



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 4 of 2007

SAMSON OLE TINA PLAINTIFF/RESPONDENT

VERSUS

THE CLERK, TRANSMARA COUNTY COUNCIL 1ST DEFENDANT/1ST APPLICANT

TRANSMARA COUNTY COUNCIL 2ND DEFENDANT/2ND APPLICANT

RULING

1. Judgment in this case was pronounced to the parties on 30th September 2011. Judgment was made in favour of the plaintiff as against the 2nd defendant.

2. By the Notice of Motion dated 16th November 2011, which is brought under **Order 9 Rules 9** and **10** and **Order 42 Rule b (i)** (sic) and all other enabling provisions of the law, the 2nd defendant/applicant seeks the following orders:-

(a) That this application be certified urgent and subject to determination of prayer (b) below, prayer (c) be granted in the first instance.

(b) That we, Kerosi Ondieki & Co. Advocates be allowed to take over this matter in place of Onchari Otiso & Co. Advocates who have hitherto been acting for the defendants.

(c) That there be a stay of execution of the decree herein pending the hearing and determination of the intended appeal to the Court of Appeal.

3. The application is supported by seven (7) grounds set out on the face and on the affidavit sworn by Daniel Mutuku Twala, the Clerk to the 2nd Defendant, on 16th November 2011. The gist of the applicant's case is that the interest of the wider public will be put to great risk if the orders sought are not granted because the suit land is used as a cemetery for the good of the whole public as opposed to the interests of one individual. The applicant avers that whereas the plaintiff sought to be given only 2 acres, the judgment has given him 5 acres out of the suit land, hence the prejudice to the applicant. The applicant also avers through its clerk that it is ready and willing to abide by any conditions that may be imposed by the court for the stay.

4. The application is opposed vide the statement of grounds of opposition filed under **Order 51 rules 15** and **16** of the **Civil Procedure Rules 2010** dated 25th November 2011 and filed in court on 29th November 2011 to the effect that:-

1. The instant Notice of Motion Application is pre-mature, mischievous, misconceived and otherwise bad in law.
2. The Notice of Motion Application herein has been filed and/or mounted by a stranger without the requisite locus standi, to mount same, whatsoever. Consequently, the instant application is legally untenable.
3. The instant application contravenes and/or violates the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. Consequently, the instant Application is inept and still-borne.
4. The Defendants/Applicants herein have not shown and/or established sufficient cause and/or basis, to warrant the orders of stay of Execution sought, whatsoever and/or howsoever.
5. At any rate, the Notice of Appeal on record, is pre-mature and otherwise invalid.
6. Besides, the instant Application does not capture and/or satisfy the requisite conditions under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.
7. Nevertheless, the Orders sought vide the instant Application, are contrary to and/or in contravention of the provisions of sections 27 & 28 of the Registered Land Act, Chapter 300, Laws of Kenya.
8. The Defendants/Applicants have not shown and/or established any evidence of Substantial loss, whatsoever and/or howsoever, to warrant granting the Orders of stay of Execution.
9. The instant Application has been made and/or mounted with unreasonable delay, which has not been explained. Consequently, the defendants/Applicants are guilty of laches.
10. The instant Application constitutes and/or amounts to an abuse of the due process of court.
11. In the circumstances, the instant application is otherwise devoid of merits, whatsoever.

5. By consent of the parties, the instant application was canvassed by way of written submissions. Both parties filed their submissions as agreed and the same are on record. In addition to the application, the plaintiff/respondent filed authorities in opposition to the application.

6. The court has read through the submissions and all the authorities carefully. The court has also carefully read through the application and the grounds given in support of the same. The court has also read through the grounds of opposition and the relevant provisions of the law cited therein. Two issues arise for determination:-

i) Is the firm of Kerosi Ondieki & Co. Advocates seized of the locus standi to seek the orders prayed for in the application and

ii) If the answer to (i) above is in the positive, has the 2nd defendant/applicant made out a case for the orders sought?

Order 9 rule 9 of the Civil Procedure Rules, 2010 provides as follows:-

“When there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed advocate, or party

intending to act in person as the case may be.”

7. In essence therefore, for the firm of Kerosi Ondieki & Co. Advocates to be properly on record in this matter, the first step was to apply to this court, with notice to all parties concerned, for leave to come on record. Or alternatively, the said firm should have obtained the consent of the firm of Onchari & Co. Advocates acceding to the new firm of advocates to come on record.

8. Although a perusal of the record shows that the instant application was to be served upon the firm of Onchari Otiso & Co. Advocates, there is no affidavit of service to confirm that the said firm of Onchari Otiso & Co. Advocates were served with the application. There is also no response to the application from the said firm of Onchari Otiso & Co. Advocates. In the circumstances, I find and hold that M/s Kerosi Ondieki & Co. Advocates who took a shortcut to coming on record in this matter are not properly on record.

9. If I had found that the firm of Kerosi Ondieki & Co. Advocates were properly on record, the applicant would still be required to satisfy the conditions set out in **rule 6 (2) of Order 42 of the Civil Procedure Rules, 2010**, to wit:-

- a) *satisfy this court that substantial loss may result to the applicant unless the order is made;*
- b) *satisfy this court that the application has been made without unreasonable delay; and*
- c) *demonstrate that the applicant has provided such security as the court orders for the due performance of such decree or order as may ultimately be binding on him or her.*

10. A reading of the above sub rule shows clearly that an applicant seeking an order of stay pending appeal must satisfy not one, but all of

the three conditions. These conditions apply whether or not an applicant has an appeal with overwhelming chances of success. See **Carter & Sons Limited –vs- Deposit Protection Fund Board & 3 others – Court of Appeal at Nairobi, Civil Appeal No.291 of 1997.-**

11. The plaintiff/respondent contends that for the applicant to succeed on this application, it must show the existence of some special or peculiar circumstances to necessitate withholding the plaintiff's fruits of his judgment and decree. I have read the application but find no mention of such circumstances save that the suit land is used as a cemetery for the public good. That may be so, but there is no indication by the applicant that there is no other parcel of land that could be used for such purposes. In my considered view therefore, and applying the principles laid down in the case of **Kenya Shell Limited –vs- Benjamin Karuga Kibiru & another [1982-88] 1 KAR 1018 -1022**, I do not think that the applicant has established that it would suffer substantial loss if the order of stay is not granted. As rightly stated by the Court of Appeal in the **Kenya Shell Case** (above) proof of substantial loss is the cornerstone to granting of an application for stay. This is what the Court of Appeal said in part of its judgment:-

“It is usually a good rule to see if Order 41 r.4 of the CPR can be

substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money.”

12. I entirely agree with the words of his Lordship Platt JA as stated above. The applicant in this case has not shown substantial loss.

13. Clearly too, the applicant did not bring this application without undue delay. From the application, it appears that the judgment against the applicant is harsh and oppressive, yet inspite of the said picture

painted by the applicant, the instant application was not brought until some 45 days or so after delivery of judgment. Could it be that the decision to bring this application was an afterthought? The period of more than 40 days between date of judgment and bringing of the instant application is inordinate delay in my view, especially considering the gravity of the judgment and its consequences for the applicant.

14. In the premises, I find that this application is not merited. The same is accordingly dismissed with costs to the plaintiff/respondent.

15. Lastly, the delay in delivering this ruling is regretted. At the time it was due, I was involved in hearing and determining the more than 125 IEBC boundary disputes together with other four judges sitting in Nairobi. Judgment in the said cases was delivered on 9th July, 2012.

16. It is so ordered.

Dated and delivered at Kisii this 12th day of September, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Oguttu-Mboya (present) for Plaintiff/Respondent

Mr. M.M. Omondi for Kerosi Ondieki for 1st & 2nd Defendant/Applicant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.