



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Civil Application 648 of 2008

SAMUEL ACHOLA NDONGA.....APPELLANT

VERSUS

DEFRONZA MASAKA.....RESPONDENT

R U L I N G

1. By a notice of motion dated 30th June, 2009, Samuel Achola Ndonga, hereinafter referred to as the applicant, seeks an order restraining the respondent Defronza Masaka, from evicting the applicant from premises known as House No. 10 Akal Road, pending the hearing and determination of their intended appeal to the Court of Appeal, against a ruling delivered by this Court on 16th June, 2009.
2. The ground upon which the application is anchored is that the applicant is aggrieved by the ruling of the Court and unless the orders sought are granted, the applicant will be evicted from the suit property, where he has lived for the last 12 years, and his appeal would thereby be rendered nugatory.
3. The applicant has also sworn an affidavit in support of his application in which he explains the circumstances in which his occupation and right to the suit property arises. Mr. Nyandieka who argued the application, urged the Court to grant the orders sought, as the substratum of the appeal would otherwise be lost, if the orders of the lower Court are executed.
4. The respondent has objected to the application through grounds of opposition as follows:
 - (i) The application is an abuse of the due process of this Court.
 - (ii) The application is *res judicata*.
 - (iii) This Honourable Court lacks jurisdiction to hear and determine the application for stay.
 - (iv) The application lacks merit and the same ought to be dismissed with costs.
5. Mrs. Wambugu, who appeared for the respondent argued that this Court's jurisdiction was not properly invoked, as the prayers sought are not supported by the provision of the law under which the application is brought. The respondent has also sworn a replying affidavit in which she states that she is the registered owner of the suit property, and is therefore entitled to enjoyment of her property. The respondent further depones *inter alia*, that the applicant has come to Court with unclean hands as he is a trespasser, having gained forceful entry into the suit premises after being evicted, pursuant to a lawful Court order.

6. I have carefully considered the application, the affidavit in support and in reply. In effect the applicant is seeking an interlocutory order of injunction restraining the respondent from evicting him from the suit premises, pending the hearing of his intended appeal to the Court of Appeal.

7. On 10th March, 2009, this Court delivered a ruling in which it considered and rejected the applicant's application for stay of execution pending appeal. Although the present application is worded differently, (i.e. for an interlocutory injunction to restrain eviction), the orders sought are in effect orders staying execution of the decree issued by the lower Court in Milimani CMCC No. 10838 of 2006, which was to evict the applicant from the suit property and put the respondent in possession.

8. To that extent this application is similar to the previous application for stay of execution pending appeal, which was the subject of this court's ruling of 10th March, 2009. The applicant has not put forward any good reason that would justify this Court departing from its previous position and granting the orders sought, particularly when it is apparent that the applicant has re-entered the suit premises in defiance of a Court order.

9. I do appreciate that the applicant now seeks to have the execution of the decree of the lower Court stayed to enable him pursue a further appeal to the Court of Appeal. I also appreciate that the suit involves a residential house where the applicant has apparently been living with his family for some time. Nevertheless, the applicant has not demonstrated *prima facie* that he has a better right to the suit property than the respondent who has demonstrated that she is the registered proprietor of the suit property. Much as the applicant has a right to appeal, that right must be balanced against the right of the respondent who is also entitled to enjoy the fruits of her judgment without undue delay.

10. For the above reasons, I find that it would neither be fair nor just to issue the order of interlocutory injunction sought by the applicant. Accordingly, his application is dismissed.

Those shall be the orders of this Court.

Dated and delivered this 16th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Nyaribo holding brief for Nyabena for the applicant

Kinyua for the respondent

Eric, court clerk