



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE**

Civil Appeal 3 of 2007

STEPHEN WAMALWA BARASA.....APPELLANT.

VERSUS

WILLIAM SIKUKU WEKESA & 47 OTHERS.....1ST RESP.

RONALD WEKESA.....2ND RESP.

NDEGE RUMUNYASI.....3RD RESP.

RULING.

The appellant has moved the court by way of a Notice of Motion pursuant to the provisions of order 41 rule 4 of the Civil Procedure Rules.

It is the appellant's application that this court should order for a stay of execution of the decree in Kitale CMC Land Case No. 109 of 2006 pending the hearing and determination of his pending appeal.

The appellant was one of the two co-administrators of the estate of the late WILLIAM WAMALWA A. NGEIYWA, who passed away in 1976. His co-administrator, William Christopher Wamalwa, died in 2003.

It is common ground that in Kitale CMC Land Case No. 109 of 2006, the court adopted as a judgment, the decision made by the Saboti Land Disputes Tribunal. It is also common ground that the appellant herein felt aggrieved with that decision, and therefore instituted Judicial Review proceedings, with a view to quashing the decision of the tribunal.

It is the appellant's case that this court did grant an order for stay of execution until the judicial review matter was heard and determined.

Notwithstanding the order for stay of execution, the appellant blames the magistrate's court for proceeding to issue an order for his eviction.

The said magistrate's court is also accused of declining to lift the eviction order regardless of the stay orders already issued in the judicial review proceedings.

In the light of those facts, the appellant fears that the suit property was in imminent danger of being invaded by members of the 1st respondent. It is for that reason that the appellant has moved the court for an order of stay.

It is the appellants' position that the respondents were well aware that they have no legal interest in the suit property. Therefore, if the said respondents were to be allowed to take possession of the said suit property, the appellant and the other beneficiaries of the estate of William Wamalwa A. Ngeiywa would suffer substantial loss.

The appellant did point out that the suit property L.R. No. 5364/2, was also the subject matter of ELDORET HCCC NO. 67 of 1985. In that case, the parties are said to have entered a consent judgment, through which the 3 respondents herein agreed to vacate the land in issue.

After that judgment was recorded on 24/9/1985, the appellant says that two appeals were filed before the Court of Appeal. Those appeals were Nos. 43/86 and 153/86, which were thereafter consolidated. The said consolidated appeal was thereafter dismissed by the Court of Appeal on 19/3/1987.

Following the dismissal of the appeal, the respondents were evicted.

However, in the year 2006, the respondents are said to have instituted fresh proceedings before the Saboti Land Disputes Tribunal, on the question of the suit property. Those proceedings are said to have been conducted behind the appellant's back.

The proceedings thereafter culminated in the award being given by the Tribunal, which was subsequently adopted as a judgment in Kitale CMC Land case No. 109/06.

It is the execution of that judgment which the appellant now seeks.

In answer to that application, the 1st respondent submitted that the appellant was abusing the process of the court, by filing multiple applications, which sought the same reliefs.

One such application was filed in Misc. suit No. 110/06, submitted the 1st respondent. That suit was said to touch on the same subject matter as in this suit. However, when the court declined to adjourn the application, the appellant had it withdrawn.

For the sake clarity, I find it prudent to explain that Misc. Suit No. 110/06 was the application by the appellant herein, for leave to institute judicial review proceedings.

According to the respondents, the stay order issued in Misc. Suit No. 110/06 lapsed when the appellant failed to serve the respondents with the substantive judicial review proceedings within 21 days from the date when the appellant was granted leave to institute the substantive action.

On the other hand, the appellant expressed the view that the stay order was still in force; only that the magistrate's court had wrongfully chosen to ignore it.

To my mind, this case raises a fundamental question regarding the compliance with parallel orders issued by different courts. First, there is the consent judgment in Eldoret HCCC No. 67 of 1985. In that suit there are a total of 48 plaintiffs. The subject matter of the suit was L.R. No. 5364/2, which was allegedly purchased jointly, by all the plaintiffs and the defendants in that suit.

It is instructive to note that the defendants in that suit were Michael Wamalwa Kijana, Ndege Lumunyasi and Ronald Wekesa.

On 24/9/1985, the Hon. V.V. Patel J. recorded a consent judgment, in the presence of the advocates for the parties as well as in the presence of all the three defendants and most of the plaintiffs.

By that consent judgment, the plaintiffs together with the 2nd and 3rd defendants therein, were to quit, vacate and deliver up vacant possession of the suit property to the 1st defendant. It was further declared that the plaintiffs and the 2nd and 3rd defendants had no legal claim of right or other interest whatsoever in

the suit property.

In the light of that consent order, it does appear very strange indeed that subsequently, some 48 persons lodged a claim before the Saboti Land Disputes Tribunal, for “THREE RIVERS FARM PLOT NO. 5364/2 L.R. 1246, 602 ACRES.”

The Tribunal awarded the farm to the 48 farmers.

In effect, there was then a decision of the tribunal, which was wholly inconsistent with the consent judgment in ELDORET HCCC NO. 67 of 1985.

In the circumstances, I hold the considered view that if the award by the Tribunal was given effect, yet the appellant was striving to have it upset through the Judicial Review, the end result would most probably be a negation of the consent judgment.

As the consent judgment appears to be in force, it could be used by the appellant to evict the respondents from the suit property. At the same time, the respondents might feel inclined to have the eviction order executed.

The existence of those two parallel orders issued by competent courts of law can only lead to total confusion. It is for that reason that I do hold that it is in the interests of justice to stay the execution of the eviction order until the appeal is heard and determined. This decision is informed by the fact that the appellant is presently in occupation; which occupation was pursuant to a consent judgment that has not been upset.

An attempt to review the consent judgment failed. And thereafter, an appeal to the Court of Appeal, challenging the dismissal of the application for review was dismissed by Nyarangi, Platt and Gachuhi JJA. All the three judges of appeal held that the consent judgment was valid and binding.

Can that judgment be varied, reversed or vacated indirectly through the execution of the judgment in Kitale CMC Land Case No. 109/06?

To my mind, that is a very serious issue indeed. I therefore hold that until that issue is resolved substantively, the subject matter of this appeal should remain intact, hence the order for stay of execution.

However, in order to ensure that justice is done across the board, I further direct the appellant to ensure that the property is preserved in its current state. He shall not dispose of the property or any part thereof either by way of sale, gift, sub-division or otherwise howsoever. Also, he shall not in any manner cause the property to be encumbered. These orders will remain in force until the appeal is heard and determined.

Meanwhile, the costs shall abide the outcome of the appeal, as I find that it would only be fair that the party or parties who ultimately succeed in the appeal, should also be awarded the costs of this interim application.

Finally, it is directed that the appeal be listed for hearing on a priority basis. It is vital that this whole dispute be resolved soonest.

Dated and Delivered at Kitale, this 15th day of October, 2007.

FRED A. OCHIENG.

JUDGE.