



Wakaba (Acting as the Personal Representative of the Estate of the Late Philip Wakaba Pursuant to a Limited Grant of Letters of Administration Ad-litem) v Kurgat (Civil Appeal 12 of 2017) [2018] KEELC 4478 (KLR) (26 January 2018) (Ruling)

Samson Mwangi Wakaba (Acting as the personal representative of the Estate of the late Philip Wakaba pursuant to a Limited Grant of Letters of Administration ad-litem) v Irene C. Kurgat [2018] eKLR

Neutral citation: [2018] KEELC 4478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
CIVIL APPEAL 12 OF 2017
A OMBWAYO, J
JANUARY 26, 2018**

BETWEEN

**SAMSON MWANGI WAKABA APPELLANT
ACTING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE
LATE PHILIP WAKABA PURSUANT TO A LIMITED GRANT OF LETTERS OF
ADMINISTRATION AD-LITEM**

AND

IRENE C KURGAT RESPONDENT

RULING

1. The appellant prays for orders that there be stay of execution of the orders made on 10.11.2017 in Eldoret CMCC No. 410 of 2011 pending the hearing and determination of appeal. The application is based on grounds that substantial loss will occur and that sufficient cause exists to warrant grant of stay. Moreover, that the application is made without undue delay. Last but not least, that the applicant is ready to offer security. The application is supported by the affidavit of Samson Mwangi Wakaba who states that on the 10th November, 2017 the Hon. E. Kigen — Resident Magistrate delivered a ruling in Eldoret CMCC. NO. 410 OF 2011 Nicholas Kipkemboi Bett —V- Samson Mwanzi Wakaba (Sued as the personal representative of the estate of the late Philip Wakaba).
2. The ruling related to the respondent's application seeking to be placed into occupation of the suit-land as a purchaser. The application was argued by way of written submissions. That by the terms of the ruling the respondent's amended application dated 15th August, 2017 was allowed as prayed. He is aggrieved by the ruling and stands to suffer substantial loss as the tenants of the estate of the deceased and the beneficiaries shall be evicted and the estate shall suffer loss of monthly rental income. The



tenants of the estate shall also be rendered destitute as they are liable to be evicted without notice and may even be detained in prison. The respondent upon assuming occupation would place new persons into occupation and should the appeal succeed it will necessitate further legal proceedings to eject them at a high cost and time will have been wasted.

3. Therefore, sufficient reasons exist to warrant the grant of a stay of execution as can be seen from the grounds of the appeal filed in the memorandum herein. The court had no jurisdiction being presided over by a Resident Magistrate to address the eviction as its pecuniary jurisdiction is Kshs.5,000,000/= under section 7 of the Magistrate's Court Act, Cap. 10 while the subject matter is valued at over kshs.11,000,000/=.
4. That also no certificate of sale as required by rule 79 of order 22 of the Civil Procedure Rules, 2010 has ever been issued and which is a mandatory document for the court to consider in an application of this nature. The application has been made without undue delay and I am ready to comply with terms as to security.
5. The respondent states that she is advised by her advocates which advise she verily belief to be true, that the application is incompetent, unmerited and an abuse of the court process. That she purchased that property known as ELDORET MUNICIPALITY BLOCK 21 (KINGONGO) 1928 through an auction held on 7th November, 2012. That the sale was a result of orders in execution of decree in Eldoret CMCC No. 410 of 2011 parties being Nicholas Kipkemboi Bett Vs Philip Wakaba. That upon purchase, he was issued with a certificate of sale. That she applied to the court which made the sale absolute on 12th July, 2014. That upon the sale being made absolute, she was issued with a title. That she is advised by her advocate which advise she verily believe to be true that the issues canvassed by the applicant herein were the same issues raised in application dated 20/6/2013, before the lower court and which in application was dismissed. That upon being dissatisfied, the applicant filed an appeal in the High Court being Appeal No. 26 of 2015 touching on the same issues.
6. She is advised by her advocate which advise she verily believe to be true that execution in this matter was concluded when the court made the sale absolute on 21.9.2011. That she is further advised by her advocate which advise she verily belief to be true that the matter in Eldoret CMCC No. 410 of 2011 was concluded by way of consent recorded between the decree holder' s advocate and then defendant advocate' s. The applicants have never moved the court to have the terms of the consent order set a side. The issue of jurisdiction of the court was never raised when the application dated 15.8.2017 which culminated in the orders made on 10.11.2017. That she is advised by her advocate which advice she verily belief to be true that the instant application ought to have been filed before High Court Civil Appeal No. 26 of 2015.
7. The issues raised in these proceedings are directly and substantially in issue in Eldoret HCCA No. 26 of 2015 as such the proceedings herein are subjudice. The applicants knowing very well on that the issues being raised would be caught up by time, abused the court process by filling the instant application.
8. She is advised further by her advocate which advise she verily believe to be true that the orders made on 10.11.2017 are well provided for under section 51 of the C. P.A., Order 21, Rule 80, 81,82, and 83 of the Civil Procedure Rules. That she is advised by her advocate which advise she verily belief to be true that the appeal herein does not lie in law having been lodged without leave of the court.
9. I have considered the application dated 13.11.2017 for stay of execution of orders made on 10.11.2017, the supporting affidavit and replying affidavit and do find that the genesis of this matter is not a dispute related to land but a debt of Kshs.300,000/= which was owed by Philip Wakaba (deceased) to Nicholas Kipkemboi. Judgment was entered against the deceased in favor of Nicholas Kipkemboi. When execution proceedings were commenced, a consent was entered that the decretal sum was to be



paid by monthly instalments of Kshs.50,000/=. The deceased did not comply and the property was sold by auction held on 7.11.2012 where the respondent herein was declared the highest bidder. The court made the sale absolute and a certificate vesting the property was issued on 29.11.2012 and title to the property was issued to the respondent.

10. This court finds that the appeal herein has been brought to a court without jurisdiction as the dispute before the Magistrate's Court was based on a debt and neither land nor environment and does not fall within section 13 of the *Environment and Land Court Act*. This appeal should be filed in the High Court. Moreover, the appeal is in respect of an order made in execution process and no leave has been sought or obtained for the appeal. Where a court finds that it has no jurisdiction to entertain a matter, it has no option but to down its tools. Since the dispute before the Magistrate's Court is not in respect of an Environment or land matter, I do comply with the law by downing my tools and both applications dated 13th November 2017 and 14th November 2017 are struck out with costs.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JANUARY, 2018.

ANTONY OMBWAYO

JUDGE

