



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 49 OF 2020 (O.S)

ZIPPORAH MUHOLO WAMIRA.....APPLICANT

VERSUS

WILLIAM OCHIENG' DANIEL OMORO.....RESPONDENT

RULING

WILLIAM OCHIENG DANIEL OMORO (the Respondent herein) has already obtained a Judgment in **SIAYA PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No 39 of 2003** ordering that **ZIPPORAH MUHOLO WAMIRA** (the Applicant herein) be evicted from the land parcel **NO SOUTH UGENYA/YIRO/1462** (the suit land). That suit is pending execution and the Respondent has already filed a Notice to show Cause application which was coming up on 6th August 2020 for the Applicant to show cause why she should not be evicted from the suit land.

The Applicant has now filed in this Court an Originating Summons dated 29th July 2020 seeking the main order that she is entitled to be registered as the proprietor of the suit land in place of the Respondent herein having on been in adverse possession thereof for a period in excess of 12 years.

Simultaneously with that Originating Summons, the Applicant filed a Notice of Motion under **Section 13(7) of the Environment and Land Court Act** seeking the following orders: -

1. Spent

2. That pending the determination of this motion, this Honourable Court be pleased to stay the proceedings in SIAYA PRINCIPAL MAGISTRATE'S COURT AWARD NO 39 of 2003.

3. That pending the determination of the main suit, this Honourable Court be pleased to stay the proceedings in SIAYA PRINCIPAL MAGISTRATE'S COURT AWARD NO 39 of 2003.

4. That costs be provided for.

The application is anchored on the grounds set out therein and supported by the Applicant's affidavit dated 29th July 2020.

The gravamen of the application is that whereas the suit land has been registered in the names of the Respondent since 1st December 1971, the applicant, her late husband **ELKANA ODUOR WAMIRA** and their children have since 1970 established their matrimonial home on the said land where they reside. That the Respondent filed a suit against the Applicant at the **SIAYA LAND DISPUTES TRIBUNAL** seeking to evict her. Following the adoption of the award in **SIAYA PRINCIPAL MAGISTRATE'S COURT CASE No. 39 of 2003**, the Respondent now wants to evict her and that will result in irreparable loss and render this suit nugatory. That the orders sought herein will not prejudice the Respondent.

The application is opposed and by a replying affidavit dated 13th August 2020, the Respondent has averred, inter alia, that this application is an abuse of the Court process aimed at defeating the Judgment in **SIAYA PRINCIPAL MAGISTRATE'S COURT CASE No 39 of 2003** where the Applicant has been summoned to show cause why she should not be evicted from the suit land. That the Applicant cannot seek a stay when there is no appeal and she has also not disclosed to this Court the full facts of the case.

When the application was placed before me on 2nd September 2020 during the service week at the **ENVIRONMENT AND LAND COURT KISUMU**, **MS IKHUMBA** Counsel for the Applicant requested that I grant ex – parte orders but I declined and directed that the application be canvassed by way of written submissions which were duly filed both by the firm of **K. N. WESUTSA & COMPANY ADVOCATES** for the Applicant and by the Respondent in person.

I have considered the application, the rival affidavits and the submissions filed.

The application is anchored on **Section 13(7) of the Environment and Land Court Act** which provides as follows: -

“In exercise of it’s jurisdiction under this Act, the Court shall have powers to make any orders and grant any relief as the Court deems fit and just, including –

- (a) Interim or permanent preservation orders including injunctions;***
- (b) Prerogative orders***
- (c) Award of damages***
- (d) Compensation***
- (e) Restitution***
- (f) Declaration***
- (g) Costs”***

In her submissions, Counsel for the Applicant has cited the provisions of **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules** and also the case of **BUTT .V. RENT RESTRICTION TRIBUNAL 1982 KLR 417** in an attempt to persuade this Court to grant the orders sought in the Notice of Motion dated 29th July 2020. That provision and the case of **BUTT** (supra) are inapplicable in this situation because what is before me is not an appeal. **Order 42 of the Civil Procedure Rules** deals with appeals and **Rule 6(1)** states that: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.” Emphasis added.

Citing that provision, Counsel for the Applicant has submitted as follows in paragraph 6: -

“The Applicant submits that the provisions of the afore – mentioned law apply mutatis mutandis with regard to the nature of stay being sought in these proceedings. She has satisfied the initial condition as she has immediately moved this Honourable Court upon being served with the show cause Notice.”

While it is true that the Applicant moved to this Court upon being served with a Notice to show cause, she has not moved to this Court on appeal. Instead, she has filed an Originating Summons claiming the suit land by way of adverse possession. Neither **Order 42 of the Civil Procedure Rules** nor **Section 13 (7) of the Environment and Land Court Act** donates to this Court powers to grant the prayers sought in the Notice of Motion. It is true, in my view, that if the Applicant is evicted from the suit land which, as per her supporting affidavit, she and her family have occupied for the last five (5) decades, she will suffer irreparable loss. If there was an appeal before me, I would have no hesitation in granting the orders sought. However, in the absence of an appeal, there is no basis upon which this Court can invoke it’s discretionary powers under **Order 42 of the Civil Procedure Rules** to order a stay. It is not clear why the Applicant did not appeal the award of the **SIAYA LAND DISPUTES TRIBUNAL** or the subsequent Judgment in the Subordinate Court. Had she done so, I think the twin issues of jurisdiction of the Tribunal and limitation would have been arguable.

I have also considered whether I should then stay the proceedings in **SIAYA PRINCIPAL MAGISTRATE’S COURT CASE No 39 of 2003** pending this suit pursuant to the doctrine of sub – judice. This is provided for in **Section 6 of the Civil Procedure Act** as follows: -

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed.” Emphasis added

From the documents annexed to the application, the award of the Tribunal was adopted as a Judgment of the **SIAYA PRINCIPAL MAGISTRATE’S COURT** on 14th March 2006 by the late **S. A. OKATO (SRM)** over fourteen (14) years ago. Therefore, the proceedings in the Subordinate Court are no longer pending which is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as: -

“Remaining undecided; awaiting decision.”

In any event, the Applicant is not entirely without recourse. The Notice to Show Cause application is before the Subordinate Court which is well suited to determine it and she will have an opportunity, if she has not already done so, to show cause why she should not be evicted.

The bottom line really is that in the absence of any appeal from the Judgment or any of the orders emanating from the **SIAYA PRINCIPAL MAGISTRATE'S COURT CASE No 39 of 2003**, this Court cannot grant any orders of stay of proceedings as sought by the Applicant.

The up – shot of the above is that the Notice of Motion dated 29th July 2020 is devoid of merit. It is accordingly dismissed with costs to the Respondent.

Boaz N. Olao.

J U D G E

30th September 2020.

Ruling dated and signed at BUNGOMA this 30th day of September 2020.

To be delivered on 30th September 2020 by way of electronic mail as was advised to the parties on 2nd September 2020 in keeping with the COVID – 19 guidelines.

Boaz N. Olao.

J U D G E

30th September 2020.