



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
MISC. APPLICATION NO. 29 OF 2013

STEPHEN NABANGIAPPLICANT

VERSUS

MOSES MULATI..... RESPONDENT

ELVIS BARASAAGGRIEVED PARTY

RULING

By a notice of motion dated 27th March 2013 brought under Section 1A, 1B, 3, 3A of the Civil procedure Act and Order 45 of the Rules, the aggrieved party seeks for ;

- (a). Pending hearing and determination of this application Nzoia Sugar Co. Ltd. be ordered not to release cane proceeds in respect of field nos. **45107107083 and 451008307081** to the respondent.
- (b). The honourable court be pleased to review and/or set aside its orders herein dated 30th January 2013.
- (c). That consequently this court be pleased to order that the cane proceeds be released to the aggrieved party herein
- (d). costs of the application be provided for.

The application is premised on five grounds on the face of inter alia that ;

0. The aggrieved party is aggrieved.
0. There is an error apparent on the record.

It was also supported by the affidavit of Elvis Barasa and Hillary Musoko Waswa. While submitting in support of this application, Mr. Ocharo pointed out that the applicant – Mr. Stephen Nabayi did not file any documents to challenge the present application. He was dully served and as the respondent put it to court, he gave him transport to come but he does not know why he did not come to court.

The application thus opposed only by the respondent – Mr. Moses Mulati the applicant and the respondent commenced this suit by way of miscellaneous civil application on 7th January 2013. The order sought was to have caveat placed on field numbers 45107107083 and 451008307081 at Nzoia

Sugar Co. Ltd. by the respondent removed. A3 submitted by Mr. Ocharo, no relationship is explained between the applicant and the respondent or why he sued in the first place. Even in his supporting affidavit to that application, he did not explain why he wanted the caveat removed.

They entered a consent on 30th January 2013, which consent was endorsed by the Deputy Registrar on the same date.

That consent removed the caveat and added another order which was not prayed for in the application to wit "2. That cane proceeds in respect of the said two field numbers be and are released to the respondent when the same become due". It is this limb of the order which aggrieved the aggrieved party to move this court. He leased a portion of the land indicated in the field numbers from Hillary Waswa who is a brother to the respondent in 2007. The lease entitled him to three harvests. The said Hillary has also sworn an affidavit to confirm this fact.

The respondent in opposing this application swore a replying affidavit. He averred that the said Hillary did not have capacity to lease the land as the registered owner who is their father died in 1993 and the action of his brother amounted to inter-meddling with estate of a deceased. He quoted Section 45 of the Law of Succession Act. He said there is an order restraining activities on this land although he did not show the court that order. He further argued that the aggrieved party has harvested thrice and that the contract with Nzoia shows him as the owner of the land.

What came out when the parties appeared before is that the cane belonged to the aggrieved. This was a fact conceded from the court by both the applicant and the respondent.

Secondly Limb 2 of the order was not prayed for in the application. It was an obvious error on the record for the consent to introduce a new prayer that was included earlier.

The applicant merely stated in his grounds on the face of the application that "the said caveat needs to be removed to enable the parties concerned access the cane proceeds to enable them basic needs." such prayers must be comprised in the body of the application for it to be valid.

Lastly this court also note the affidavit in support of that application was sworn by one Benedict Nyongesa Awoyi. The respondent has not told this court who he is. The applicant according to the views of this court is the one inter-meddling with the estate of the deceased. Instead of using the role of trust bestowed on him as an administrator, he is merely abusing that role by introducing people who are not direct beneficiaries to the estate and disregarding the rights of other beneficiaries such as Hillary.

The application by the aggrieved party is therefore merited as this court must stop the respondent in his tracks to benefit from the sweat of the others while abusing the court process. The application is allowed in terms of prayer (c), (d), (e) & (f).

RULING SIGNED, DELIVERED AND READ in open court this 5th day of June 2013.

A. OMOLLO

JUDGE.