



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 142 OF 2011

KANAMPIU M'RITHARA.....1ST APPELLANT

GRACE MUNJIRU KANAMPIU.....2ND APPELLANT

VERSUS

JULIUS GITUMA KIRIGIAH.....1ST RESPONDENT

NANIS KAGWIRIA GITUMA.....2ND RESPONDENT

RULING

The application herein is dated 20th December, 2011 and is premised Upon Order 42 rule 6 of the Civil Procedure Rules and prayers for orders:

1. **THAT** this application be certified as urgent.
2. **THAT** this Honourable Court be pleased to issue an order of stay of injunctive orders of 11th November, 2011 against the Applicants/Appellants vide Meru CMCC No. 167 of 2011 pending the hearing and determination of this appeal.
3. **THAT** costs of this application be provided for.

The parties agreed that the application should be heard by way of written submissions.

APPLICANTS' SUBMISSIONS

It was submitted that one of the applicants owned the suit property and that eventually it was registered jointly with the “2nd applicant and the family.” It was said that the entire family resided on the suit premises. The orders sought to be set aside in had affected the applicants as they were restrained from entering a place they resided in and that they stood to suffer irreparable and substantial loss and lose all their properties. It was submitted that they would be unable to meet their basic requirements against the requirements enshrined in Article 43 of the Constitution which accorded them rights to access reasonable shelter, sanitation, food and social security. It was also submitted that the respondents could only sue for refund of their money and for that reason the order of stay being prayed for would not affect them prejudicially.

It was submitted that the orders given by the Chief Magistrate in CMCC 167 of 2010 (Meru) were a back door way of taking control of the suit premises belonging to the Applicants.

RESPONDENTS' SUBMISSIONS

For the Respondents, it was submitted that the lower Court had granted the order of injunction fully

satisfied that the respondents (plaintiffs in the lower court) had a

prima facie case and that the ruling had been based on the rules of natural justice which do not allow a party to sell land to another, receive a whopping sum of Kshs.510,000/= being full purchase price and still continue to unlawfully stick to the property without giving vacant possession to the purchaser.

It was proffered for the respondents that the applicants only moved to this Court with their present application to forestall the hearing of a contempt application in the lower court. If this were not so, they should have sought an order of stay in the lower court.

It was submitted that as the applicants premised their application upon order 42 of the Civil Procedure Rules, if the court was persuaded to grant the applicants' prayer for stay, then it was incumbent upon the court to order that security be provided. It was submitted that a stay of execution pending appeal is conditional on provision of security.

Regarding the submission that the applicants stood to suffer irreparable damage if the order of stay is not granted, it was countered that it is the respondents who stood to suffer irreparable damage as full purchase had been paid and 10 years down the line, the applicants had refused to give vacant possession or refund money equivalent to the current price of the land to the respondents.

The respondents decried the attempt to introduce documents in Court at the stage of submissions by the applicants. They trashed that attempt as unprocedural and opined

that the copy of one miscellaneous receipt attached to the submissions was a forgery and unauthentic. The respondents expressed surprise that the appellants had marked the documents attached to the submissions as annexures whereas annexures related to affidavits and not submissions. They opined that this was tantamount to abuse of the court process.

Having considered all the averments and the submissions, I note that it is not disputed that the applicants by an agreement sold the suit land to the respondents and received a sum of Kshs.510,000/= over 10 years ago. It is not disputed that there is a contempt application in the lower court. In my view, it is only the court in which the application is filed that can determine the merits therein.

I also note that this application was premised upon Order 42 rule 6 of the Civil Procedure Rules. The order allows the Court that has issued an order to stay execution of the apposite order upon application by the aggrieved party. The grant or denial of such an order may be contested in the appellate court. In my view, it would have been preferable for the applicants to have sought a stay in the 1st instance in the Chief Magistrates Court. But I am not saying that this application is improperly before this Court.

Regarding security, I note that order 42 Rule 6(2) b decrees that no order for stay of execution shall be made under sub-rule (1) "unless 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." It is not for the Court to speculate if the applicants are able to post security or not. They have not offered any security. This application states that it is predicated upon order 42 of the Civil Procedure Rules.

Having considered all matters raised herein, I have come to the conclusion that the application by the appellants dated 20th December, 2011 is not merited. It is therefore dismissed with costs to the Respondents.

Delivered in Open Court at Meru this 26th day of July, 2013 in the presence of:

Cc. Daniel

Advocates or parties- absent

P. M. NJOROGI

JUDGE