



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 54 OF 2009

M'MUGAMBI THIRINGI.....APPELLANT

VERSUS

M'MBIRITHIA GITHONGO.....RESPONDENT

RULING

1. The Applicant M'mugambi Thiringi pursuant to order 40 Rule 1 and 2(I) of the Civil Procedure Rules and section 3A of Civil Procedure Act seeks orders that the Honorable court be pleased to grant the Applicant orders of status quo until this application is heard and that the court do make further orders as pertains to Amwathi/Maua/3371 and 2823 Adjudication section, that the orders obtained be served upon the OCS Maua Police Station for maintenance of peace and tranquility because the Respondent can be violent and cost be provided for.
2. The application is based on the grounds on the face of the application dated 13th November, 2014.
3. The application is further supported by applicant's affidavit dated 13th November, 2014 in which the applicant has deponed interalia; that he has developed houses in the disputed land, that he has fenced the whole land; that he has very good grounds to lodge an appeal against the judgment of the learned judge delivered on 12/11/2014; that he has arrow roots and other subsistence crops from which he and his family lives in; that the appeal will be rendered nugatory if the Respondent proceeds to demolish his premises and evict him from his land; that if orders are granted no prejudice would be occasioned on the Respondent as the applicant has been on the land for over 80 years and the respondent has never set a foot on the disputed land.
4. The Respondent filed replying affidavit dated 20th November, 2014 contending interalia; that the allegation that the Applicant has developed houses in the disputed land are misplaced and he has no legitimate claim over the land parcel No. 2823; that Applicant's claim is over parcel Amwathi/Maua/774; that the applicant's application is just a device to delay the finalization of the matter; that Applicant is misleading the court by bringing in new evidence; that Respondent should be left to enjoy the fruits of his legally obtained judgment that the application is not in good faith; that an appeal perse is not sufficient to stay a decree and that no appeal has been filed; that the applicant's application is grossly defective and incompetent and that the applicant's application has no merits.
5. The court has carefully considered the application, affidavit in support, replying affidavit, counsel respective submissions dated 24th December, 2014 and 7th January, 2015 respectively and the authorities submitted thereto. The issue for consideration in this application is whether the Applicant has met the conditions to warrant granting of orders of status quo or any further orders as pertains to Amwathi/Maua/3371 and 2823 Adjudication Section.

6. The dispute before this court and as regard the present application touches or relates to claim to land under Adjudication process which process is not complete. The Court of Appeal has held in many matters that where a dispute relates to land, special caution must be exercised to avoid determination of dispute on pure technicalities; **(See Peter Wekasa Versus Peter Wangusi Wasiko Civil Appeal No. 62 of 2003 (Eldoret)**

7. The Court of Appeal in the case of; **Chris Munga W. Bichange Versus Richard Nyagaka 2013 Civil Appeal No. 39 of 2013 (UR No. 17/2013) Kisumu** stated as follows:-

“The law as regards applications for stay of execution, stay of proceedings, or injunction is now well settled. The Applicant who would succeed upon such an application must persuade the court on two limbs which are first that his appeal or intended appeal is arguable, that is to say it is not frivolous secondly that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one, is demonstrated.”

8. I have carefully considered that there is an Appeal. In my view before stay orders can issue there should be an appeal filed or intended Notice of Appeal in form of Notice of Appeal. In the instant application notice of intended appeal was filed within time and served. I have on my part been persuaded that the intended Appeal raises arguable points, which arguable points need not be points that will succeed. I need to point out that the intended appeal is for a court higher than this court to decide and need not say any more. That the success of the appeal, if it were to succeed will be rendered nugatory if the application is refused. In my view the applicant has demonstrated the two limbs. I would in view of the foregoing exercise my discretionary powers in favour of the Applicant as far as prayer (a) is concerned.

9. The upshot is that the applicant's application dated 13th November, 2014 is granted. I therefore make the following orders:-

- a. ***That there be orders of status quo in respect of Amwathi/Maua/3371 and 2823 Adjudication Section pending filing of an intended Appeal from the judgment/decree in Civil Appeal case No. 54 of 2009 which intended appeal should be filed within 45 days from the date of this ruling in default of filing of the intended appeal these orders be deemed as vacated.***
- b. ***That the order be served upon the OCS Maua Police Station for maintenance of peace and tranquility between the Applicant and the Respondent herein.***
- c. ***No order as to costs.***

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD APRIL, 2015

J. A. MAKAU

JUDGE

Delivered in open court in presence of:-

CC Penina/Mwenda

J. A. MAKAU

JUDGE