



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS
Civil Case 148 of 2006

IN THE MATTER OF THE GOVERNMENT LANDS ACT (CHAPTER 280)

AND

IN THE MATTER OF PROPERTY TITLE NO.L.R. 22 NAIROBI

OTHERWISE KNOWN AS CLOSEBURN ESTATE

AND

IN THE MATTER OF THE REMOVAL OF CAVEAT REGISTERED

ON THE 28TH October 1987

BETWEEN

RITH DAMARIS WAMBUI MBIYU.....1ST PLAINTIFF

EDDA WANJIRU MBIYU.....2ND PLAINTIFF

MARGARET NJERI MBIYU.....3RD PLAINTIFF

DAVID NJUNU MBIYU KOINANGE.....4TH PLAINTIFF

(Suing as the Administrators and for and on behalf of the Estate of the late MBIYU KOINANGE)

VERSUS

KENYA PLANTERS' CO-OPERATIVE UNION LIMITED.....DEFENDANT

RULING

The plaintiffs came to this court by way of an Originating Summons dated 15th February 2006 seeking the following orders in respect of a caveat that was lodged by the defendants against the suit property being LR NO. 22 NAIROBI namely:

(1) That there be a declaration that the said caveat is illegal and/or unlawful and has been unlawfully retained by the defendant on the said property to the detriment of the estate of the deceased.

(2) That the defendant do forthwith show cause why the said caveat should not be withdrawn unconditionally and in default thereof, the court do order the Registrar of Titles to remove the said caveat forthwith.

The plaintiff also sought costs of the application.

The defendant on being served with summons raised Preliminary Objection which was filed in court on 22nd March 2006. The Notice of Preliminary Objection contained 4 grounds but counsel abandoned the last two and only argued ground 1 and 2 namely:

1. That the action (Originating Summons) is statute barred under the applicable provisions of the Government lands Act (Cap 280) Laws of Kenya) and

2. That the compulsory one month's Notice has not been issued as expressly provided by the Government Lands Act (Cap 280 Laws of Kenya). When the matter went before Makhandia J, he made a finding that the objection taken is not sustainable and dismissed the Preliminary Objection quoting from the case of MUKISA BISCUITS MANUFACTURING CO. LTD 1969 EA 696 he said:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Point may dispose of the suit. Examples are objection to Jurisdiction of the Court, or a plea of limitation or submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

I agree with my brother Makhandia J that the issues raised in this Preliminary Objection will require looking at evidence to be proved and therefore were not properly raised as Preliminary Objection. They could be argued in the main application.

The applicant being dissatisfied with the dismissal of the Preliminary Objection has preferred an appeal and now applied for stay of execution pending the outcome of the appeal. The principles upon which the court acts in an application of this nature are now well settled.

First the applicant has to demonstrate that the intended appeal is likely to succeed or that it is not frivolous. Secondly the applicant has to show that the appeal would be rendered nugatory if the orders sought are not granted. The applicant did not satisfy the court on either of these issues. Nor am I persuaded that the intended appeal is arguable or that it would be rendered nugatory if the orders sought are not granted.

For the reasons stated above stay is refused and accordingly the application is dismissed with costs.

Dated and delivered at Nairobi this 31st day of October 2006.

J.L.A. OSIEMO

JUDGE