



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL APPEAL NO.70 OF 2010

MAKIRA NATHAN.....APPELLANT

VERSUS

JAMES MWANGI NATHAN1ST RESPONDENT

PAULINE WANGECHI MWANGI.....2ND RESPONDENT

RULING

Under Order XLI rule 4 (now order 42 rule 6) of the Civil Procedure Rules, Makira Nathan, the appellant/applicant herein, took out the motion dated 10th May 2010 in which he sought for the following orders:

- 1. That the application herein be certified as urgent and be heard on priority basis.**
- 2. That an order for stay of proceedings in Murang'a PMC LDT No. 46 of 2008 to issue pending the hearing and determination of this application.**
- 3. That an order for stay of proceedings in Murang'a PMC LDT No. 46 of 2008 do issue pending the hearing and determination of this appeal.**
- 4. That costs be provided for**

The applicant filed an affidavit he swore in support of the application. James Mwangi Nathan and Pauline Wangechi Mwangi, being the Respondents herein did not file any grounds nor any affidavit to oppose the motion.

When the motion came up for interpartes hearing, the applicant was granted leave to proceed ex parte when the Respondent and their advocate failed to turn up in court. The law however enjoins me to consider any responses filed by the Respondents in answer to the application. The main order prayed for is an order for stay of proceedings in Murang'a P.M.C. LDT No. 46 of 2008 pending the hearing and determination of the appeal. It is that the submission of the appellant/applicant that unless the order is issued the appeal before this court will be rendered useless in that the decree will have been executed. It is said the subordinate court has chosen to ignore the express orders of this court issued pursuant vide Nyeri H.C. Misc. Application No. 208 of 2008.

The history of this dispute is succinctly explained by the appellant/applicant in his affidavit. It started when Murang'a S.R.M. SUCC. Case No. 264 of 1994 was filed. The subordinate court appears to have heard the succession cause and found the cause in favour of the appellant and four of his siblings, in that, L.R. No. Loc. 10/Wanjengi/471 was to be shared between the appellant/applicant with his siblings. The court issued an order directing the Respondents to be evicted and to relocate to L.R. Loc.

No/Wanjengi/534. Being dissatisfied, James Mwangi Nathan (1st Respondent) preferred an appeal vide Nyeri H.C.C.A. No. 194A of 1996. The aforesaid appeal was heard and dismissed. The 1st Respondent filed an appeal to challenge this court's decision before the Court of Appeal vide Nairobi C.A. No. 220 of 1999. The court of Appeal Struck out the Appeal on the basis that it had no jurisdiction to hear the appeal under S. 50(1) of the Law of Succession Act. The 1st Respondent appeared undeterred because he thereafter filed a fresh suit at Nairobi High Court vide Nairobi H.C.C.C. No. 1800 of 2000 which suit was later dismissed for being resjudicata. The Respondents went back and filed a complaint before the Kahuro Land Disputes Tribunal whereupon they successfully obtained an award which was adopted by the Murang'a P.M.'s court as its decision vide Murang'a L.D.T. 46 of 2008. The applicant herein successfully challenged the aforesaid award before this court vide Nyeri H.C. Misc. application No. 208 of 2008. The order quashing the award and proceedings was served upon the Murang'a Principal Magistrate's court. The Applicant was thereafter served with the application dated 14th December 2009 in which the Respondents had sought for orders directing the applicant herein to execute documents to confer title to them. The Applicant opposed the application which was later heard and determined in favour of the Respondents. Being dissatisfied, the Applicant has preferred this appeal. Pending the hearing and the determination of the appeal, the appellant/applicant has now beseeched this court to issue the orders sought in the motion dated 10th May 2010 to maintain the status quo. It is obvious that unless the orders are granted, the orders issued by the subordinate court will be executed and thus the subject matter of the suit will have been lost and hence the appellant/applicant will suffer substantial loss. Let the ring be kept evenly by granting the orders sought.

In the end I allow the motion dated 10th May 2010 as prayed with costs to the Appellant/Applicant.

Dated and delivered this 25th day of February 2011.

J.K. SERGON

JUDGE

In open court in the absence of the parties with notice.

J.K. SERGON

JUDGE