



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE 171 OF 2004

SHIVA MOMBASA LTD.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITYDEFENDANT

RULING

By a plaint dated 7th July 2004, the plaintiff sued the Defendant claiming ownership of the parcel of land known as L.R. NO. MN/1/9594. The defendant denied the claims in its Defence. It took out Third Party Notice against the Third Party.

Upon hearing the case, the Honourable Justice Sergon on 24th July 2009 dismissed the plaintiff's suit. The court held that the property had been reserved for the defendant in 1979 hence the same was not available for allocation. The court held that the plaintiff could not in law acquire the said property from other persons allocated the land and registered since the property was not available for allocation. That the land had been reserved for public use. The court ordered rectification of the register relating to the suit property by cancellation of the plaintiff's name and insertion of the Defendants in its place.

Being aggrieved with the decision, the plaintiff lodged a Notice of Appeal to the Court of Appeal on 28th July 2009. On the 19th August 2009, the plaintiff filed this application under the provisions of Order 41, Rule 4 of the Civil Procedure Rules for an order that there be a stay of execution of the Orders of 24th 2009 in favour of the Defendant and all consequential rights and interest appertaining thereto kept in abeyance pending the intended appeal.

The grounds of the application are that:-

1. Substantial loss may result unless stay is granted.
2. The application is made without unreasonable delay.
3. Security for due performance can be provided.
4. The appeal is arguable and might be rendered nugatory unless stay is granted.

The application is supported by an affidavit sworn on 18th August 2009

by a director of the plaintiff, Mr. Mahesh Bhagani.

The application was opposed by the Defendant which filed a Replying affidavit sworn by the Acting Deputy Commissioner Legal Services in the Defendant parastatal on 5th October 2009, Mr. Paul M. Matuku.

I have considered the application, the rival affidavits and the able submissions by Mr. Kassim Shah Advocate for the Applicant and Mr. Njoroge Regeru for the Respondent.

Under Order 41 Rule 2, no order for stay of execution shall be made unless:-

- (a) The Court is satisfied that a substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) 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.

The subject matter of this suit is an immoveable property, L.R. No.

MN/II/19599. The plaintiff has in its possession a registered Title issued by the Third Party, The Commissioner of Lands. The Defendant on its part had a letter of Reservation dated 23rd July, 1979 which stated in part:

Plot site "A" and "B" is reserved to your Department for the proposed extension of Customs and Excise Training Institute.

The Applicant has never been in possession of the suit premises. At all material times, the Defendant has been in possession of the property with a perimeter wall enclosing the plot.

From the foregoing, if there is no stay of execution it means that the Applicant's name shall be removed and cancelled from the register to the land. It also means that the Respondent may proceed to put up and develop the land. It intends to extend its Training Institute which it say has been accredited as the second Institute of its kind in Africa. This means that if there is no stay pending appeal the property will never be the same and it will not be available to the

Applicant if its Appeal is successful.

It is clear therefore that the appeal will be rendered nugatory as the subject matter of the appeal would have been substantially alienated and altered.

Strictly this court cannot sit on appeal of its own judgment. Unless there are exceptional circumstances, the court from which its decisions is appealed from, cannot state whether there is an arguable appeal or not. That is for the Court of Appeal to decide.

What this court must protect is the undaunted rights of appeal of the Applicant.

I do hold that immovable property is a unique and valuable property. Each property has its special characteristics, locations, aesthetics, economic value and possibly sentimental value to the registered owner or one who has acquired a vested legal or equitable right thereto. One cannot say that immovable property and the right to ownership is compensable by pecuniary damages. The Applicant has not said that it wishes to sell the property if it succeeds in the Appeal. The Applicant has not asked for monetary security for the property which could have been possible.

In the circumstances, I do hold that unless the order of stay is granted, the substantial loss will result to the applicant. I do not think that the Respondent has on its part demonstrated that it will be prejudiced irreversibly. In any case they have had possession of the property since 1979 and shall combine to be in possession until the appeal is determined.

I do therefore grant prayer (b) of the application dated 18.8.2009. I do grant this order on condition that the Appeal shall be heard and determined within a period of 12 months unless otherwise ordered by this Court. This will ensure the Applicant prosecutes the Appeal expeditiously. Costs shall be in the Appeal.

Dated and delivered at Mombasa this 15th day of July 2010.

M. K. IBRAHIM

J U D G E

Mr. Chakera

I seek leave to appeal. Certified copies of the Ruling and proceedings.

Order

I grant leave to appeal. Certified copies of proceedings and Ruling be supplied.

IBRAHIM, J

15/7/10

Ibrahim, J

Court clerk – Kazungu

Mr. Chakera h/b for Mr. Njoroge Regeru for the Defendant.

No Appearance for the Applicant.

Ibrahim, J