



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 103 OF 2007

ROBERT MUKARANI SIMITI.....1ST PLAINTIFF

JOSEPH WANDAKA.....2ND PLAINTIFF

FRED WANGILA.....3RD PLAINTIFF

VERSUS

PETER BADHIA.....1ST DEFENDANT

PETER WEKESA.....2ND DEFENDANT

ANN WEKESA.....3RD DEFENDANT

DR. TIMOTHY PIERCE.....4TH DEFENDANT

RULING

1. By a ruling dated **30/9/2019**, the application dated **2/7/2019** was struck out with costs on the basis that the applicants did not comply with **Order 9 rule 9** of the Civil Procedure Rules.

2. Upon the striking out the applicants filed the application dated **17/10/2019** seeking the following orders:

1. ...spent

2. That the court be pleased to review, vary and/or set aside its order and/or ruling delivered in court on 30/9/2019.

3. ...spent

4. That upon grant of prayer 2 above, the court be pleased to issue orders of stay of execution and/or further execution and/or notice to show cause and/or orders of this court pending hearing and final determination of the appeal in the Court of Appeal.

5. That costs be provided for.

3. The applicants brought the application under **Article 159 of the Constitution of Kenya, 2010, Sections 1A, 1B and 63 (e) of the Civil Procedure Act, Order 45 Rule 2, Order 42 Rule 6 and 7 and Order 51 Rule 1 of the Civil Procedure Rules.**

4. The grounds on which the said application is made are that the applicants fully complied with **Order 9 rule 9** of the Civil Procedure Rules and there appear to be an error on the face of the record; that there is a notice of appointment and consent granting **Ms. Nyairo & Co. Advocates** permission to take over the conduct of this matter for and on behalf of the plaintiffs/applicants yet the court in its ruling held that the applicants did not comply with **Order 9 Rule 9** of the Civil Procedure Rules; that the said consent was served upon Samba & Co. Advocates on **4/7/2019** and that now that the error has been pointed out the court ought to allow the application dated **2/7/2019** as prayed. A copy of the notice of appointment and consent are attached to the supporting affidavit showing that Ms. Nyairo & Co. were appointment on **2/7/2019** and that Ms. Kidiavai & Co. Advocates had on the same date consented to the coming on record of the former.

5. This court has noted that there is a consent as well a notice of appointment that were filed on **2/7/2019**. It appears that those documents escaped the notice of the court during its scrutiny of the record thus leading striking out. For that reason this court finds that prayers **No. (2)** and **No. (3)** in the application dated **17/10/2019** is merited.

6. What is left for determination now is prayer **No. 4**, which is on all fours with prayer **No. 3** in the application dated **2/7/2019**.

7. Prayer **No. 4** seeks stay of execution pending the hearing and final determination of the appeal in the Court of Appeal.

8. In the application dated **2/7/2019** the grounds relied on for the stay of execution sought were that judgment was delivered on **8/3/2017** dismissing the suit and a notice of appeal was filed on **9/3/2017**; that the appeal is yet to be heard and concluded and typed proceedings are yet to be availed to enable the filing of the record of appeal, reason being that the file has been in constant movement due to the various applications filed on behalf of the defendants; that this court issued orders *inter alia* restraining the plaintiffs from the suit land and ordering them to hand over to the trustees of the Faith Centre Children's Home. It is urged that without any stay order in place the defendants may move to execute the decree thus subjecting the plaintiffs to substantial loss that cannot be compensated for monetarily.

9. The application had not been opposed by the defendants.

10. The application is supported by an affidavit of the 1st applicant dated **2/7/2019** sworn on his behalf and on behalf of other applicants. He exhibited the request for certified copies of proceedings and judgment, the notice of appeal and the notice to show cause why execution should not issue.

11. The conditions for a grant of stay of execution are contained in **Order 42 rule 6** of the Civil Procedure Rules which provides as follows:-

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless -

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

12. I am satisfied that for the purposes of a stay of execution application there is an appeal in place as the notice of appeal has been filed.

13. As to whether the application has been filed without undue delay I do note that judgment was delivered on **8/3/2017** and the application was filed on **2/7/2019**. That is delay for a period of **27 months**. That is quite a lengthy period. However is the delay explained?

14. The only explanation that has been put forward by the applicants is that the file record was in constant movement owing to the applications filed by the defendants. This explanation is not contained in the supporting affidavit filed with the original application dated **2/7/2019** but in **ground No. (f)** at the foot of the application dated **2/7/2019**. In this court's view that is quite an assumptuous approach to a rather critical issue in a stay of execution application. Delay of **27 months** has not even been explained by way of a sworn statement inside the body of the supporting affidavit. I find that the delay is not only inordinate but that it has not been explained at all.

15. As to the issue of substantial loss. I have examined the application dated **2/7/2019** and found that it was brought only after an application dated **21/6/2018** was heard and concluded. That application had been brought by the defendants seeking eviction of the plaintiffs or any other persons claiming under them from the suit premises and a further order directing the County Land Registrar to correct the register to read the name of **Dr. Harlod Timothy Pierce** in trust for **Faith Centre Children's Home** and that the Deputy County Commissioner Trans-Nzoia West Sub-County do provide security during the exercise. This court dealt with that application and in a ruling dated **13/11/2018** ordered as follows:

a. That the plaintiffs/respondents, their servants, agents or anyone else claiming through them shall remove themselves from land title numbers Kiminini/Kinyoro Block 4/27 and Kiminini/Kinyoro Block 4/28 and hand over the said lands to the Trustees of the Faith Centre Children's Home with immediate effect in default of which they shall be evicted therefrom.

b. Subject to any governmental regulation mechanisms as from time to time may be in place, the physical management of the land and assets thereon and their use for day to day activities for the purposes of the Faith Centre Children's Home shall be the responsibility of the Trustees of the Faith Centre Children's Home.

c. The land comprised in title numbers Kiminini/Kinyoro Block 4/27 and Kiminini/Kinyoro Block 4/28 shall be registered in the name of the Public Trustee to hold it on behalf of Faith Centre Children's Home and the Deputy Registrar of this court shall execute all documents necessary to effect that registration.

d. The plaintiffs shall jointly and severally bear the costs of this application

16. It is correct that if that mode of execution was followed the plaintiffs would have to be evicted from the suit premises if they failed to remove themselves. However in the body of that ruling this court expressed itself in the following manner regarding the conduct of the parties herein:

"In their submissions the applicants stated that there was no counterclaim the application to amend the defence to include the counterclaim having been dismissed on the 15th May 2013 and hence there is no duplication as alleged in the replying affidavit of the respondents. I have perused the court record in this matter and found that that is the correct position. I have also examined the judgment of the court dated 8/3/2017. Paragraph 20 thereof states as follows of the plaintiffs:

"This case is a clear example of people who want to use donors and then dump them. It is clear that Dr. Pierce was brought on board not just as a donor but as a person with a stake in the Hope Centre. He solely provided funds for purchase of the suit properties. He found himself in the cross fire involving Pastor Simiti, Peter Wekesa, and Peter Badhia on the Management Hope Centre (sic). I therefore find that the plaintiff's suit against the defendants is misconceived."

I will refer to yet another paragraph in the judgment which states as follows:-

"There were attempts to have one of the properties transferred to Faith Centre. This did not work as the properties are still in the name of Hope Centre. The differences between the two groups escalated. There were even reports to police station and accusations of mismanagement. What is clear however is that the intention of the plaintiff and the defendants was to work together. This was not possible because of friction caused by the actions of Pastor Simiti.

What happened between the plaintiff and the defendants is what is commonly afflicting most donor funded projects. People have their own selfish interests and they want to benefit under the guise of helping the less fortunate in the society. Regrettably, most of the cases of such kind of behaviours fall on innocent children who end up being used to enrich some people."

I find that the plaintiffs conduct was in breach of the trust bestowed upon them and that it disentitles them from dealing with the land and assets of that enterprise. I am also convinced that the application to have the plaintiffs evicted from the suit premises is merited.

However, regarding the third prayer in the motion, it may not be possible to regulate the activities of the plaintiffs and the defendants in the coming times especially regarding their engagements with the donor community.

It is necessary to note that the land that was purchased was for a noble purpose, to serve the less fortunate in society and that it is the backbone of a charitable public trust that can not be revoked by either the plaintiffs or the defendants. It also forms the launching ground for any of the positive action that any of the trustees to the charitable enterprise may consider fit for generations to come."

17. Further down in that ruling this court stated as follows:

"I am of the opinion that a public charitable enterprise will outlive the pioneers and unless the contrary is shown to be the case that enterprise should perpetually treated as public and charitable. It can already be seen that any perceived ability on the part of any of the pioneers to seize and dispose of the suit land for their own benefit is occasioning harm to an already rolling project that may attract more benevolent attentions of any person organization or even government and in that event benefit the public more.

I consider that the control over the title and use of the land by the plaintiffs and the defendants ceased the day they decided that they wished to commence a charitable enterprise. That institution must remain a public institution to benefit the less fortunate long after the parties herein are departed.

I find no special need to therefore adjourn this application and insist on the names of the trustees of Faith Centre Children's Home to be provided to perfect prayer number 3 in the application, or to grant the said prayer as it is for the prayer I will grant will be considered by the defendants, if they are still minded for charity, to have the same effect as prayer 3 or even better.

I find that it would be appropriate to have the land registered in the name of the Public Trustee of the Republic of Kenya while the activities of the Centre are managed by the Trustees of the Centre. It can only be hoped that the regulatory bodies will take care of the day to day activities of the trustees as would require them to be accountable in future.”

18. The essence of the plaintiffs’ and the defendants’ activities in respect of the suit land is purely charity. This court’s directions in the application dated **21/6/2018** were meant to ensure that there was no interruption in the conduct of charitable activities on the suit land. The basis for those directions and reasoning was that the activities were not meant to benefit the litigants herein personally but members of the public. In the circumstances this court fails to see how execution of the judgment would occasion the applicants’ substantial loss.

19. For the above reasons this court finds that the application **2/7/2019** has not merit. The same is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Kitale on this 27th day of November, 2019.

MWANGI NJOROGE

JUDGE

27/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nakitare holding brief for Samba for Respondent

Ms. Odwa for Applicant

COURT

Ruling read in open court in the presence of counsel at 3.15 p.m.

MWANGI NJOROGE

JUDGE

27/11/2019