



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. 34 OF 2013

JOSEPH MBURU GITAU.....APPELLANT

VERSUS

MUNGAI KIMANANGE.....RESPONDENT

RULING

The Notice of Motion dated 7th February 2013 by the Appellant seeks, in the main prayer, a stay of execution of decree pending appeal. The intended appeal is against the decree of the lower court passed on 25th October 2012. That decree found that the Respondent was entitled to seven acres of the suit property as claimed in the plaint. It also declared that the Appellant had indeed encroached on the Respondent's land.

The application is expressed to be brought under Sections 3A and 79G of the Civil Procedure Act, Cap 21 and Order 50 rule 7, Order 51 rule 1 and Order 42, rule 6(1) of the Civil Procedure Rules (the Rules). It is supported by the affidavit of the Appellant.

Grounds for the application include –

- (i) That the Appellant has an arguable appeal with high chances of success and unless the orders sought are granted, the appeal shall be rendered nugatory.
- (ii) That while the appeal has high chances of success, the appellant might go ahead and execute the decree.
- (iii) That the Respondent stands to suffer no prejudice if the orders sought are granted.

The application is opposed through a replying affidavit sworn by the Respondent on 15th May 2013. The grounds emanating therefrom include –

- (i) That the application is a waste of time meant to delay the execution of the lower court's decree.

(ii) That he stands to suffer irreparable loss if the execution is delayed as he is a 90 year old sickly man who doesn't want to leave problems for his sons stemming from the suit land once he dies.

Submissions were filed by the learned counsel appearing, who also cited some cases. For purposes of the present application there is an appeal already filed, in that memorandum of appeal was duly lodged on 25th January 2013.

Apart from sufficient cause under rule 6 (1) of Order 42, the Appellant must satisfy the conditions set out in sub-rule (2) of the same rule which provides-

No order for stay of execution shall be made under sub rule(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.”

Delay has not been pleaded, and none is apparent. The application was filed without unreasonable delay. The two other issues the court ought to look at are substantial loss and security.

The Appellant apart from stating that he shall suffer substantial loss in paragraph 16 of his supporting affidavit does not give any other detail.

This plea rings hollow, especially bearing in mind the fact (from the lower court's record) that the Appellant fraudulently encroached on the property of the Respondent.

In the judgment of the lower court it was established that the Appellant committed a fraud upon the Respondent, by encroaching in approximately one acre of the property bought in good faith by both of them while knowing fully well the agreement they had entered into over 40 years before (joint purchase of 17.3 acres of land where Appellant was to acquire 10.3 acres while the Respondent would get 7.0 acres).

There is of course the possibility that these findings of fact and law could be overturned by this Court, but in the particular circumstances of this case and as set out in the lower court record, the appellant has not demonstrated that he stands to suffer substantial loss. What will be taken away from him in execution of the decree is simply what he should not have taken away from the Respondent in the first place.

The Appellant has not offered any security at all in respect to the property itself nor did he indicate whether if given sufficient time he could raise any amount to act as security.

By way of demonstration of sufficient cause the appellant has alleged that he was not involved in the re-survey of the suit land that took place during the trial in the lower court, and that the court did not benefit from important evidence. It is to be noted that the survey was done by two surveyors who represented the two parties. They then jointly prepared a report of their findings. There is nothing that prevented the appellant from calling surveyor/officials of the land registry to testify. This allegation does not establish sufficient cause at all to enable the court to grant the order sought.

It follows the application must fail. It is therefore dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 9th Day of December, 2014.

A.MBOGHOLI MSAGHA

JUDGE