



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL APPEAL NO. 17 OF 2010
MICHAEL MUTHANDI KANGETHE.....APPELLANT
Versus
MWEKE NGUGI.....RESPONDENT

(Arising from the judgment/decree of the Senior Principal Magistrate's Court at Murang'a in Civil Suit No. 471 of 2006)

RULING

The application is a Notice of Motion brought under order 42 Rule 6(1) of the Civil Procedure Rules and section 1A and 3A of the Civil Procedure Act wherein the Applicant is seeking orders.

That this honourable court be pleased to grant stay of execution of the judgment/decree of the lower Principal Magistrate's court until the hearing and determination of this appeal.

It is based on the grounds that the Applicant has filed an appeal against the judgment of the PM's court in Muranga PMCC. No. 471 of 2006 and that the said pending appeal has good and valid grounds on merit.

The application is opposed by the Respondent and has filed grounds of opposition through the firm of C. Mwangi Gachichio as follows:

- a. ***The application has no legal basis.***
- b. ***The said application has no full disclosure of all relevant facts and is also otherwise fatally defective.***
- c. ***The applicant has no arguable appeal.***
- d. ***The applicant has no appeal with any chances of success.***
- e. ***The applicant is frivolous, vexatious and is otherwise an abuse of the process of court.***
- f. ***The memorandum of appeal annexed to the application shows that the appeal is frivolous, vexatious and is otherwise an abuse of the process of court.***
- g. ***The application seeks to deny or delay the fruits of litigation to the respondent.***

h. The application has no merit.

i. It is otherwise in the interests of justice that the application be denied.

The principles which govern this court in exercise of the jurisdiction in deciding applications for stay of execution pending appeal are set out under order 42 rule 6(2) to order for stay of execution shall be made under sub rule (1) unless:

(i) The court is satisfied that substantial loss may result to the applicant unless the order is made.

(ii) The application has been made without unreasonable delay.

(iii) Such security as the court may order from dire performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Mr. Gachichio learned counsel for the Respondent has further submitted on the authority of OCEANIC VIEW HOTEL LTD vs KCB Civil Suit No. 241 of 2002 Mombasa [2002]2 KLR 338 that the court should look at all the circumstances including the merits of the appeal and that the applicant must satisfy two conditions.

That the appeal or intended appeal is not frivolous and that the intended appeal if successful should be rendered nugatory if a stay of the order is not granted.

He submitted that the applicant has not met the stated conditions as no attempt was made by the same to show that the applicant has merit.

Has the application before this court met the conditions stated herein above for the grant of orders sought?

Has the Applicant shown that he will suffer substantial loss?

In answer to the above questions the applicant has deponed that the issue in the appeal involves a matter of title to land and that he is currently the registered proprietor of the suit land and the decree appealed against ordered that the registration of the plaintiff' as the absolute registered owner of the suit land be cancelled and the Respondent be inserted as the absolute proprietor at the appellants costs. To my mind should the Respondent proceed with execution and transfer the title into her name and it later turn out on appeal that the applicant was right then the said title can still be cancelled and the land registered into the Appellants name.

I therefore see no prejudice that will be suffered by the Appellant should the Respondent proceed with execution herein as the exercise can be reversed should the appeal succeed. It was submitted by Mr. Kimani and rightly so that at this stage what is being challenged is the title deed in the name of the appellant.

The other issue which the court must look at is as to whether the application has been made without unreasonable delay. I have noted that the order/decreed appealed against was made on 15th January 2010 and the application before this court filed on 19th November 2011. No explanation has been offered by the Appellant for the delay in filing the application for stay and in my view this delay is inordinate.

I am therefore of the considered opinion upon the submissions herein that the application has no merit and is therefore dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 10th day of February 2012.

J. WAKIAGA

JUDGE