



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 79 of 2006

PETER M'IMARIA.....APPELLANT/APPLICANT

VERSUS

JULIUS BARIU M'ITOBİ.....RESPONDENT

RULING

1. The Applicant, Peter M'Imaria by his Notice of Motion under Order XLI Rule 4(1) of the Civil Procedure Rules seeks orders that there be a stay of execution of the decree and judgment in **Maua PMCC No. 9/2005**. The decree was to the effect that the Applicant be evicted from the suit land namely title No. Njia-Cia-Mwendwa/716 and in an affidavit sworn on 14.8.2006 in support of the Application, the Applicant deponed that he has a house on the suit land and as well as miraa plants and that the Respondent was intent on evicting him unless stay orders are issued.

2. In his Replying Affidavit sworn on 15.9.2006, Julius Bariu M'itobi depones that pursuant to the decree, he evicted the Appellant from the suit land which he proceeded to fence off before taking possession thereof. A letter dated 21.8.2006 is annexed to the affidavit and one Bernard Kimuyu confirmed that as Officer-Commanding Station, Maua, he had executed the decree by evicting the Applicant on 11.8.2006, three (3) days before the Application for stay of execution was filed.

3. Having heard submissions by advocates for the parties in line with the affidavits filed, one glaring issue must be addressed first; is the Applicant still on the suit land? He says in his affidavit of 15.9.2006 that **“on 4.8.2006 the respondent in a bid to restrain me from accessing the said land fenced the same all round with barbed wire”** and that he had now **“been prevented from entering [his] land”**. The Respondent in his Replying Affidavit confirmed this fact so that when the original Application (later amended) was filed on 14.8.2006, the Applicant had effectively been evicted from the land and he had lost possession thereof. This fact was confirmed by the OCS, Maua in his letter to court and in a further Supporting Affidavit sworn on 27.1.2000, the Applicant at paragraph 7 complains that the **“matter at Maua Law Court PMCC No.9/2005 was not a criminal, traffic or a matter involving the Police to necessitate the police to carry out an execution as the said court has court bailiffs and indeed there are auctioneers to carry out the work.”** Further, at paragraph 8, thereof, **“that the involvement of the police goes to show clearly that what I am saying is true about the bias of the court in the way he handled the trial suit”** (sic).

4. All the above matters lead to the clear conclusion that the Applicant admits that the Respondent, with the help of the Police, actually effected the order of eviction and there is nothing left to stay. Issues of the legality of the eviction have not been raised in the substantive Application and I cannot in addressing stay of execution seize the jurisdiction to do so, whatever my views on the subject.

5. Order XLI Rule 4 of the Civil Procedure Rules is not intended to aid a litigant who has already

suffered the effect of an execution but he who seeks that the execution be stayed. In this case, the execution has taken place and there is nothing left to be done as regards it. All other issues raised in the Application lack relevance and the Applicant has remedies elsewhere than by the order of stay of execution. I would in other circumstances have granted the order. Seeing as it is that the dispute involves the sensitive and emotional item called land but not in this case.

6. With great sympathy for the Applicant, the Application dated 16.1.2007 as amended lacks merit, came too late in the day and is best dismissed with costs to the Respondent.

Orders accordingly.

Dated, signed and delivered in open court at Meru this 18th day of September, 2007.

ISAAC LENAOLA

JUDGE

In the presence

Mr. Gitonga holding brief for M/s Mwangi Advocate for the Appellant

Mr. Mwarania holding brief for Mr. Arimba Advocate for the Respondent

ISAAC LENAOLA

JUDGE