

REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT KITALE.
HIGH COURT CIVIL APPEAL NO. 14 OF 2004.

CONSTANT KHISA ::::::::::::::::::::::::::::::::::: APPELLANT.

VERSUS

HARRY A. KEDAHA ::::::::::::::::::::::::::::::::::: RESPONDENT.

R U L I N G.

The applicant has moved the court under OXLI r.4 (1), 2 & 3 Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act cap 21 for the following orders.

- (a) There be a stay of execution of the ruling delivered on 7/10/2004 in Kitale S.P.M.C. Land case No. 34 of 2001.
- (b) That there be stay of execution of the ruling delivered on 7/10/2004 pending the hearing and determination of the appeal filed herein.
- (c) That costs of the application be provided.

The same is premised on the following grounds:-

- 1. That the applicant being dissatisfied with the Ruling in Kitale S.P.MCC No. 34 of 2001 delivered on 12/3/2004 had appealed to this Honourable court.
- 2. That unless stay of execution is granted pending appeal, the applicant stands to suffer irreparable loss and/or damage. 3. That unless stay of execution is granted, the appeal will be rendered nugatory.
- 4. That the appeal has high chances of success.
- 5. That the applicant has not been granted any stay of execution from the said ruling and/or decree delivered on 7/10/2004.

The same is also supported by the applicants affidavit dated 8/10/2004 and the further supporting affidavit dated 29/1/2005. The same is opposed vide Mr. Kidiavai's (counsel for Respondent) replying affidavit dated 14/12/2004.

I have carefully perused all these documents: Of particular interest are contents of Mr. Kidiavai's replying affidavit most of which the respondent has not responded to e.g. paragraphs 6, 7, 8, 9, 10, 11, 12 and 13. Indeed this shows that the applicant has been less than candid in his affidavits and has failed to disclose material facts, which were necessary to assist this court in making this ruling. I have also considered the oral submissions made by both counsel in court.

First and foremost, I agree with Mr. Kidiavai for the respondent that the applicant herein has a penchant for filing a multiplicity of applications seeking similar orders. This amounts to an abuse of the process of the court. The applicant has not rebutted paragraph 11 of Mr. Kidiavai's replying affidavit, which has listed 5 similar applications – which he has annexed to the affidavit – all which seek the same orders against the same judgment. I am in agreement with my brother Justice Bosire in Civil case No. 2252/1989 **ARBUTHNOT EXPORT SERVICES LTD. VS MANCHESTER OUTFITTERS SUITING DIVISION LTD & ANOTHER** that this shows absence of bona fides on the part of the applicant and this application should therefore be struck out. Be that as it may however, I think it is

important to determine this application on its merits to avoid a situation where the applicant might decide to file a seventh application of similar nature. After going through the annexures herein, I have gotten a grip on this matter. Firstly, I note that the same was filed in court as an award from Waitaluk location Land Disputes tribunal on 2/5/2001. The same was formally adopted by the court on 30/5/2001. A decree was thereafter drawn by the learned Resident Magistrate L.N. Kinyanjui. That decree is nonetheless not the subject of this ruling. Pursuant to that ruling, the applicant came to court by way of Judicial Review. That motion was heard by Commissioner of Assize Mr. Birech. He dismissed the application with costs on 19/8/2003. The applicant is said to have filed an appeal against that ruling. It is not clear what happened to that appeal or why this applicant did not pursue the same. It is in my view doubtful if the applicant ever even had the said appeal admitted. The determination of that appeal would have laid this matter to rest.

Instead of pursuing that matter however, the applicant decided to shuttle between one court and another. This application is not for stay in respect of the decree or order adopting the Tribunal's award. It is against the order by Mrs. Ong'udi – SPM dated 7/10/2004. As rightly stated by Mr. Kidiavai, that order has not been annexed to this application – nor is the application giving rise to that order. How then is this court supposed to determine whether the applicant's appeal has high chances of success? Why did he not pursue his appeal against the orders dismissing his motion for Judicial Review, which he purports to have filed almost 2 years ago? Even if the appeal against the orders of 7/10/2004 was to succeed, this would not affect the ruling of the Hon. Commissioner of Assize which is still on record or the decree issued after the dismissal of the application for Judicial Review.

This application is clearly an abuse of the court process and a waste of the court's precious time. It lacks merit. I have no reason to allow it at all. The same is hereby dismissed with costs to the respondent.

WANJIRU KARANJA.

JUDGE.

Delivered, signed and dated at Kitale this 12th day of May, 2005 in the presence of:-