



REPUBLIC OF KENYA

High Court of Kisii

Constitutional Petition 61 of 2010

JAMES AMOS ONYINA APPLICANT

-VERSUS-

PERSILLA ADHIAMBO OLANGO 1ST RESPONDENT

ASEGO LAND DISPUTES TRIBUNAL 2ND RESPONDENT

**THE SENIOR RESIDENT MAGISTRTE HOMA BAY LAW COURTS3RD
RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

NICHOLAS ORACHA OMENY 5TH RESPONDENT

RULING

1. The Notice of Motion coming up for hearing is dated 18th July, 2010. It was filed on 19th July, 2010. The same is brought pursuant to Order 51 rule 15 of the **Civil Procedure Rules** as read with Order 22 rule 25 of the **Civil Procedure Rules**, sections 1A, 1B and 34(1) of the **Civil Procedure Act** and part 1of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual (High Court Practice and Procedure) Rules, 2006, rules 2, 3, 4 and 5. The application is brought by **Persila Adhiambo Olang'o** (1st respondent in the petition) and **Nicholas Oracha Omeny** (5th respondent in the petition). The applicants seek the following orders:

1. *Pending the hearing of this application, the honourable court be pleased to make an interim order of stay of execution and in the first instance the presence of the respondent be dispensed with.*

2. *The honourable court be pleased to set [aside] the exparte order made on the 14th day of July, 2010 in the Constitutional petition dated 18th day of May 2010 filed on 28th May, 2010, quashing the award of the tribunal and ordering costs against the applicants and the other respondents therein.*

3. *Thereafter the honourable court be pleased to strike out the petition and dismiss the suit commenced thereby.*

4. *Alternatively, the honourable court be pleased to set aside the order for costs made on the 14th day of July 2010 as against the 1st and 5th respondents to the petition (i.e herein and 1st and 2nd applicants) and substitute thereto an order for costs against the 4th respondent only.*

5. *The honourable court be pleased to make an order that the 2nd applicant/5th respondent is wrongly joined as a party to the Constitutional Petition.*

6. *The costs of this application be provided for in favour of the applicants.*

2. An interim order of stay of execution in terms of prayer 1 was granted by this court at the ex parte stage.

3. The application is based on the grounds that are on the face thereof. The applicants' main complaint being that they were condemned unheard since the orders made on 14th July, 2010 were made ex parte. They also contend that unless the orders sought are granted, they shall suffer substantial loss. They also aver that there has been no undue delay in making this application and further that no prejudice shall accrue to the respondents if the orders sought are granted.

4. The application is also premised on an affidavit sworn by **Nicholas Oracha Omeny** on 18th July 2011. By the averments therein the deponent supports the grounds on the face of the Notice of Motion. He also says that he is the registered proprietor of land parcel no. **Kanyada/Kanyango-Kalanya/4673** and further that he was lessee of land parcel no. **Kanyada/Kalanya-Kanyango/5036** from **Persila Adhiambo Olang'o** but he later vacated the same and was never a party to the Land Dispute whose proceedings are the subject of this petition. He says that he is baffled by his inclusion in the petition when he was not a party to the land dispute. He prays that the orders sought be granted.

5. This application is opposed by the Hon. the Attorney General vide the grounds of opposition dated 2nd September, 2011 and filed in court on 5th September, 2011. The three grounds are:-

1. *THAT the court lawfully and procedurally exercised its discretion*

under section 27(1) of the Civil Procedure Act Cap 21 Laws of

Kenya in making an order for costs against the 1st and 5th respondents.

2. *THAT on making the said order for costs the court became functus officio and therefore the orders sought by the 1st and 5th respondents cannot be granted by this honourable court.*

3. *THAT the 1st and 5th respondents' application seeking to substitute the said order with one for costs against the 4th respondent only, is misconceived, frivolous, bad in law and lacks merit.*

6. The petitioner/respondent also swore a replying affidavit dated 3rd October, 2011 in opposition to the application. He depones that service of the petition was effected upon the 1st and 5th respondents on the 3rd and 16th June respectively and that the said service was effected within the stipulated time contrary to what the said applicants now allege. He also depones that the technical issues raised by the applicants against the petition are curable under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution and that nothing therefore turns on such issues. In any event, the deponent says that the applicant's complaint that he and 1st respondent were never served is an issue that has been heard by the court and dismissed and execution has already ensued. The deponent says the applicants have been indolent and that their application is intended only to thwart the course of justice by denying the petitioner/respondent the fruits of his judgment. The deponent prays that the application be dismissed with costs.

7. The parties herein agreed to canvass the instant application by way of written submissions. All the parties have filed their written submissions and

relevant authorities except for the 2nd, 3rd and 4th respondents who did not supply any authorities alongside the submissions. I have read all the submissions carefully and gone through all the cited

authorities. I note from the applicants' submissions that their main complaint is against the order of costs against them. They want the order for costs made against them set aside and be substituted with an order condemning only the 4th respondent with such costs.

8. Before I proceed to consider the issues raised by the instant application, some background information is a must. The petition herein was filed on 28th May 2010. The petitioner sought the following orders.

1. *The petition herein be certified as urgent and service be dispensed with at the first instance.*
2. *That the honourable court be pleased to issue conservatory orders preventing the deregistration of the plaintiff as the owner of LR Kanyada/Kanyango Kalanya/5037, or cancellation of the title currently held by the applicant and/or substituting the name of the applicant with that of the 1st respondent herein.*
3. *That the honourable court be pleased to issue a declaration, declaring that the award of the Asego Division Land Dispute Tribunal dated the 4th day of April 2006, together with the judgment of the Senior Resident Magistrate dated the 6th August 2006, in respect of LR Kanyada/Kanyango Kalanya/5037, are illegal, null and void, in so far as the same contravenes section 75 of the Constitution of Kenya and the same is of no legal consequence.*
4. *That an order do issue quashing the Asego Land Disputes Tribunal decision dated the 4th day of April 2006 and the resultant judgment of the Senior Resident Magistrate, Homabay, dated the 6th day of August 2006 vide Homabay SRMC Misc. Application No. 6 of 2006.*
5. *Costs of this application do abide the cause.*
6. *Such further and/or other orders be made as the court may deem just and expedient.*

9. The petition was supported by the affidavit of James Amos Nyina dated 18th May 2010 and the annexures thereto, among them a copy of the earlier application filed in this matter being HCC Misc. application No. 203 of 2006 by which the petitioner sought leave of the court to commence judicial review proceedings in the nature of certiorari, mandamus and prohibition concerning the decision of the Asego Division Land Disputes Tribunal award which award was subsequently adopted as a judgment of the court by the SRM's court at Homa Bay on 6th August 2006. The deponent averred that the tribunal had no powers to interfere, question and/or determine the issue of ownership or even purport to divest the applicants of the title and that in doing what it did the tribunal acted beyond its jurisdiction.

10. I have heard the submissions and from the submissions of the 1st and 5th respondents, their major complaint is against the order for costs. Matters or issues of costs are governed by the provisions of **Section 27(1)** of the CPA, which provides as follows:-

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge and the court or judge shall have the full power to determine by whom and out of what property and to what extent such costs are to be paid and to give all necessary direction for the purposes aforesaid and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of these powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”.

11. The above is the law as regards questions touching on who is to pay costs and out of what property such costs are to be paid. The court or judge has absolute power to make whatever orders they deem fit, but like all discretion, the discretion should be exercised judicially.

12. Although this matter is not before me on appeal, the law is that where a trial court has exercised its discretion on costs, another court should not interfere unless the discretion has been exercised unjudicially or on wrong principles for example where it gives no reasons or where the reasons given do not constitute “good reason” within the meaning of the rule. See **Kiska Ltd –vs- De Angels (1969)**

EA and Seif Mohammed –vs- Yunus Omar & Another – Court of Appeal Civil Appeal No. 47 of 1993. This principle is so deep rooted in the law that even if the Court of Appeal, or a review court as in this case, feels that the damages awarded are on the lower side it will not interfere unless it is so inordinately so low or so high as to amount to an error of principle. This was the position taken by the Court of Appeal in the case of **Leah Tatu –vs- Suleiman Said Nasser & Another – Civil Appeal No. 80 of 1992**, at Nairobi.

13. In the instant case, my brother **Makhandia J.** made the orders now complained of when the respondents who had been duly served failed to turn up for the hearing of their matter; they and their counsel. The applicant’s have not shown that my brother judge exercised his discretion unjudicially, nor has it been shown that the 1st and 5th respondents herein were never served. I have also considered the 1st respondent’s allegation that she was advised by government officers to filer her case before the tribunal to be baseless as there is no documentary proof of such an allegation.

14. In any event, there is evidence on record showing that after the

orders of 13th July 2010 were made, the parties have appeared in court on a number of other occasions towards execution of the costs delivered on 10th December, 2010. If it is true that the 5th respondent was wrongly joined in the petition, he should have taken the earliest opportunity to challenge his inclusion in the petition instead of waiting until the execution stage.

15. As rightly submitted on behalf of the plaintiff/respondent the applicants’ attempt to set aside the judgment is a belated afterthought whose main purpose is to avoid execution. In brief, this application was not brought in good faith, and it was not brought without unreasonable delay. The order complained of was made on 13th July, 2010 (though the applicants refer to 14th July, 2010) and this application was not brought until 19th July, 2011. That was a whole year down the line. No explanation has been given for the delay. The law is clear that equity is not for the indolent but for the diligent. The applicants were indeed indolent in the circumstances of this case.

16. The upshot of what I have said above is that this application lacks merit. The same is accordingly dismissed with costs to the plaintiff and

the 4th respondent.

17. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

18. It is so ordered.

Ruling dated and delivered at Kisii this 7th day of September, 2012.

RUTH NEKOYE SITATI
JUDGE

In the presence of:

Mr. Nyamurongi for O.M. Otieno for petitioner

Mr. Ogweno for G.S. Okoth for 1st respondent/applicant

N/A for 2nd respondent/applicant

N/A for 3rd respondent/applicant

N/A for 4th respondent/applicant

Mr. Ogweno for G.S. Okoth for 5th respondent/applicant

Mr. Bibu - court clerk

RUTH NEKOYE SITATI

JUDGE