



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

MISCELLANEOUS CIVIL APPLICATION NO. 01 OF 2016

MOSES BANDA STEPHEN WAFULA.....CLAIMANT

VERSUS

1. CONSTANT MECHUMO MUCHOE.....1ST RESPONDENT

2. JOHN WANYONYI MASONI.....2ND RESPONDENT

3. DAVID NYONGESA MASONI.....3RD RESPONDENT

4. EDWARD WEKESA MASONI.....4TH RESPONDENT

5. MAURICE WANJALA MASONI.....5TH RESPONDENT

6. FREDRICK SIMIYU WAFULA.....6TH RESPONDENT

7. PATRICK MASONI.....7TH RESPONDENT

AND

1. MESHACK WAFULA

2. DAVID JUMA

3. TITUS MALENYA.....OBJECTORS/APPLICANTS

RULING

From the record herein, it is clear that the parties referred their dispute to an arbitrator way back in 2009. The dispute revolved around the ownership of land parcel **NO KIMILILI/SIKHENDU/607** in which **MOSES BANDA STEPHEN WAFULA** was the Claimant and **CONSTANT MECHUMO MUCHOE** and six others were the Respondents. The applicants herein i.e **MESHACK WAFULA, DAVID JUMA** and **TITUS MALENYA** were not parties to the said arbitration proceedings.

After hearing the parties, the arbitrator one **E. W. OUNA ESAQ** signed the award on 4th April 2015 together with **MOSES BANDA STEPHEN WAFULA** and **CONSTANT MECHUMO MUCHOE**. The parties essentially arrived at a consent on how to share the land in dispute. The award was subsequently filed in Court on 12th January 2016 and following an application by **MOSES STEPHEN WAFULA BANDA** dated 11th January 2016 but filed on 12th January 2016, **MUKUNYA J** adopted the said award as an order of the Court and a decree dated 12th October 2017 followed in terms of what the parties had agreed.

I now have before me an application dated 19th July 2018 by **MESHACK WAFULA, DAVID JUMA** and **TITUS MALENYA** who describe themselves as **OBJECTORS/APPLICANTS** seeking the following prayers:-

(a) Spent

(b) That there be a stay of execution of the decree dated 12th October 2017 pending the hearing and determination of this application.

(c) That the Claimant/Respondent whether through his agents, servants or any other person be restrained from evicting the Objectors/Applicants from the land parcel number KIMILILI/SIKHENDU/607 until the determination of this application.

(d) That costs be provided for.

The application is drawn by the Objectors/Applicants who are acting in person and it is therefore not premised on any known provisions of the law and neither is it easy to decipher what exactly are the grievances of the Objectors/Applicants in relation to the said award. From what I can gather out of the Objectors/Applicants affidavit is that:-

1. They were not aware about the suit that led to the award.

2. They bought a portion of the suit land from one MARTIN MUKHEBI WAFULA who was a beneficiary of the Estate of the deceased owner of the same.

3. That the beneficiaries of the said Estate shared it without the knowledge of other beneficiaries who include the Objectors/Applicants who had bought a portion measuring 50 x 100 as per copies of agreements attached.

4. That the Claimants now want to evict them from their portion and this will render them homeless.

5. That when they learnt of this dispute, they complained and a clan meeting was called under the Chairmanship of AGGREY MULONGO WALIAULA and several resolutions were made.

The application is opposed and **MOSES BAND STEPHEN WAFULA** the Claimant has filed a Replying Affidavit dated 24th July 2018 in which he had deponed, inter alia, that the application is bad in law since it does not accord with the provisions of the **Arbitration Act Chapter 49 Laws of Kenya** which prohibit this Court from intervening with matters governed by the said Act. That the Objectors/Applicants are strangers to these proceedings and in any event, their application to set aside the arbitral award should have been filed within three (3) months. That the arbitral award having been filed and adopted on 22nd December 2017 on agreed terms, the Objectors/Applicants have no other recourse except as provided under the Arbitration Act. That the Objectors/Applicants cannot claim to have been un-aware of the proceedings as they committed themselves to voluntarily vacate the suit land by a letter dated 24th April 2018 (annexture MBSW – 1).

However, in a Supplementary Affidavit dated 25th September 2018 **MESHACK WAFULA** the 1st Objector/Applicants have no other recourse except as provided under the Arbitration Act. That the Objectors/Applicants cannot claim to have been un-aware of the proceedings as they committed themselves to voluntarily vacate the suit land by a letter dated 24th April 2018 (annexture **MBSW – 1**).

However, in a Supplementary Affidavit dated 25th September 2018 **MESHACK WAFULA** the 1st Objector/Applicant disowned the letter dated 24th April 2018 claiming the signature thereon is not his and that the Replying Affidavit is full of lies. He added that he needs this Court's protection.

I have considered the application and the rival affidavits.

As stated above, the Objectors/Applicants are acting in person and their application does not cite the legal provisions upon which it is premised. Looking at the application it seeks two main prayers:-

1. Stay of execution of the decree dated 12th October 2017.

2. An order restraining the Respondents from evicting them from the suit land.

No appeal appears to have been filed against the decree issued by this Court on 12th October 2017. An order for stay of execution can only be issued pending another process e.g an appeal. It cannot be issued in a vacuum. Indeed **Order 42 Rule 6(1) of the Civil Procedure Rules** says:-

“No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order” Emphasis added.

In this case, the litigation is complete. The dispute was heard by an arbitrator and the award filed has already been adopted as an order of the Court and a decree was issued on 12th October 2017. There is no pending appeal and therefore there can be no basis upon which this Court can order any stay of execution. That prayer is dismissed.

The second prayer is for an order restraining the Respondents from evicting the Objectors/Applicants from the suit land. It is therefore a prayer for an injunction. However, there is no suit pending in this case to warrant the grant of any orders of injunction either temporary or mandatory. **Order 40 Rule 1 of the Civil Procedure Rules** provides as follows:-

“Where in any suit it is provided by affidavit or other otherwise -

(a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree; or

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording a reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The Court may by order grant a temporary injunction to restrain such act, or make such other orders for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.” Emphasis added.

It is clear from the above provision that without filing a suit as defined in **Section 2 of the Civil Procedure Act**, a party cannot apply for an interim relief such as an order for injunction. This was considered by the Court of Appeal in **GEOFFREY NDUNGU THEURI .V. LAW SOCIETY OF KENYA C.A CIVIL APPEAL NO 5 OF 1985 (1988 eKLR)** where the Court held that without a suit the Applicant “could not have set on foot a competent action on which he could bore the claim for the grant of interim relief.” The Objector/Applicant in this case is in the same position as was the Applicant in the case of **GEOFFREY NDUNGU THEURI** (supra) without a suit commenced through a plaint, Originating Summons or any other manner prescribed by law, he cannot obtain any injunctive relief however well merited the claim may be. That prayer must also be dismissed.

I must emphasize that what is before me is not an application to set aside the arbitral award. If the Objectors/Applicants purchased a portion of the suit land from one **MARTIN MUHEBI WAFULA** who was not even a party in the arbitration proceedings, their best option would be to file a suit against him.

Ultimately therefore, the Objectors/Applicants Notice of Motion dated 19th July 2018 is devoid of merit. It is accordingly dismissed with costs.

Boaz N. Olao.

JUDGE

9th May 2019.

Ruling dated delivered and signed in Open Court this 9th day of May 2019 at Bungoma

Claimant present

1st Applicant present

3rd Applicant present

Boaz N. Olao.

J U D G E

9th May 2019.