



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Misc Appli 187 of 1996

KIBIRGEN ARAP SAMOEI

KIPROTICH ARAP NGELECHE

JEPLETING KOBOT

KIPKERIN ARAP

TARUS.....APPLICANTS

VERSUS

ATTORNEY GENERAL.....RESPONDENT

RULING

The Applicants filed this Notice of Motion on 14th June,1996 under the provisions of Order 53, Rule 3 and 4 of the Civil Procedure Rules after another application which they had filed earlier was struck out on 4th June, 1996. This was Eldoret H.C.Misc. Civil Application No. 5 of 1996 also for judicial review orders.

After Justice Nambuye struck out the earlier application she granted the Applicants leave to file a fresh application. This order was deemed to be the order of leave for the filing of the present application. There was no order that the leave operate as a stay of the decision being challenged herein, namely the Decree of the Kapsabet S.R.M.C. Land Disputes Tribunal case No.4 of 1995.

Exactly ten (10) years later the suit is still pending and the applicant’s have later filed an application dated 31st May, 2006 for inter alia, following orders:-

“1.....

2. **That there be a stay of execution of the decree of the Kapsabet**

Senior Principal Magistrate court Land Dispute Tribunal

Case No. 49 pending the hearing and determination of this application inter partes and thereafter pending the hearing and determination of the main motion on judicial review.

3.

4.”

The application opposed. Order 53, Rule 1 (4) provides:-

“4. The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as stay of proceedings in question until the determination of the application, or what the judge orders otherwise.”

I have carefully perused and studied these provisions. My understanding and interpretation is that the question as to whether the grant of leave is to operate as stay ought be considered by the Judge at the time leave is being considered. It is perhaps arguable whether the judge can post-pone the hearing or determination of stay to a later stage or set it down for hearing inter-partes.

Be that as it may, the significant issue in the application before this court is that, strictly, no application for leave was ever made as required by orders 53 of the Civil Procedure Rules. The leave it appears was granted after the court dismissed an earlier application on some technicalities. The court must have exercised its inherent jurisdiction to grant leave. But there was no reference or order regarding stay.

In my view since there was no application for order of leave to operate as stay and no such order was ever granted, the matter is closed. A party is bound by his pleading. In this case there is no formal application for leave and stay.

This court would be failing in its duties if it does not make some observations regarding the timing of this application. The substantive application was filed on 14th June,1996 which is exactly ten (10) years ago. It has not been prosecuted. The record shows that the Applicants are not genuine and committed in prosecuting this application.

The interested parties did not execute the Decree which is the subject matter of the application. This amounted to a “stay” for ten (10) years by default. What kind of stay did the Applicant need? One for twenty(20) years or a century? I hold that the application herein amounts to an abuse of the process of the court due to the inexcusable and inordinate delay in prosecuting it. Even if this court had powers to grant stay at this stage, I would have rejected it on this ground.

I do hereby dismiss this application dated 31st May,2006 with costs to the interested parties.

M.K. IBRAHIM

JUDGE

2/08/2006

Coram – Ibrahim ‘J’

C/C - Chelang’a

Mr. Keter for the interested parties.

No Appearance for the Applicants.

Ruling read in their presence.

M.K. IBRAHIM

JUDGE