



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCC. MISC. APPL. NO. 225 OF 2000

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION AND
MANDAMUS

IN THE MATTER OF: THE REGISTERED LAND ACT CAP. 300

IN THE MATTER OF: THE LAND (GROUP REPRESENTATIVES) ACT, CAP 287

AND

IN THE MATTER OF: LAND ADJUDICATION ACT, CAP 284

REPUBLIC

=VERSUS=

COMMISSIONER OF LANDS1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

=VERSUS=

ISANGAWISHI GROUP RANCHINTERESTED PARTY

- EX-PARTE
- 1: EDWARD LENJO MUSAMULI
 2. PASCAL SHOLOO
 3. MILTON MASALE MWIWAWI
 4. RICHARD MWABILI
 5. BERNARD NDOLE MBAYA
 6. NOBERT LENJO MSHAMBA

RULING

1. In the Notice of Motion dated 22nd October, 2012, the ex parte applicant is seeking for orders that;
 - a) the warrant of attachment issued to the respondent be set aside
 - b) the court grants a stay of execution.
 - e) the applicant be granted leave to file a reference.
 - d) the auctioneers costs be borne by the respondent.
 - c) costs of this application be provided for.

2. The application is supported by the five grounds on the face of it and the affidavit deposed by Norbert Lenjo Mshamba. One of the grounds being; they were not notified of date when the ruling was delivered thus denying them a chance to file a reference against the taxed costs. Further that they have not been served with a copy of that ruling to date. They have annexed letters from the ex parte advocates who wrote to court enquiring when the ruling would be ready. The applicants argue that it is their right to file a reference hence the entire execution process ought to be set aside.

3. The application is not opposed by Mr Odongo for the 1st ex parte applicant but it is opposed by the firm of Munyithia, Mutugi, Umara & Co advocates for the interested party. The interested party filed grounds of opposition inter alia that the applicants are only seeking to delay the execution process. Secondly that the applicants were excessively negligent in not checking the progress of the file in court from the time the bill of cost was prosecuted up to the time the ruling was delivered.

4. Both counsels filed written submissions for and against the application and which I have considered. The applicants brought out the facts of their case and referred the court to the decision in ***R -vs- The Minister for Agriculture Misc. Civil App. No. 621 of 2000*** and the provisions of the Remunerations Order in regard to instructions for judicial review applications. The respondent submitted on the three headings of setting aside, warrants, stay of execution and leave to file reference out of time. They referred the court to;

i) *Advocates Renumeration Order*

ii) *Nyamogo & Nyamogo Advocates -vs- Mwangi EALR (2008) Pg.281*

iii) *William Muthee Muthami -vs- Bank of Baroda (K) Ltd. 2007 eKLR*

The decree, the subject of this dispute is a decision of the Deputy Registrar. It is necessary to mention at the outset that I have no jurisdiction to set aside the Deputy Registrar's orders unless the matter is brought as a reference. The execution process sought to be set aside by the application is a consequence of the decree passed by the Deputy Registrar when he taxed the costs.

5. From the record, the applicants have not laid any basis either in their grounds or the submissions why the warrants issued should be set aside. The only reasons they are asking the court to set aside the process is because they were not informed of the ruling. The grounds for setting aside orders were laid in the renowned case of ***Patel vs E.A. Cargo Handling*** (1975) EA 75 and ***Shah vs Mbogo*** (1967) EA 75 which grounds include inter alia that a party must a good defence, prejudice to be suffered and the explanation for the delay. This is not obtaining in the present circumstance as the applicants participated in the taxation. As submitted by the respondent, the applicants have not faulted the process under which the warrants were issued. I do find the prayer for setting aside as lacking in merit and dismiss it.

6. The 2nd prayer is for an order to stay the execution process. In prayer B of the motion, the stay sought is open ended as the applicants do not state stay pending what action? The applicants also made no mention or justification for seeking stay of execution in his submissions. The case of **R vs Minister for Agriculture supra** is applicable in my view if and when the reference filed and fixed to be heard and not at the stage of seeking leave to file reference out of time. The respondent cited two cases i.e **Nyamogo & Nyamogo** and **Sande Investments supra** where Kasango J held that the Civil Procedure Act does not apply to the Advocates Remuneration Order and vice versa hence she declined to grant stay of execution for advocates' costs. I am alive to the fact that these decisions are merely persuasive on me. However in the instance such as this where no reasons has been put before this court to consider whether or not to grant the stay, I have no basis to disagree with the findings of Kasango J in the authorities quoted. The grounds to be considered for granting stays are set out under order 42 of the Civil Rules were I to find the Civil Procedure Rules are applicable to this case. The applicants have not proved any prejudice they are likely to suffer as they have not submitted that the interested party is incapable of refunding the costs in the event the intended reference is successful. Further the Court of Appeal in the case of **Francis Kaba vs Nancy Wambui & another** the court held **"we do not think that stay can be granted in respect of costs. Cash paid if any can always be refunded. In the result I also disallow this prayer"**.

7. On the prayer for leave to file reference out of time, the applicants stated they were not made aware of the date when the ruling was to be delivered. From the records, the Deputy Registrar made a finding on taxed costs on 16th December 2011. It is indicated in the court records that notice had been circulated through the public notice board and copy sent to the Law Society of Kenya Mombasa Branch. When the deputy registrar delivered the ruling none of the parties or their advocates was present. The applicants made no mention whether they confirmed such notice was ever placed on the notice board. There is a possibility that the notice may have skipped their advocate's attention. But he cannot blame the respondent for not informing him when the respondent was also not present when the ruling was delivered. In any event as rightly put by the respondent, the applicants did not put any effort to follow up on the ruling. The only letters annexed in their supporting affidavit were the ones written by the interested party to court. In conclusion it is not deniable that they did not become aware of this ruling in time. On this account, I shall grant them an opportunity to present their case on appeal. Consequently prayer No. 4 is granted for the applicant to file a reference within 7 days of the date of delivery of this ruling.

8. Lastly on payment of the auctioneer's costs, having found nothing wrong with the process of obtaining the warrants of execution, it follows that the execution process was regular and the auctioneers costs if any are to be borne by the applicants. On Costs of this application, I order that each party will bear their respective costs. The application therefore succeeded only in respect of prayer no. 4.

Dated and delivered in open court at Mombasa this 11th day of February, 2015

A. OMOLLO

JUDGE

11.2.2015