



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC JUDICIAL REVIEW MISC. APPL. NO. 2 OF 2017

IN THE MATTER OF ORDER 53 RULE 12, 3 AND 4 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF ARTICLE 47(1), 185 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF NDUU ADJUDICATION SECTION

AND

IN THE MATTER OF PLOT NUMBER 1000

AND

IN THE MATTER OF ARBITRATION CASE NO.NDUU/ARB/1/15

BETWEEN

REPUBLIC.....APPLICANT

-AND-

THE DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER,

MAKUENI DISTRICT.....1ST RESPONDENT

ARBITRATION BOARD NDUU

ADJUDICATION SECTION.....2ND RESPONDENT

TITUS MUNGUTI NDIAINTERSTED PARTY

ONESMUS MUTUA MUKILYA.....EX PARTE APPLICANT

R U L I N G

1. What is before this Court for ruling is the Interested Party's/Applicant's Notice of Motion Application expressed to be brought under Order 22 Rule 1 of the Civil Procedure Rules, Section 63(e) of the Civil Procedure Act and the enabling provisions of the law for orders;

(i) Spent

(ii) There be a temporary stay of execution against the Interested Party/Applicant pending the hearing of this application.

(iii) The honourable court be pleased to set aside warrants of attachment dated 3rd December, 2018 as against the Interested Party Applicant.

(iv) Costs be provided for.

The application is predicated on the grounds that:-

i) The Applicant who is the Interested Party is faced with execution of a Decree of this honourable court issued on the 2nd July, 2018.

ii) The said decree on costs was issued against the Respondents and the execution against the Interested Party is illegal, and misplaced.

iii) It's only mete and just that the warrants of attachment be set aside against the Interested Party/Applicant.

The application is supported by the affidavit of Titus Munguti Ndia, the Interested Party/Applicant, sworn at Nairobi on the 22nd January, 2019. The application is dated 22nd January, 2019 and was filed in court on the 24th January, 2019.

2. The exparte Applicant/Decree Holder has opposed the application vide his grounds of opposition dated 06th February, 2019 and filed in court on even date.

3. Pursuant to the court's direction on the 13th February, 2019 that the application be disposed off by way of written submissions, the exparte Applicant and the Interested Party filed their submissions on the 19th and 26th February, 2019 respectively.

4. The Counsel for the Interested Party/Applicant has submitted that the decree on costs that was issued pursuant to the court's judgment delivered on 02nd November, 2017 (emphasis are mine) was against the Respondents whom their decisions were challenged in court by the ex parte Applicant. That when the exparte Applicant applied for the execution of the warrants of attachment, the honourable Deputy Registrar issued warrants of attachment against the Interested Party/Applicant to be executed by the firm of Mambu Auctioneers based at Machakos.

5. The Counsel submitted that by issuing the warrants of attachment against him, the honourable Deputy Registrar acted erroneously and the said warrants should be set aside/quashed.

6. Regarding the exparte Applicant's grounds of opposition, the Counsel for the Interested Party submitted that apart from entering appearance, the Interested Party never opposed the said cause either through a replying affidavit or grounds of opposition and as such, the assertion by the exparte Applicant that he Interested Party opposed the application is factually and legally untrue.

7. On the other hand the Counsel for the exparte Applicant submitted that in the instant case, the court awarded costs of the suit to be borne by those who responded and or opposed the suit. That none of the parties applied for an appeal or review of the order on costs and that the Interested Party/Applicant never opposed the party and party bill of costs despite service.

8. Arising from the foregoing, the Counsel submitted, the warrants of execution were properly issued against the Interested Party/Applicant. The Counsel cited the case of **Rosemary Wairimu Munene, Exparte Applicant vs. Ihururu Dairy Farmers Co-operative Society Ltd.** in **Judicial Review No.6 of 2014** where **Mativo, J** held as follows:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

9. Having read the application, the grounds of opposition, as well as the submissions that were filed by the Counsel on record, it is not in dispute that the Interested Party/Applicant was not a Respondent in the instant suit but was the source of the dispute that was determined by the Arbitration Board. In its judgement delivered on 02nd November, 2017, the court held as follows amongst others **“The Arbitration Board did not have the statutory quorum to adjudicate upon the dispute referred to it by the Interested Party. Suffice it to say, the Arbitration Board acted unlawfully and illegally.”** The above being the case, it was incumbent upon the Interested Party/Applicant to oppose the party and party bill of costs upon service by the exparte Applicant bearing in mind that the court had found the Arbitration Board not to have had statutory quorum to determine the dispute that the Interested Party referred to it. He instead chose not to. It therefore follows that the Interested Party/Applicant cannot be heard to say that the execution against him was illegal and misplaced. I do agree with the exparte Applicant's Counsel that the Interested Party/Applicant's application lacks merit. In the circumstances, I dismiss it with costs to the exparte Applicant.

Signed, dated and delivered at Makueni this 20th day of June, 2019.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Hassan holding brief for Mr. Nzioki for the Interested Party.

Ms. Watta holding brief for Mr. Korongo for the ex-parte Applicants

No appearance for the respondents

Ms. Nzioka – Court Assistant

MBOGO C.G, JUDGE

20/06/2019.