



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Appeal 5 of 2009

KIDHEKA MUSYA NGATAPLAINTIFF

VERSUS

EMMANUEL NGANDE NYOKADEFENDANT

R U L I N G

The Notice of Motion application is dated 11-2-09 and is made under section 65 Civil Procedure Act and Order XLI Rule 4(1). It seeks that pending hearing and determination of the judgment in Kilifi SRMCC No. 188 of 2005, Emmanuel Nganda Nyoka V Kidheka Mutisya Ngata.

It is based on grounds that:

- (1) The appellant is disadvantaged wholly with the judgment of SRMCC (Kilifi) No. 188 of 2005 made on 5th February 2009.
- (2) Soon after delivery of the judgment the appellant promptly applied for certified copy of proceedings and judgment which are yet to be supplied to him.
- (3) The appellant has promptly filed Memorandum of Appeal.
- (4) The intended appeal has high chances of success.
- (5) In the absence of an Order of Stay execution shall proceed and this will render the appeal nugatory.

In the affidavit supporting the application it is deponed that despite the trial court having granted the applicant a right of appeal within 28 days, from the date of judgment, it, in the same breath, ordered execution of its judgment within a period of seven (7) days.

It is the applicant's contention that the order to execute the transfer was made without jurisdiction as the same was not prayed for by the Respondent amongst the reliefs he had sought in the plaint in the lower court. It is his contention that the order denies him adequate time to take up his appeal which has high chances of success because:

- (a) The respondent's suit was incurably defective and bad in law for failure to join the estate of Mudhia Ngata Nzui with whom he is claimed to have jointly signed the agreement.
- (b) The subject sale agreement in respect of which the court ordered specific performance relates to an Agricultural property (i.e the suit property) and which in absence of consent from the Land Control

Board, became null and void in terms of section 2 of the Land Control Act.

(c) The orders of specific performance are incapable of being effected given that the suit property is jointly registered in applicant's name and one Mudhia Nzui Ngata – deceased whose estate was not enjoined as defendant in the lower court.

In summary, that the trial magistrate misdirected himself in making findings against the applicant and if stay is not granted, then he is likely to lose the suit property. He explains that given the framework of the time given by the trial court, it has proved totally impossible for him to obtain typed certified copies of the proceedings and judgment from the lower court, thus prompting him to obtain a photocopy of the handwritten one and out of which he has prepared an uncertified copy of the trial proceedings and judgment, both annexed and marked KMN 3 and 4.

The application is opposed and in the respondent's Replying affidavit, it is deponed that the seven days order by the trial magistrate was not unreasonable and in any event the appeal does not have high chances of success as:

- (1) The issue of non-joinder was never raised in the lower court.
- (2) Specific performance is wide and envisages compliance with section 2 of the Land Control Act.
- (3) The order of specific performance is capable of being effected against the applicant
- (4) The trial magistrate did not misdirect himself in arriving at the decision.

It is the respondent's further contention that the applicant has not shown any substantial loss that he is likely to suffer that might not be mitigated by damages or restitution. The application is termed an abuse of the court process and that it should be dismissed.

In arguing the application, Mr. Maosa submitted that the lower court's order was flawed and incompetent, reiterating what is contained in the grounds on the face of the application and the supporting affidavit.

Mr. Magolo for the respondent conceded that the appeal was filed about one week after judgment – which was fairly expeditious. He however argued tht applicant had not demonstrated that he would suffer any substantial loss.

He explained to this court, that the undisputed background to this dispute is that applicant is holding to purchase price, now going to ten (10) years and has not taken any steps to transfer the land – he is not offering any security and wonders what the applicant will suffer if the sale is concluded. It is his contention that if the execution proceeds, it only means there will be changes in the register as to who is the proprietor, and if the appeal succeeds that will be reversed noting that it is not something irreversible. He also laments that applicant is not offering any security but now suggests from the bar that they are willing to abide by anything this court orders.

It is also his argument that there is no valid appeal – citing Order XLI Rule 4 and 5, and pointing out that the procedures for instituting an appeal must all be conferred with as Order 41 rule 1 and 1a make it mandatory that there be a petition of appeal and certified copy of the order/decreed appealed from before any action can be taken, and that has not been done in the present instance.

Mr. Magolo argues tht even on merit, the appeal has no basis as the appellant received the purchase price then refused to do his part of the bargain and is holding to both the money and the land thereby coming to court with unclean hands and should not be accorded any equitable remedy.

However Mr. Maosa insists that they have complied with the procedure sunder Order XLI Rule 1 (1) – saying the appeal is on record and part 2 refers to grounds of appeal which have listed nine grounds. He argues that Mr. Magolo has misinterpreted section 1(a) saying it is not fatal to file an appeal without a

certified copy of decree or order – and that the provision in fact gives the appellant a lifeline. It is also argued that a decree is as a result of a judgment (which has been filed in court) and a reading of it brings out what the trial magistrate ordered. The biggest fear is that if the property is transferred to the respondent, he will deal with it adversely including selling it to a third party. The order being contested was made vide a judgment by the SRM Kilifi, Mr. Nduna to the effect that:

“an order for specific performance of the sale agreement dated and executed on the 10th day of March 1999, within the next 7 days failing which the executive office of the court will execute the transfer documents in favour of the plaintiff”

Under the provisions of Order XLI rule 4(2) (1)

“No order for stay of execution shall be made under subrule (1) unless-

- a) the court is satisfied that substantial loss may result to the applicant unless the order is made and 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 applicant fears that he will lose the land which is registered in his name. He does not however deny that he received the consideration paid to him ten years ago and which he still holds to date – in effect, he has the cake and the icing. It is not said that certain developments have been made on the said land so that in the event of the order by the trial magistrate being effected then the developments would be adversely affected. His only fear is that if the land is transferred to respondent, he may transfer it to a third party – those are speculations with no basis whatsoever – if the transfer is effected and the appeal succeeds, the title will simply be ordered canceled and that the Register be rectified to show the applicant's name.

However, I do confirm that the application was brought without any inordinate delay.

Applicant has not offered any security for the due performance, preferring to let the court order such security. My reading and comprehension of subrule 2(1) (b) is that it is the applicant who should give such an offer – this has not been done and appears to be a last minute afterthought or realization, which still remains non specific. To that extent then the requirement anticipated under the mentioned subrule is not fulfilled.

The applicant has exhaustively reproduced his grounds of appeal in the supporting affidavit, perhaps to demonstrate that he has an arguable appeal, which will be rendered nugatory if the orders are not granted. The applicant's main contention is that there is an important legal point he wishes to pursue on appeal with regard to the orders of the lower court. This concept of an appeal being rendered nugatory seems to have developed from the views expressed by Brett J in the case of Wilson v Church (No.2) 12 ChD [1979] 454 at pg 459 that as a general rule the court ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory and in the same case Cotton J. stated:-

“I will state my opinion, that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal of successful, is to nugatory”

In the present case, I have already alluded to the aspect of substantial loss and why I don't think it would be irreparable. That reasoning is closely connected with the issue as to whether the appeal will be rendered nugatory – it will not, for precisely the very reason referred to earlier touching on substantial loss. In Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 EA 227 at pg 232, it was stated that:

“The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

I have tried to extend my Mind to encompass the meaning of that term on the present circumstances, and I am totally persuaded that the appeal will not be rendered nugatory if the orders are not granted.

I therefore find no limb on which to grant the orders sought and the same is dismissed.

Costs to the respondent.

Delivered and dated this 6th day of July 2009 at Malindi.

H. A. OMONDI

JUDGE