



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

P & A APPEAL NO.15 OF 2009

NGARI GITHIORIAPPELLANT

VS

MUNENE NGUYO.....1ST RESPONDENT
DAVID GITHAE.....2ND RESPONDENT
TERESA NDUTA.....3RD RESPONDENT

(ARISING FROM KARATINA S.R.M. SUCCESSION CAUSE NO. 77 OF 2004)

RULING

Pursuant to the provisions of order 22 and 25 of the Civil Procedure Rules, Ngari Githiori, the Appellant/Applicant herein, took out the motion dated 14th March 2011 whereof he applied for an order for stay of execution of the judgment of the trial court delivered on 19th August 2009 vide Karatina S.R.M.C Succession Cause No. 77 of 2004 pending the hearing and determination of this appeal. The motion is supported by the affidavit of the Appellant/Applicant. Munene Nguyo, David Githae and Teresa Nduta being the 1st, 2nd and 3rd Respondents respectively herein opposed the motion by filing the replying affidavit of Munene Nguyo sworn 14th April 2011.

When the motion came up for interpartes hearing, Mr. Wamahiu, learned advocate for the Appellant, urged this court to grant him the orders on the basis that his client has an appeal with overwhelming chances of success. It is Mr. Wamahiu's argument that the Appellant will suffer substantial loss if the order is denied in that the appeal will be rendered nugatory if the decree is executed. The Respondents opposed the motion claiming the same was calculated to delay the conclusion of the dispute.

I have considered the rival submissions. There is doubt that the trial court found that George Njambuya Kariuki, deceased held the parcel of land known as L.R. no. Konyu/Mukyrye/783 in trust for the Respondents' father's family and his family. The learned magistrate proceeded to issue an order directing the land to be shared in two equal portions i.e of 2.1 acres each. It is clear that if the order of

stay is not given, it will mean that the aforesaid land will have been subdivided and transferred to the Respondent who in turn may dispose of same to third parties. It is trite law that title acquired by third parties is protected under S. 93 of the law of Succession Act. That protection given by law means that the Appellant's appeal will be rendered nugatory if the order for stay is denied in that the land in dispute will have been put out of the reach of the Appellants. The other question which the court must consider is whether the appeal is arguable. I have looked at the grounds of appeal set out in the Memorandum of Appeal and find that one of the grounds raised is to the effect that the trial magistrate had no jurisdiction to determine a claim based on trust within the succession proceedings. With respect, I think that is a serious arguable point which need to be determined.

In the end I find the motion to be well founded. It is allowed as prayed save that costs shall abide the outcome of the appeal.

Dated and delivered this 20th day of May 2011.

J.K. SERGON

JUDGE

In open court in the presence of the Respondent. No appearance for the Appellant.