



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISC. CIVIL APPL. NO. 303 OF 2010
IN THE MATTER OF ITEN SRM COURT – SUCCESSION
CAUSE NO.28 OF 2009

ESTATE OF RUTO KIMOTUET alias RUTO KIMWATEK (DECEASED)

LUKA CHESIRE RUTO

TIMOTHY K. KOIMA

JOHN KIPCHUMBA RUTO &

RICHARD KIPKOECH RONO APPLICANTS

=VERSUS=

CHEMWOLO RUTO MOTWEK RESPONDENT

RULING

The Applicants have asked this court to set aside the orders which were made on 31st January, 2013, when the Court dismissed their application dated 24th November, 2010.

The Applicants also asked this Court to reinstate their application dated 24th November, 2010, so that it could be heard and determined on merit.

It is common ground that on 31st January, 2013, the matter was before *Azangalala J.* (as he then was), for the hearing of the application dated 24th November, 2010.

The hearing date had been fixed by consent of the two parties. However, the applicants and their advocate failed to attend court, whilst *Mr. Wafula* advocate attended court on behalf of the Respondent. *Mr. Wafula* told the learned Judge that he was ready to proceed with the case. But because the Applicants were not in court, to prosecute their application, the Respondent asked the court to dismiss the said application.

After giving due consideration to the matter, the learned Judge noted that there was no reason which had been given to explain the absence of both the applicants and their lawyer.

In those circumstances, the Court dismissed the application, on the grounds that the Applicants had failed to prosecute it.

Following the dismissal of the application dated 24th November, 2010, the Applicants moved this court, by way of a Notice of Motion, seeking the reinstatement of that application.

It is the Applicants' contention that the failure of their advocate to attend court on 31st January, 2013, was inadvertent. Apparently, the lawyer had failed to diarise the hearing date in his diary.

The Applicants feel that the reinstatement of the application cannot be prejudicial to the Respondent.

Furthermore, the Applicants believe that they have a good case, on merits, especially when it is considered that the trial court lacked jurisdiction, (in the understanding of the Applicants).

Secondly, the Applicants asserted that the issue as to dependancy (or otherwise) of the Respondents, could only be ascertained through oral evidence.

On his part, the Respondent argues that Justice had been done to the party who was diligent enough to attend court when the case was scheduled for hearing.

The Respondent also indicated that as at 20th May, 2013, the Applicants were not seeking the reinstatement of the application dated 24th November, 2010. That proposition was based on the Respondent's interpretation of the hand-written comments, which appear on the face of the letter from the District Surveyor, Keiyo District, dated 15th May, 2013.

The hand-written comments are in the following words:

“Extended to 12/06/2013, the parties through Chief to agree on modalities of survey (signed). 20/05/2013”.

In my understanding, what was being extended was the date for the implementation of the order made in the Succession Cause No. 28 of 2009. I say so because the letter itself reads as follows:-

MINISTRY OF LANDS

COURT

OF ARMS

KY/LL/VOL. 1/107

DISTRICT SURVEY OFFICE

PO BOX 219 – 30700

ITEN

15th May, 2013.

THE DISTRICT OFFICER

KAMARINY DIVISION

P.O. BOX 200

ITEN

REF: SUCCESSION CAUSE NO. 28 OF 2009

“ The above order is yet to be implemented and the date set is Wednesday the 22/05/2013.

The copy of the order is enclosed for your clarity. Security has been sighted as major component in the implementation of this order. Please accord us the security as we have confirmed that some interested party at one time chased away the surveyors and the security detail.

By copy of this letter, the Chief IRONG location is requested to report on the security situation on the ground before the material date so that modalities of security are put in place.

(Signed)

S.M. Barasa

DISTRICT SURVEYOR

KEIYO.

CC

THE PARTIES TO SUIT

CHIEF KAMARINY LOCATION ”

The signature on the hand-written comments appears to be the same as that of **Mr. S.M. Barasa**, the District Surveyor.

Therefore, I am unable to understand why the decision by the District Surveyor, to “extend” the date for the implementation of the Court order, could be suggestive of what the applicants' views were, as at 15th May, 2013.

The hand-written note or comments do not indicate that the applicants had agreed with the Respondent and the District Surveyor, or with the Chief, that the only issue that was yet to be resolved was the question of the modalities for the exercise of survey.

The Respondent's submission was that the court did not issue a stay order at the *ex parte* stage because the court was already convinced that the applicants did not deserve an order for stay of execution.

This is a court of record. It speaks through what it records in the file. There is no need to second-guess what the court intended to say. The record should speak for itself.

I have perused the record of the proceedings on 30th May, 2013. The same indicates that the learned Judge declined to certify as urgent, the application dated 29th May, 2013.

The reason given for that decision was;

“That the application which was dismissed was dismissed in January, 2012. Since that date, no action has been taken in the file.

I do therefore direct that the application be served upon the Respondent and a hearing date be taken in the registry, in the normal manner”.

From that record, there is no reference to the issue as to whether or not the order for stay of execution was justified. That issue was not determined then, and needs to be determined at this stage.

Having given due consideration to the application, I hold the view that it is imperative that the issue of jurisdiction be determined, in a substantive manner.

It is well settled that any court of law or tribunal adjudicating on legal matters, can only act lawfully, if it had jurisdiction.

Jurisdiction is everything; without jurisdiction, a court that takes any action, does so in vain. The orders issued by such a court are a nullity.

Therefore, if the applicants were to persuade the court that the Senior Resident Magistrate's Court lacked jurisdiction, then everything that that court had done would be of no legal effect.

In order to give the parties an opportunity to canvass that vital issue, I find that it is in the interests of justice to set aside the order dismissing the application dated 24th November, 2010. Therefore, the orders made on 31st January, 2013 are vacated.

I further direct that the application dated 24th November, 2010 be reinstated for hearing.

However, the Applicants will pay the costs of the application dated 29th May, 2013. The Applicants will also pay the costs for the Respondent, for the Court session on 31st January, 2013.

Those costs are to be borne by the Applicants because the Respondent is not at all blameworthy for the failure by the Applicants' and their lawyer, to attend court on 31st January, 2013. And because the application dated 29th May, 2013 was necessitated by the default on the part of the Applicants' lawyer, it is only fair that the Applicants bear the costs attendant thereto.

The parties are directed to fix a date today, for the hearing of the application dated 24th November, 2010.

Meanwhile, I order that there be a stay of execution of the orders made in **ITEN SRMCC SUCCESSION CAUSE NO. 28 OF 2009**. This order of stay will remain in force until the determination of the application dated 24th November, 2010.

This order for stay of execution is necessary, so as to preserve the subject matter of the application.

DATED, SIGNED AND DELIVERED AT ELDORET, THIS 4TH DAY OF FEBRUARY, 2014.

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FRED A. OCHIENG

JUDGE