



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Case 60 of 1999

RINGERA MAITIRA APPELLANT

VERSUS

GEOFFREY MURITHI & ANOTHER. RESPONDENT

RULING OF THE COURT

This application dated 7.4.2004 brought under Order 41 Rule 4(1) of the Civil Procedure Rules and Sections 3 and 3a of the Civil Procedure Act is seeking an order of stay of execution of the judgment in civil suit number 779 of 1993 until the appeal herein is heard and determined. The applicant also seeks an order of inhibition against parcel of land No. ABOTHUGUCHI/KITHIRUNE/784 until the appeal is heard and determined. The grounds in support of the application is that the applicant/appellant is the registered owner of parcel No. ABOTHUGUCHI/KITHIRUNE/784 until the appeal is heard and determined. The grounds in support of the application is that the applicant/appellant is the registered owner of parcel No. ABOTHUGUCHI/KITHIRUNE/784 and that judgment was erroneously entered against him in MERU SRMCC No. 779 of 1993. The application is also supported by an affidavit sworn by the applicant on 7.4.2004 in which he has deponed that the respondents are already in the process of executing the judgment in SRMCC No. 779 of 1993 as they have already applied for Land Board Consent to transfer the parcel of land of which he is the absolute proprietor under the registered Land Act. He has deponed further that since he is still alive his sons cannot purport to disinherit him of his property.

The application is opposed on the grounds that the application suffers from inordinate delay and further that the applicant has not complied with the procedure for filing appeals.

Briefly, the respondents herein sued their father, the appellant in SRMCC No. 779 of 1993 on 11.11.93. At paragraph 3 of the plaint the respondents who were original plaintiffs in the said suit stated:-

“4. That the plaintiffs are the sons of the defendant by his senior wife” and paragraph 5 thereof they stated:-

“5. That the title No. Abothuguchi/Kithirune/784, which comprises 4.30 acres was registered in the name of the defendant by his father Naitira Kairebi to hold the same in trust for himself and other members of the family.”

Paragraph 6 of the plaint states:-

“6. That in breach of the customary law trust the defendant has threatened to dispose of this land by way of sale without any due regard to the said trust thus rendering the plaintiffs destitute.”

And the plaintiffs therefore sought the following reliefs from the court.

1. A declaration that the defendant holds half share of title No. ABOHTUGUCHI/KITHIRUNE/784 in trust for the plaintiffs.
2. An order that the defendant do transfer half share (2.15) acres to the plaintiffs.
3. Costs of this suit.
4. Interest thereof at the court rates on (3) above.

In his defence filed in court on 7.12.1993, the defendant/applicant denied all the plaintiffs allegations and prayed that the suit against him be dismissed. After a full trial the learned magistrate found for the plaintiffs holding that indeed the defendant held the suit land in trust for himself and his children and that he should therefore transfer 2.15 acres thereof to the plaintiffs/respondents.

It is against that judgment that the applicant has appealed, and it is against the execution of that judgment that the applicant has brought this application. The memorandum of appeal sets down the grounds of appeal as follows:-

1. That the learned magistrate averred in law and in fact in failing to find that the respondents claim was in nature of a trust which was extinguished upon registration under section 28 of the Registered Land Act.
2. That the learned magistrate erred in law and infact in failing to find that the first registration could not be defeated by the respondents' claim as the title is absolute with no trust noted on the register.
3. That the learned magistrate erred in law and infact in arriving at a decision contrary to law and evidence on record.
4. That the learned magistrate erred in law and infact in failing to find that the respondents had not proved their case on a balance of convenience.

For the purpose of this application I have to be satisfied that there is an arguable appeal; and that in the event that the appeal succeeds, any withholding of stay orders may render success in the appeal nugatory. It is quite arguable that sections 28 as read with sections 27 and 30 of the Registered Land Act vest absolute ownership of registered land together with all rights and privileges in the registered proprietor. It is also quite arguable that a first registration may not be defeated by the respondent's claim against the applicant/appellant. It is therefore my considered view that if the stay order is not granted, the respondents will go ahead to transfer the land and develop the land according to their own tastes and plans. The evidence in the lower court shoed that apart from the respondents herein, the applicant has five other children. If stay is not granted the success of that appeal is likely to be rendered nugatory, and the other children of the applicant may suffer prejudice.

In the circumstances, I allow this application and grant the orders in terms of prayers (c) and (d) of the chamber summons dated 7.4.2004. The costs of this application shall be costs in the appeal. It is so ordered.

Dated and delivered at Meru this 29th day of July 2004.

RUTH N. SITATI

JUDGE