



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 538 of 2003

JACOB MATIPEI & 3 OTHERS.....PLAINTIFFS

VERSUS

COSMAS MUSYOKA & 22 OTHERS.....DEFENDANTS

R U L I N G

The Application before me is a Notice of Motion dated 17th September 2007 which seeks prayers:-

- (1) That this application be certified as urgent and service of the same be dispensed with in the first instance.
- (2) That pending hearing of this , this Hon Court be pleased to stay execution of the decree and all consequential order herein.
- (3) That Judgment entered on 5th November 2005 together with all consequential orders be reviewed and be set aside.
- (4) That the costs of this application be borne by the Plaintiff.

A Notice of Preliminary Objection was filed and served on 1st October 2007 raising issues of *Res Judicata* and *locus standi*.

During the hearing of those issues, it became apparent that the Applicants have filed other applications which were as under:-

1. The first application was that of 18th January 2006 wherein certificate of urgency was prayed and temporary injunction against the eviction order was asked for. It came for hearing before Hon. Njagi J who did not certify the said application as urgent and also found that the application is a back-door appeal which cannot be accommodated.

This application is awaiting hearing which was directed to be taken on priority basis.

2. The second application dated 15th March, 2006 was filed by the previous Advocates namely Obaga & Co. It seeks prayers of certificate of urgency, of setting aside the Judgment entered on 8th November 2005, stay and vacation of execution of eviction order. This application came before Hon. Visram J who did not certify the same as urgent and directed to take an early hearing date on priority.

This application is also not prosecuted and pending hearing date.

3. Thereafter a Notice of Motion was filed by M/s D.B. Wati & Co. on 2nd November 2006. It prayed for leave for M/s Wati & Co. to come on record for the Defendant and also prayed for temporary stay of execution of the decree vide prayer No. 4:

On 9th November 2006 only prayer nos. 2 and 3 of the said application were granted. No order as to prayer of stay of execution was made.

I may note that grounds of opposition were filed on 9th November 2006 against the said application.

4. After more than a year, the present application is filed and I have enumerated the prayers sought for.

Mr. Wati the learned counsel for the Defendants/Applicants has stated from the Bar that when he had filed the present application, he had an intention to apply for withdrawal of the application dated 15th March, 2006 and that he did not intend to press even the application for stay of execution. He could not explain satisfactorily why he had to wait for more than one year and six months for that intention to be made a reality. He has also not explained why, if he did not want the prayer of stay of execution, he still repeated the prayer in the present application.

He has not bothered to tell me what would be the position of the very first application dated 18th January 2006 which sought injunction against eviction.

The reason for this application was averred in paragraph 16 of the supporting affidavit sworn on 17th September 2007 and I quote:

“16. That I am equally advised by my advocates on record that our application filed on 15th March, 2007 is inadequate and the way forward is to apply for review of the Judgment and all consequential order.”

I may note that the earlier application had already asked for setting aside of the Judgment and nothing could have been simpler to seek amendment to the said application or to seek permission to withdraw, neither whereof is sought for.

This is a first case of its peculiar nature which I have come across and was even beyond my dreams that I would encounter one like this.

It seems the counsel for the Defendants have taken this court for granted and gone on trial and error method leaving a trail of pending applications seeking similar orders. This is a clear case of the abuse of the court process, which I can prevent under my inherent powers.

I do agree, however, with Mr. Wati that none of the preliminary objections are proved as definitely the applications pending are not determined except that of 2nd November 2006 which did not give order no. 4 for temporary stay though asked for in the application. I hasten to add that Mr. Wati is not now seeking the prayer of stay.

I am perturbed and horrified at the manner in which the Counsel can play around with the claims or rights of the litigants, whose interest I have to look after while looking at the substantive justice for both parties. I do sympathize with the Defendants who have been taken on a merry go round by their Advocates.

Doing the best I can under the circumstances, I direct that applications dated 18th January 2006, 15th March, 2006 be marked as withdrawn with costs to the Plaintiffs.

The present application shall be heard on the date taken from the court at the hearing of this ruling in respect of prayers 3 and 4 thereof.

Dated, Delivered and Signed at Nairobi this 30th November, 2007.

K.H. RAWAL

JUDGE