



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 110 OF 2011

MUSYOKA MUTIE MAKAU PLAINTIFF/APPLICANT

VERSUS

MUNYAO MUTIE MAKAU..... 1ST DEFENDANT/RESPONDENT

PETER MUTIE MAKAU..... 2ND DEFENDANT/RESPONDENT

RULING

1. By way of **Notice of Motion** dated **5th August 2014**, the applicant seeks this court's order discharging a stay of execution order dated the **14th June 2013**.
2. Secondly, he also prays for an order directing the OCS Machakos police station to help in enforcing the decree dated 8th November 2012 as sought in an application dated the 18th December 2012.
3. The application is premised on grounds that the Court of Appeal struck out the defendant's notice of appeal and intended appeal yet they continue to enjoy stay orders issued on the 14th June 2013; it will therefore be just to have the order discharged.
4. In support of the application the applicant swore an affidavit whereby he deponed that the defendants have been enjoying stay orders on the basis of their notice of appeal. On the 25th July 2014 the notice of appeal and intended appeal were struck out by the Court of Appeal. In order to execute the pending judgment the stay order must be discharged.
5. In a response thereto, the 1st respondent/Defendant stated that the notice of appeal was struck out hence the appeal was not heard and determined on merit; He intends to seek review of the judgment and decree issued in order to have the plaintiff's suit struck out.
6. Further he stated that the pleadings were prepared by an unqualified advocate and that the Hon. **Justice Dulu** lacked the jurisdiction to entertain the case having been a land matter. He also stated that if the order sought is granted they will suffer irreparable damages and it would mean being evicted from the suit land.
6. It was submitted by **Mr. Odawa**, Counsel for the applicant that the notice of appeal and intended appeal having been struck out the logical conclusion is that the stay order has been discharged. Other issues raised were matters to be raised on appeal.
7. In his response **Mr. Kituku** learned counsel for the respondents admitted that indeed the appeal was

struck out but not on merit. He argued that a party would be at liberty to move the court on review of its order. Discharge or orders meant the defendants being evicted. He called upon the court to consider the issue of pleadings having been filed by an unqualified advocate as there was no evidence that **Jacob Ngwele** was registered to act on his own as an advocate.

8. I have duly considered rival submissions of both counsels. Right at the outset I wish to point out that on the **14th June 2013** this court granted the respondents an order staying execution of the judgment on the basis that there was evidence of a notice of appeal having been lodged with the court which was an indication of the desire to appeal against the decree issued.

9. It has now been demonstrated that the intended appeal and notice thereof having been struck out there is no pending appeal.

10. Judgment was entered herein in favour of the plaintiff by **Dulu J.** on the **7th November 2012**. The intended appeal having been struck out no appeal shall be rendered nugatory. Issues raised of whether or not the advocate was qualified should have been canvassed before the judge who presided over the matter or on appeal. This court cannot sit as an appellate court to interrogate what was considered and determined by a court of the same jurisdiction.

11. From, the foregoing, this court cannot let a stay order to remain in force unprocedurally on the grounds that the applicants will be evicted. An order of the court must be complied with.

12. In the premises I hereby discharge the order of stay granted herein on the **14th June 2013**.

13. The Respondent is condemned to pay costs of the application.

DATED, SIGNED and DELIVERED at MACHAKOS this 13TH day of NOVEMBER, 2014.

L.N. MUTENDE

JUDGE