



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 96 OF 2000

ALDIS MUTUMA.....APPELLANT

VERSUS

STEPHEN NTONGAI.....1ST RESPONDENT

HARISON MEME.....2ND RESPONDENT

NYAMBENE COUNTY COUNCIL.....3RD RESPONDENT

LESIIIT J.

RULING

I have considered the application for temporary injunction over the suit land that is parcel No. 5901 Upper Athiru Gaiti Adjudication section pending the hearing and determination of the suit. The application has been brought under Order XXXIX rules 1 and 2 of the CPA. The grounds upon which this application is made is that the appellant has a pending appeal against the ruling of the subordinate court over the suit property which is yet to be heard and determined, and that the 1st respondent has ferried materials to the suit property in readiness for construction. This application has been brought under the wrong rules. The appellant ought to have moved the court for stay pending appeal under Order XLI rule 4. The jurisdiction of this court has not been properly invoked. The appellant cannot seek an injunction pending the hearing and determination of an appeal when the rules provide that what he ought to apply for is a stay pending appeal.

The application has been brought to this court in its appellate jurisdiction under Order XLI a stay pending an appeal may be granted by an appellate court. The same rules provide that before stay can be ordered the applicant must satisfy the court that substantial loss may result to the applicant unless the application is granted. The applicant is also required to offer security for the due performance of the decree of order

stayed. The most important factor however is that the law requires that the application should be made without unreasonable delay.

Regarding the issue of unreasonable delay this application has been brought 10 years after the appeal was filed before this court. The record of the appeal shows that the appellant has not been diligent in having his appeal heard. In a period of 10 years is inordinate delay and no attempt has been made to give any explanation also ever for the delay in bringing this application.

Regarding substantial loss the appellant has not shown what loss if any he stands to suffer if his application is not granted. The applicant has also not offered any security for the due performance of the decree or order that may ultimately be binding on him in case his appeal does not succeed.

The appellant has come to this court with this application for an injunction to prevent the execution of the judgment of the lower court that was determined in August 2000. It is important at this stage to also consider whether the appeal before this court is an arguable appeal. I have perused the records of the proceeding before the subordinate court the applicant is claiming an interest in land in an adjudication section. In support of his case the appellant produced a letter signed on behalf of the District Land Adjudication Settlement Officer dated 7th July 1998 that letter certified that the appellant was recorded in the records of the adjudication settlement officer as the owner of land parcel Nom 5901 at Upper Athiru Gaiti. The appellant did not produce any map to show the location to this alleged parcel of land. Secondly the appellant sued the original owner (2nd respondent) and the purchaser (1st respondent of a land parcel No. 28 Kiraone market Igembe South District. He also sued Nyambene County Council the 3rd respondent was sued on grounds it had fraudulently allocated the suit property to the 2nd respondent without the consent of the plaintiff. The 3rd respondent in his defence and in his evidence before the subordinate court took the position that Parcel No. 28 Karaone Market belonged to the 2nd respondent and that the 2nd respondent rightfully sold it to the 1st respondent.

It is my view having perused the record of the lower court that the appellant did not discharge his burden of proof before the trial court.

The appellants claim was for land in an adjudication section. The land adjudication act cap 284 provided procedure for the hearing of any objection of petition by the adjudication officer over a claim or interest over land in an adjudication section. The appellant ought to have followed the procedures laid down under cap 284 to lodge his claim over land before filing his suit in court. The appellant did not follow the laid down procedure in making his claim.

I also noted that the appellant is claiming land parcel No. 5901 the 1st and 2nd respondent have brought a map from the physical planning department of the ministry of lands and settlement showing the location of the parcel of land No. 28 Kiraone Market. The appellant did not produce any map to either show the existence of his parcel No. 5901 or any prove that his alleged parcel of land is one and the same parcel as the respondents No. 28 Kiraone Market. I am not satisfied that the injunction sought over the respondents parcel of land is justified as the appellant has not shown that he has any legal claim or interest over the respondents parcel of land.

Having come to that conclusion I am satisfied that:-

1. The appellants application is incompetent for failure to invoke this courts jurisdiction.
2. Even if the appellant invoked the correct rules to bring his application he will still be undeserving of any orders staying the execution of the lower courts judgment for reason he does not satisfy the conditions under which stay pending appeal can be granted. Consequently I dismiss the applicants application in totality with orders that the appellant meets the costs of this application to the respondents.

Dated Signed and delivered at Meru this 17th day of February 2011

LESIT, J

JUDGE