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| Court: | High Court at Kakamega |
| Case Action: | Ruling |
| Judge: | Isaac Lenaola |
| Citation: | JEAN OMOYO IRARU & Another v HUMPHREY EJILONG ESUBA & Five others [2010] eKLR |
| Advocates: | - |
| Case Summary: | .. |
| Court Division: | - |
| History Magistrates: | - |
| County: | - |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO.48 OF 1994**

**JEAN OMOYO IRARU …… 1ST PLAINTIFF**

**GEORGE OMOYO …….... 2ND PLAINTIFF**

**V E R S U S**

**HUMPHREY EJILONG ESUBA ……..…… 1ST DEFENDANT**

**LEONARD JOSHUA IKAROT …….. 2ND DEFENDANT**

**BEN OJILONG ……..…….. 3RD DEFENDANT**

**BRAMWEL IRARU OJILONG ……. 4TH DEFENDANT**

**ALEX IPAEL OJILONG (MINOR) ……... 5TH DEFENDANT**

**ANDREW ISUBA OJILONG ……..…….. 6TH DEFENDANT**

**R U L I N G**

**1.** The Applicants, by their Notice of Motion dated 25.5.2010 seek that pending an appeal to the Court of Appeal, an interim order of stay of execution be granted. The Motion is brought under section IA, IB, and section 3A of the Civil Procedure Rules.

**2.** I have read the supporting Affidavit sworn on 25.5.2010 by Leonard Joshua Ikarot and his Further Affidavit sworn on 7.7.2010 and the case for the Applicants is as follows;

**3.** That on 15.4.2010 a Ruling written by Chitembwe J. was delivered and the Applicants are unhappy with it. That they were unaware of the same and only came to know of it when the 2nd Respondent caused costs to be uprooted from land that the Applicants occupy. Further, that the 4th and 5th Applicants are minors and it was illegal to issue against them.

**4.** In a Replying Affidavit sworn on 1.7.2010, by George Omoyo, it is the case for the Respondents that the Applicants are strangers to the suit and that it is their father, Ejilong Esuba, who is behind their belated attempt at entering the dispute. That it was the said Ejilong who transferred the suit land to the Applicants on 25.3.2008 while in fact he had no good title to pass. Further, that the applicants allegedly obtained fake orders in a suit before the High Court in Bungoma and had a caution placed on the disputed land, removed, and then transferred the land to themselves.

**5.** At paragraphs 13 – 43 of the Replying Affidavit, George Omoyo has detailed out certain actions by the Applicant which he finds offending and they include alleged instigation of criminal charges against one Rose Mutoro and Judith Mutoro, his sisters; the institution of H.C.C.10/2009 (Bungoma) during the pendency of this suit; the institution of Bungoma CM's Court Misc. Application no. 20/2009 seeking the same orders as in the Bungoma High Court suit and obtaining ex-parte orders in the latter to lift the caution placed on the suit land and upon registration of the land in their names, that the Applicants allegedly then entered it on 4.6.2010 and forcefully planted cassava on one acre of it. That soon thereafter they allegedly attempted to charge the land and obtain monies with the land as collateral thereof. That therefore the Applicants have not come to court with clean hands and their Application should be dismissed with costs.

**6.** In the Further Affidavit sworn on 7.7.2010, the 2nd Applicant claims that he is unaware of HC.C.C.10/2009 (Bungoma) and that the subordinate court had jurisdiction to order the removal of the caution as it did when he applied for it to do so.

**7.** I have taken into account submissions by the advocates for the parties and I further note as follows;

**8.** This suit was commenced by way of an Originating Summons dated 4.2.1994 and in it, Simon Mutoro Iraru had claimed that he was entitled to land parcel no. Malakisi/Mwalie/300 by adverse possession. The Respondent was one, Humphrey Ojilong Esuba. On 3.6.1998, the court awarded the land to the Applicant, Iraru, and on 16.11.1998, Humphrey Ojilong Esuba sought a review of that judgment. He claimed that the Applicant had bribed witnesses to testify in his favour and so there was an error on the face of the record. It is clear from the record that what happened to that Application was that Tanui J. dismissed it on 11.5.1999.

**9.** On 25.7.2000, the Respondent then sought to have the suit dismissed because the Applicant had apparently died and so the suit was said to have abated. The said Application was however withdrawn on 20.3.2001 and nothing happened thereafter until 10.12.2008 when Jean Omoyo Iraru and George Omoyo sought to be substituted in place of their deceased father, Iraru, aforesaid and their prayers were granted by Ochieng J. on 28.4.2009.

**10.** On 2.7.2009, the present Respondents sought to have the registration of the Applicants as registered proprietors nullified and/or cancelled and that the same be registered in their joint names. In a Ruling delivered on 15.4.2010, Chitembwe J. rendered himself thus;

***"The judgement delivered on 3rd June, 1998 has not been challenged by way of Appeal. It therefore cannot be held to have lapsed or its effect eroded. I do find that the 1st respondent had no title to pass to the 2nd to 6th respondents as his title had already been extinguished by the court. Had the Deputy Registrar effected the decree, the 1st respondent could not have circumvented the decision of the court. The 2nd to 6th respondents cannot allege that they were not parties to the initial suit as they are beneficiaries of an illegality. The 1st respondent's action is contemptuous of the court process as he was aware of the court decision.***

***I am satisfied that the 1st respondent's action to transfer the suit property to the 2nd – 6th respondents was aimed at defeating the court decision. He had no valid title to pass to the other respondents as the land belonged to the late Simon Mutoro Iraru."***

**11.** It is the above decision that is sought to be appealed from and in the meantime a stay of execution is sought. Order XLI Rule 4(2) provides as follows;

"**4 (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."***

**12.** The above Rule grants this court a fettered discretion to grant orders of stay of execution once a party meets the conditions set. In this case, I see no evidence of substantial loss because like Chitembwe J. did, I find it completely unacceptable that whereas Tanui J. in a judgment that remains alive to date did consider the matter and concluded that the Respondents' father was entitled to the whole of parcel no. 300 aforesaid by adverse possession, and before transfer could be effected in line with that order, the Applicants would institute separate proceedings, and on 31.3.2008 have title issued in their names. What loss can a party who has benefited from an illegality purport to suffer when this court says that its actions were unlawful. It cannot be that a party should purport to benefit from a patently illegal action, consciously taken to deprive another party of its lawful entitlement.

**13.** It matters not that the applicants have come to court timeously. I have shown that the Respondents lawfully got themselves enjoined in this suit and I am not being asked to set aside the decision of Chitembwe J. on account of the allegation that the 4th and 5th Applicants are said to be minors. The Applicants included the minors in the title to the suit land and in any event the wider interests of justice would necessitate that the error, if at all, should not override the clear case that the court process was abused when orders were obtained in Bungoma Chief Magistrate's court to defeat orders by a superior court in separate proceedings.

**14.** The application before me is devoid of merit and is best dismissed with costs to the Respondents

**15.** Orders accordingly

***Delivered, dated and signed at Kakamega this 16th day of November, 2010***

**ISAAC LENAOLA**

**J U D G E**