



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

HCC. NO. 605 OF 2001

BROMINE INVESTMENT LIMITEDPLAINTIFF

- VERSUS-

1. KALUME KARISA MBITHA

2. NANCY KHANJILA KALUMEDEFENDANTS

RULING

[1] The applicants filed this application on 20th March, 2013 praying for a stay of execution of the judgment and order of Mwera Judge (as he then was) delivered on 11th December 2012 restraining the respondent from evicting the applicant from the land they own and occupy known as **Kilifi/Mtondia/161** pending the determination of an appeal intended to be filed and whose notice was filed in court on 11th February 2013.

The application was grounded on the grounds annexed to the motion filed by one Kalume Karisa. The grounds were that the applicant owned the suit land Kilifi/Mtondia/161, that they are currently in occupation and have massively invested therein. Further that if the application is not granted they will suffer great loss, that the application was made without delay, the applicants have filed a notice of appeal and that the appeal has high chances of success.

[2] The respondent company opposed the application. It averred that it is the registered owner of Kilifi/Mtondia/61 and have all rights and privileges of the same which ought to be protected. They annexed a certificate of lease dated 24th February 1992. They stated in their affidavit that the land was transferred to it from one Zakaria Orwa who had obtained interest therein on 11th September 1974. A copy of the Green Card was annexed to the Affidavit of one Bharat Ruparela. The Respondent stated that there was no arguable appeal and that the grant of stay order shall interfere with the respondents proprietary rights as conferred by the Constitution of Kenya.

[3] The applicant relied on the grounds on the face of the application and the affidavit of Kalume Karisa Mbithia sworn on 20th March 2013 and annexures thereon. The applicant further relied on Order 42 rule 6 of the Civil Procedure Rules and Sec.1(a) 1(b) and 3(a) of the Civil Procedure Act.

Miss. Njuguna Learned Counsel for the applicant argued that the appellant had lodged a notice of

appeal dated 11th February 2013 and wrote a letter to the Deputy Registrar of the court applying for certified copies of the proceedings to enable the applicants to file their appeal and by virtue of Order 42 rule 6 (4) Court of Appeal rules, the applicant should be deemed to have filed the appeal.

She further argued that a further requirement of stay is to demonstrate that the applicant has an arguable appeal. On this score she argued that para 4 of the applicants affidavit gives a glimpse of what the applicant will interrogate on the appeal.

Miss. Njuguna then went on to set out the other conditions of granting the stay, that the appeal should have been filed without delay and the requirement that security be given for due performance if stay is granted. She stated that the applicant is ready and willing to give such security.

[4] The respondent opposed the application, the respondents main reason was that the applicant had no arguable appeal. To demonstrate that fact the respondent stated that the suit land was alienated to one Zakaria Orwa in 1974. He was registered as proprietor, he then sold the land to the applicant and a certificate was issued to the respondent in 1992.

Mr Olwade Learned Counsel for the respondent argued that the applicant purchased this land from one Charo in 1990. That the said Charo never finalized the payment of fees to the Settlement Fund Trustees. who had allocated the land to him.

That there was no arguable appeal because the title in this case was issued to Zackaria Orwa in 1974. That one Charo Randu Nzai who sold this land to the applicant was allocated this land sometime in 1990 when the Settlement was created and put under the Trustees. That when the said Charo Randu Nzai was unable to pay the fees to the Settlement Fund Trustees the land was allocated yet again to one Noor Shive Noor. The sale by Charo Randu Nzai to the applicants was done after the Settlement Fund Trustees had already reallocated the said piece of land to the said Noor Shive Noor.

It is further argued by the respondent that this is an agricultural land. There was no consent obtained to transfer the land from Charo Randu Nzai to the applicants. It was argued that the said sale was void for all purposes under Sec.6 of the Land Control Act Cap. 302.

Mr. Olwade went on to argue that there was no substantial loss since there was no title and that at best the applicants are trespassers. That any act by Settlement Fund Trustees was void for all purposes as no land was available for alienation and/or allotment. That no evidence was tendered in Court for any developments.

It was finally argued that there was inordinate delay in this case for 4 months in bringing this application. Further that the applicants were given by the Court 45 days to remove their structures from the suit land and that they have not done so.

[5] The issues for determination in this application are as follows:

- (a) has the applicant filed an appeal?
- (b) has the application for stay been made without unreasonable delay?
- (c) Will the applicant suffer substantial loss?
- (d) Does the applicant have any arguable appeal?

(a) *Has the applicant filed the appeal?*

The judgment in this case was delivered on 6th February 2013. A notice of appeal was filed on 11th February 2013. This was well within the time allowed for filing a notice of appeal. Under Order 42(6)(4) an appeal should be deemed to have been filed.

(b) Was the application for stay made without unreasonable delay?

The application herein was made on 20th March 2013. This was barely 9 days after the judgment dated 11th December 2012 (but read on 6th February 2013) had been pronounced. This delay is not inordinate or unreasonable.

(c) Will the applicant suffer substantial loss?

There was no proof in court that the applicant would suffer any loss. There were only allegations that the applicant owns the property and that they had structures therein. There was nothing to show what these structures were and what was their value to enable the court make a finding of any loss at all.

(d) Does the applicant have any arguable appeal?

It should be noted from the outset that in this application, the court is not sitting on appeal of the judgment of a court of concurrent jurisdiction. The issue at hand is just that, finding out if on the face of it whether there is an arguable appeal from the arguments and documents attached to this application. The judge in this case found that the subject matter of this appeal land parcel Kilifi/Mtodia/66 was alienated to Zakaria Orwa on 11th September 1974 for a term of 99 years from 1st January 1974 and a lease issued to him. He transferred it to the respondents on 21st February, 1992 and a certificate issued by the land office to that effect.

The Settlement Scheme came into the scene in 1978. The settlement took the entire area without considering that the subject land was alienated to Mr. Orwa aforesaid. They allocated the same to one Charo who alienated the same to the applicants the alienation to the said Charo was later receded by the Settlement Fund Trustees due to none payment of their fees and they allocated it to one Noor Shive Noor. The Learned Judge (as he then was) of the High Court found that the sale to the applicants was void since there was no title that could pass to Charo from Settlement Fund Trustees as no land was available for alienation. The land had an owner one Zackaria Orwa. Further that the sale from Charo to the applicants was void and of no effect since there was no Land Control Consent.

To my mind, lack of Land Control consent is fatal. No title can pass on any transaction in agricultural land that has no consent. It is by law void for all purposes. This fact will not change come what may. I, without being unkind to the applicant, do agree with the respondent that indeed, this appeal is not arguable and to my mind it has no chances of success. It just denies the successful litigant of the fruits of its judgment.

The application is dismissed with no order as to costs.

Dated and delivered in open Court at Mombasa this 27th day of June, 2013.

S.N.MUKUNYA

JUDGE

27.6.2013

In the presence of:

Mr. Omwenga Advocate for the plaintiff

Mr. Thiaka Advocate for Mr. Oddiaga Advocate for the defendants
