



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Misc Appli 236 of 2003**

**JOSEPH MEME**

**JULIA CIAMAURU.....APPLICANTS**

**VERSUS**

**REUBEN MURUNGI.....RESPONDENT**

**RULING**

1. The Application dated 11.11.2003 seeks the following orders:

i) .....

ii) That the Honourable Court be pleased to stay the warrant of eviction dated 29.2.00 and 1.10.03 in Meru HCC Appeal No. 101 of 1990 and the order dated 7.11.03 until this application is heard and determined.

iii) That the Honourable Court be pleased to cancel the two warrants mentioned in prayer 2 above.

iv) That these orders to be served upon the O.C.P.D Maua for compliance.

v) That the Honourable Court be pleased to issue any other orders, it may deem just to grant for and interest of justice.

vi) That costs of this application be provided for.

2. The said Application is expressed to be brought under the provisions of Order XXI Rule 22 of the Civil Procedure Rules as well as S.3 and S.3A of the Civil Procedure Act.

3. Before returning to that Application, I think it is important to state, in summary, how the parties came to this particular stage of their protracted dispute. I gather that the original disputants were Zakaria M'Itirithia and his son, Reuben Murungi on one hand and one M'Inyingi Mutiga on the other. In proceedings before the Senior Resident Magistrate, Meru in PMCC No. 240/1988, it was the case of M'Itirithia and Murungi that Mutiga trespassed onto unadjudicated land occupied by them and destroyed Murungi's house and crops. They wanted him to be evicted and to pay damages plus costs. On

22.9.1989, the matter was referred to arbitration by elders and on 4.5.1990, the elders' award was read to parties. On 14.5.1990 an application to set aside the arbitration award was filed by Mutiga and the same was dismissed by Hon. Mary Mugo, SRM on 30.8.1990 and the learned Magistrate also proceeded to confirm the award as the Judgment of the court.

4. Mutiga then filed HCCA 101/90 with M'Itirithia and Murungi as Respondents. The same was heard and judgment delivered by Oguk J. on 22.7.1991 and the upshot of which was that Mutiga's Appeal was dismissed with costs to M'Itirithia and Murungi. The learned Judge said this while concluding his judgment and in order to avoid a multiplicity of suits over the same lands;

"I hereby give the plaintiffs liberty to eject the Defendant and his family, servants or agents from the suit land using such reasonable force as may be necessary in the circumstances. This means that they will have to get the services of the police or the court Bailiffs for this purpose".

5. Before granting these final orders, the learned Judge allowed the Appellant a period of 2 months to vacate the land after harvesting any fresh crop on it.

6. On 13.5.1993 Kuloba, J. allowed an Application by the Respondents for committal of Mutiga to Civil Jail and the Judge in doing so said;

"The Respondent is not having any reason why he has not obeyed Oguk J's order of 22.7.1991. He is sent to civil jail as being in contempt by disobeying that order...jailed for six months"

7. On 24.6.1997, an injunction order was sought by Reuben Murungi against the present Applicants who are son and daughter-in-law of the Appellant Mutiga. The Applicants opposed the Application which was allowed and when they disobeyed it, were sentenced on the part of Joseph Meme to 6 months imprisonment for contempt of court and on the part of Julia Ciomaura to a fine of Ksh.500/- or one month imprisonment, by Etyang J.

8. On 12.1.1998, the Applicants sought a review of the order of 17.12.1997 for their committal to Civil Jail and their release from custody pending the hearing of that Application. It is unclear what happened to it but another

Application seeking to commit them to Civil Jail was filed on 27.1.1998 and heard on 16.7.1998 by Juma J. who stated as follows;

"Application to commit the sons of the Respondent for contempt of court is incompetent. The persons to be committed were never parties to the suit. They were living on that property when suit against their father was filed. They ought to have been joined to the suit. The father who has sued was already vacated the land in compliance with the court order. Application is dismissed with no order as to costs".

9. On 29.2.2000, a warrant to give vacant possession, premised on the Orders of Oguk J. dated 22.7.1991, was issued, directed at the Applicants amongst others. On 31.3.2000 the Applicants sought by a Chamber Summons Application the revocation of those warrants and soon thereafter, the matter took an extra-judicial dimension when the offices of the District Commissioner, Meru North District and the District Officer, Igembe Division, the Officer Commanding, Maua Police Station exchanged detailed correspondence on the manner in which the warrants were being executed. It will be recalled that Oguk J. specifically ordered the use of "reasonable force" by the police and court bailiffs in the eviction. The correspondence elicited the reaction of the Deputy Registrar of this court and the then Chief Justice, Hon. Mr. Justice Chunga.

10. Along the way in any event and returning to the record, the present Applicants realized that they were not party to the prior suit in which eviction was ordered and they applied to be joined in that suit i.e. HCCA 101/1990. Commissioner of Assize, G.A. Omwitsa heard a Preliminary Objection raised to the hearing of that Application, upheld it and struck out the Application. It is important to emphasize why he did so. He stated in part as follows:-

“According to the record the suit has been decided and orders therein executed. Mr. Mbogo for the applicant has emphasized third prayer of stay of substance of the Application. Court cannot grant order of stay of orders which have been executed. There is nothing pending on record to be determined. If the applicant who now seek to be joined have been in possession for along period... they ought to have been aware of the suit and subsequent proceedings between the parties therein.”

11. Parties continued filing applications against each other throughout 2000 and 2001 and finally on 21.2.2002 another warrant to give vacant possession was issued for the Officer Commanding Police Division Meru North District i.e. OCPD, Meru North District to remove the Applicants and their property from the suit land. An issue arose as to the authenticity of the warrant issued and strangely by correspondence between the Advocate for the Applicant, the OCPD and the Deputy Registrar of this court, the execution of the warrants was stayed by the Deputy Registrar on 22.10.2003. At a court session on 7.11.2003, the stay aforesaid was lifted and the execution of the Warrants was allowed.

12. The Applicants then changed tact and abandoned any further action within HCCA 101/1990 and filed this Miscellaneous Application and on 11.11.2003, Onyancha J. granted interim orders of stay of execution until the said Application was heard inter-parties. It finally came for hearing on 4.7.2006 and is the subject of this Ruling as earlier stated.

13. Let me begin by addressing the Rule invoked by the Applicants i.e. Order XXI Rule 22 as well as S.3 and S.3A of the Civil Procedure Act. Order XXI Rule 22 provides as follows:-

“1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”

14. My reading of this Rule is that the Stay order envisaged is “for a reasonable time” only to enable the Applicant take steps to obtain a stay of execution at;

(i) the court which passed the decree,

or

(ii) any court having appellate jurisdiction in respect of the decree or the execution thereof.

15. The warrant sought to be stayed was issue by this court and this court cannot within the meaning of Order XXI Rule 22 be the “court to which a decree has been sent for execution.” In other words the Applicants have invoked the wrong Rule to the wrong court for the wrong reasons and the Rule is not available to them.

16. S.3 and S.3A of the Civil Procedure Act have been invoked. It has been said time and time again that those two sections cannot be applied where there are other substantive procedural provisions available to an Applicant. The present Applicants most certainly have other avenues to ventilate their grievances and I am certain that invocation of S.3 and S.3A per se is not necessarily the only way they can get a remedy. In any event, what remedy is being sought under S.3 and S.3A aforesaid? None has been cited.

17. If the Applicants have not cited the correct law and have used the wrong procedure, what exactly is their position in any event? I have detailed out what efforts they have made to retain possession of the disputed land within HCCA 101/90. It is clear that they hit a dead end. They have in this Application also titled it, "In the matter of Meru High Court Civil Appeal No. 101/1990" and one of their arguments in support is that they were never parties to that Appeal. I have elsewhere set out their efforts within that Appeal including all the attempts to stop eviction. They were even jailed for contempt of court and now they are saying that they were never heard in that Appeal! That cannot be the whole truth and nothing but the truth!

18. The other problem I have with the Application is this; the orders of stay of the execution of the warrants are sought until the Application is "heard and determined." It has been heard and is being determined. If I was to grant the stay of execution, and it is clear that I will not, to what avail would it be if it was to last until this Ruling? What event is the stay of execution attached to? What exactly do the Applicant want to do with those orders? Stay of execution in my view is not an order in perpetuity and cannot be conclusive of the rights of parties.

19. It is by now quite clear that prayer 2 of the Application dated 11.11.2003 cannot be granted. If that be so, not one reason has been advanced why prayer 3 can be granted. There is no illegality as to the issuance of the warrants, which has been cited. The Applicants have been aware of the said warrants since they were first issued and have made numerous attempts to have the same nullified. They have failed and fail they will again.

20. What I am saying in simple terms is that the Applicants have resiliently fought eviction but on all fronts they have not been successful. They are holding on to the orders of Juma J. dated 16.7.1998 refusing to commit them to civil jail and those of Tuiyot J. of 10.10.2001 (a public holiday!) agreeing with Juma J. to say that they are entitled to the suit land. Refusal to commit a party to civil jail does not mean that the said order has conferred title or ownership to land. It does not also mean that prior orders of the same court by other judges cannot be complied with. The Applicants are chasing the wind as far as this court is concerned and least of all they cannot by a Miscellaneous Application seek to overturn a final Judgment of this court in HCCA 101/1990 to which no Appeal (so far as I can see) has been preferred. The effect of the Application dated 11.11.1999 if one was to look at it in its totality is precisely that.

21. Land is a truly sensitive subject and eviction from it quite a painful pill for the victim but the route of law is sometimes very painful indeed and the Applicants must face it squarely.

22. The Application dated 11.11.1999 is not only an abuse of court process, but is also vexatious, frivolous and misguided. It is hereby dismissed with costs to the Respondent.

23. Orders accordingly.

Dated, signed and delivered at Meru this 26<sup>th</sup> Day of September 2006.

ISAAC LENAOLA

JUDGE

In the Presence of:

**N/A Advocate for the Applicant**

Mr. Okwaro holding brief for Mr. Kariuki Advocate for the Respondents

ISAAC LENAOLA

JUDGE