said;

"I am of the humble view that the documents annexed to the affidavits of TOM ODERA OKINYI as exhibits have not been properly sealed or commissioned, hence they are improperly on record and should be and are hereby ordered struck out and expunged from record."

Having so expunged the Notice of Appeal from the record before me, I nonetheless find that that is not fatal to the application.

Whilst there is a possibility that the defendant may be acting in concert with the applicant, to frustrate the plaintiffs, that is no more than a possibility, for now.

I do appreciate the plaintiffs' right to enjoy the fruits of the judgment. But in the same vein, I recognize the applicant's inalienable right to appeal against the decision which dismissed her objection proceedings.

The need to balance the applicant's right of appeal as against the plaintiff's entitlement to the fruits of the judgment was recognized by the Hon. KHAMINWA C.A (as she then was) in **REDLAND ENTERPRISES LIMITED V PREMIER SAVINGS & FINANCE LIMITED [2002] 2 KLR 139**.

Having carried out that balancing exercise, I have come to the conclusion that it would be in the best interests of justice to ensure that the subject matter of the application should remain intact until the appeal is heard and determined. In order to safeguard the property, there shall issue forthwith a stay of execution pending the hearing and determination of the applicant's appeal. However, there shall also issue forthwith an order for the maintenance of the status quo in relation to parcel No.47.

For the sake of clarity, the maintenance of the status quo shall include not only the bar from eviction of the applicant, but shall also include a bar against the applicant and the defendant taking any action which could put parcel No.47 beyond the reach of the court. In other words, the applicant shall do nothing which will encumber the title to parcel No.47. The applicant shall also not transfer the property either by herself or with any other person.

Finally, the costs of the application dated 11th June, 2007 shall abide the outcome of the applicant's appeal, which she is directed to file and prosecute expeditiously.

Dated and Delivered at Kitale, this 19th Day of September, 2007.

FRED A. OCHIENG

JUDGE