

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Misc Civ Appli 167 of 2003

ISAYA SIMIYU MATETE.....APPLICANT

VS

MOSES WASIKE MATETE.....RESPONDENT

R U L I N G

By an amended motion the applicant invoked the provisions of sections 3, 3A and 63 (c) and (e) of the Civil Procedure Act and Order L rule 17 of the Civil Procedure rules in which he sought to have an order of stay of execution granted on 28/8/2003 set aside, varied or discharged. In the same motion the applicant made an alternative prayer for an order of injunction to restrain the Respondent from ploughing, tilling, cultivating or interfering in any manner with the respondent's use of L.R.NO. BOKOLI/KITUNI/387 pending the hearing and determination of the intended appeal. The motion is supported by a supporting and a supplementary affidavit both sworn by Isaya Simiyu Matete, the applicant. The Respondent, Moses Wasike Matete filed a replying affidavit to oppose the motion.

The applicant's argument is that the Respondent used the order of stay to use the land which was not in his use before obtaining the order. He now fears that this may breach the peace currently existing in the suit premises. He now wants this court to issue as an order restricting the appellant to only a portion measuring 80 feet by 100 feet.

Mr. Kraido, opposed the application stating that the application is vexatious and frivolous. He is of the view that to grant the orders prayed in the motion will be oppressive to the Respondent who has a genuine appeal and lawful orders of stay of execution. He argues that the appellant has been in occupation of the suit land for a period of over 12 years any order barring him will interfere with the status quo.

I have considered the submissions presented by both learned counsels. I have also perused the material placed before me. It is not in dispute that this court granted the Respondent an order for stay of execution on 28/8/2003. The order did not restrict the Respondent to any part or portion or size of the suit premises. The order for stay was granted pursuant to the provisions of Order XLI rule 4 of the Civil Procedure rules. It is in my considered view that the applicant only set aside an order issued pursuant to the above mentioned provisions under order XLI rule 4 (1) of the Civil procedure Rules. To this extent I find the motion being incompetent.

The applicant has prayed for an alternative order of injunction pending appeal. The Respondent says he has been on the suit land since 1975 hence such an order would be oppressive to him. From the material placed before me the actual status on the ground is not clear. Whatever the case I am of the view that if I grant an order of injunction pending appeal it would interfere with the order of stay of execution and may put the Respondent out of the land. To grant the order at this stage would inflict greater hardship than it would solve.

The applicant in my view has not properly established the loss he is likely to suffer safe for the fact that he would be impaired from using part of the land. This is not a good ground to enable me exercise my discretion in his favour. I find that the loss he is likely to suffer can easily be compensated by damages in the form of massive profits. I have not also been shown how the applicant has abused the process of this court.

In the premises I find no merit in the motion. The same is dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 21st DAY OF January 2005

J.K. SERGON

JUDGE