



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Appeal 118 of 2011

ERNEST K MBULA APPELLANT/APPLICANT

VERSUS

MOSES KIOKO MUTETI

TOM MUSAU MBULA

WAMBUA TOM RESPONDENTS

R U L I N G

Before me is a Notice of Motion dated 10th November 2011, filed by Ernest K Mbula. The application was filed under Order 42 Rule 6(6) and Order 51 Rule 1, 3 and 13 of the Civil Procedure Rules. The prayers are as follows:-

- (a) That the application be heard *ex parte* in the first instance, service of the motion being dispensed with upon consideration of the court.**
- (b) That a temporary injunction be issued restraining the Respondents, their agents and or servants from trespassing, working by themselves or letting their livestock feed on LRP No. 122/Kilome Adjudication Section, or in any other manner deal with the said land during the pendency of this appeal adversely to the interests of the applicant.**
- (c) That in the alternative the court do order that the status quo be maintained by having one of the parties involved in this suit, not their agents and or servants, nor their family members trespass and or work on the land and or feed their livestock on Land Parcel P/No. 122/Kilome Land Adjudication Section during the pendency of the appeal.**
- (d) That the costs of this application be provided for.**

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn by the applicant on 10th November 2011.

The application is opposed. The respondent filed grounds of opposition on 13th March 2012. The ground listed is only one, as follows:-

“That the application is incompetent and the order sought should not be granted.”

Parties’ counsel filed written submissions to the application. On the hearing date, Mr Mbulo, for the applicant, and Mr Kivuva, for the respondent, highlighted their client’s respective submissions.

Mr Mbulo, learned counsel for the applicant emphasized that the applicant was seeking injunctive orders to maintain the *status quo*, before appeal is heard.

Mr Kivuva, learned counsel for the respondents stated that it was difficult to determine the current *status quo* since this was family land, and all sons were entitled to access. Counsel was of the view that the matter should be dealt with in the succession cause already filed by the applicant.

This is a matter in which judgment was delivered on 6th July 2011. The applicant lost the case. He now wants to pursue an appeal. He has also filed a succession cause, however those are proceedings for the grant of letters of administration *ad litem*.

When judgment has been entered as in this particular matter, that judgment is alive and can be executed. The only appropriate order that the trial court or the appellate court can grant to stop execution of the judgment, is an order for stay of execution. The applicant has come to this court for injunctive orders or maintenance of the *status quo*, pending appeal. Such orders, though they may be issued under Order 42 rule 6(6) have to be issued only in special cases. If I grant orders of maintenance of *status quo* herein, that will mean that the judgment delivered remains effective. The substantive orders sought herein, in my view, are only more appropriate in proceedings pending final orders, not proceedings where a final order by way of judgment has been given. In our present case, judgment has been delivered. Therefore, I find that the application is misconceived, and inappropriate. I will strike it out.

Consequently, I strike out the application with costs to the respondents.

Dated and delivered this 11th day of July 2012.

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George Dulu

Judge

In the presence of:

Nyalo – Court clerk

N/A for parties.