



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.324 OF 1993

STEPHEN MUCERU PLAINTIFF

VERSUS

PETER NDUNGU KAMAU DEFENDANT

RULING

The application No.1 and 2 in the Chamber Summons dated the 22nd of June, 1999 are the original defendant NO.1 and 2 respectively to this High Court Civil Appeal No.324 of 1993. They were both served by the Respondent original/Plaintiff in the same case whereby the respondent filed this suit in January 26th 1993 seeking for their eviction from the suit land and to be restrained by way of an injunction; not to have any dealing with the land. Further the court is declare the defendants are not entitled to the parcel of land.

The two defendants filed a defence in person. Later they were able to engage advocates to represent them. In their defence they stated that they had originally occupied land that was required to be used for public utility. The county council of Kiambu reallocated them to the present land they now occupy. It seems that the land was somehow given to another who sold it to the original Plaintiff/Respondent in this case. All this issue that required to go for trial. What actually occurred in this case is that the Plaintiff prayed for further and better particulars and a notice to admit documents. This was never given by the Defendants. On the 3.6.1993 an application was made by the Respondent that the defence be struck out. This application was adjourned.

On the 4/11/1994 after several adjournments Mr. Njai, Principal Deputy Registrar gave directions to the effect of "issues agreed" Orders 22 and 23 granted. Further adjournments were made on 11.7.1996 and again on 18/9/1996 whereby a request for a further affidavit be put in.

As of 1996 the Hon. Justice Dugdale, Justice Amin, Justice Owuor, Justice Ringera and Justice Khamoni had the matters come before them but made no conclusive hearing or orders. On the 11th December 1977 Hon. Justice Mboghohi Msagha dealt with the file for first time. The application before him was a notice of motion dated 21.3.1996 and filed on 22.3.1996 seeking that this High Court case be consolidated with HCCC 4797/90. The prayers for consolidated was duly granted.

In the said file HCCC 4797/90 the respondent had attached a consent letter whereby that suit was said to be have been compromise with another alternative plot being proved and the applicant vacating the suit premises within 30 days. Unfortunately the said consent was never signed nor filed in court as such. All the respondent did was to use it as proof that the suit had been compromised. The Hon. Justice Mboghohi Msagha then handled this file together with Justice Aluoch, Justice Patel and Justice Khamoni who had given leave for a further affidavit to be filed. Justice Amin and Justice Osiemo also handled the file but to no conclusive hearing. Earlier, Hon, Justice Mboghohi Msagha then on the 31st of July, 1998 being

satisfied that service had been effected on the two applicant heards an application dated 21st of March, 1996 that allowed consolidation of the two above suits as stated.

ON the 27th of October, 1998 the Hon. Justice Mbogholi Msagha heard the application dated the 31st of August, 1998, seeking to set aside the order obtained on 31.7.1998 the same being obtained by misrepresentation. The Hon. Justice Mbogholi-Msagha on hearing both parties extensively reserved his ruling to the 10th of November, 1998. On that day the Hon. Judge dismissed the application of 31.7.1998.

On oral application one Miss Nganga for the application stated:- "I apply for leave to appeal and stay of execution" The advocate for the respondent replied: -

"we leave it to court" The Hon. Judge then made orders:-

"Leave to appeal granted. There shall be stay pending the appeal"

Signed

10.11.1998

The original Plaintiff then wrote personally to the court of appeal to enquire whether an appeal had been filed or not. He did not write through his advocate.

The court of appeal replied through one B.P. Musyimi for the Deputy Registrar as follows:-

"I have checked my records from the date indicated in your letters and I have not traced any appeal filed by the above parties"

The respondent at once proceeded to execute and to have the two applicants evicted. I note from the court record an order extracted dated the 31st July, 1998 made under Order 21 rule 30 Civil Procedure Rules to Linder Auctioneers, Uganda house and signed personally by Hon. Justice Mbogholi-Mxsagha (this was before the Order dismissing the application of 31.8.1998.)

The effect of the dismissal of the Order is that the applicants are to be evicted from their premises. The applicants came in by way of an injunction Order 39 civil Procedure Rules and not Order 41 Civil Procedure Rule before Justice Mitey the then Duty Judge on the 27/6/1999. he granted an injunction.

This file was then placed before me on the 14th of July, 1999 for the interparties hearing for orders of stay of execution pending the determination of appeal. When the matter came before me for hearing I had been assigned the Portolio of Civil Appeal hearing together with Hon. Justice Githinji (who has been absent since the beginning of this month). I was thus handling the said portfolio alone.

The Hon. Duty Judge would allocate applications for me to hear. This being one of them. I do note that the case was extensively dealt with Hon. Justice Mbogholi-Msagha and that he is still in this station. I further note that he had been assigned the Criminal Portfolio of hearing murder case for this month. It seems that at the High Court of Kenya at Nairobi several Judges may deal with a file. I believe this may not be in line with Order 17 rule 10 Civil Procedure Rules. The best situation is if one file is dealt by one Judge throughout. Nonetheless, as it is a system I found in place, I proceeded to hear this application, which is for "stay of execution pending appeal". Under Order 39 Civil Procedure Rules. The respondent filed his grounds of opposition out of time. The same was duly struck out. The applicants by now had changed advocates and engaged the services of Mr. Mutiso who filed the main application. He stated to this court that the Hon. Justice Mbogholi-Msagha had given a stay pending appeal. It was not for a stay pending a formal application. It was a conclusive orders unless that order is overturned then it remains part of the record.

Further a notice of appeal was filed in the High court file. There requires to be no other document filed in the court of appeal. It was therefore wrong for the respondent to write to the court of appeal to obtain a letter stating that no appeal had been filed whilst the rule specify that a notice is sufficient till such time of filing.

He took over this matter from another advocate and even is the said other advocate may have filed the notice of appeal out of time, then there were laid down procedures to have the notice struck out as provided in section 80 of the Court of Appeal.

That the respondent could have also made application to set aside Hon. Justice Mbogholi-Msagha's orders to stay the execution pending appeal. This has not yet been done and the orders are valid. The advocate stated that he debated with himself whether the application before me ought to be under Order 41 rule 4 Civil Procedure rules or under Order 39 civil Procedure Rules for an injunction. As the Hon. Judge's order under Order 41 rule 4 Civil Procedure Rules for stay had not been vacated he thought to bring this application by way of an injunction. The advocate also relied on the case of B. Ngugi V. F.N. Kinyanjui C.A 1/86 I believe the intention of the Hon. Justice Mbogholi-Msagha was to grant a stay of execution pending appeal. He did not record pending a "forma; application" nor "pending execution" whatever the case.

Those orders are still on record unless otherwise removed. I believe the application filed under Order 39 Civil Procedure Rules may be defective in itself and ought to have been also made under section 3A together with Order 41 Civil Procedure Rules. Nonetheless I do not think that it is a miscarriage of Justice taking into consideration the circumstances in which eviction was being carried out despite there being a court order otherwise.

In essence the respondent was discharging the court orders I would urge that the rule of law be followed by way of appropriate application being made. I hereby rule that the orders made by the Hon. Justice Mbogholi-Msagha that reads:-

"order:-

Leave to appeal granted. There shall be stay pending the
appeal"

Signed

10/11/98

is still in existence. There orders stand

I hereby allow the application to that extent with costs to the applicant

Dated this 15th day of July, 1999 at Nairobi.

M.A. ANG'AWA

JUDGE