



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, OMOLO & AKIWUMI, J.J.A.

CIVIL APPLICATION NO. NAI.70 OF 1996

BETWEEN

MWANZI ROAD PROPERTIES LIMITED.....APPLICANT

AND

MAINA MUCHIRI

GILBERT ROAD PROPERTIES LIMITED.....RESPONDENTS

(Application for a stay of execution of the judgment of the High Court of Kenya at Nairobi (Mr. Justice Shields) dated 5th October 1993

in

CIVIL CASE NO. 1800 OF 1990 (O.S.))

RULING OF THE COURT

This is an application under rule 5(2)(b) of the Court of Appeal Rules brought by Mwanzi Road Properties Ltd (the applicant) for a stay of execution of the judgment and order of the superior court given by Shields J on 5th October, 1993. In the alternative, the applicant seeks an order of injunction against Maina Muchiri (the plaintiff) restraining him, his servants and agents from selling, disposing of, transferring or otherwise dealing with the property on Plot L.R. No. 1870/1/92 (the suit land) until the hearing and final determination of an intended appeal.

The plaintiff took out an originating summons against Gilbert Road Properties Ltd (the defendant) who was at the material time the registered proprietor of the suit land, claiming to be entitled to the suit land by adverse possession and sought to be registered as proprietor accordingly.

On 24th July, 1992, well before the date of trial, which took place on 5th October, 1993, the suit land was transferred to the applicant by the defendant by an assignment dated 23rd June, 1992. It must follow from this that at the trial on 15th March, 1993, the plaintiff knew or ought to have known that the applicant was the registered proprietor of the suit land. He took no steps to join the applicant as a second defendant in the suit. The applicant became aware of the judgment after it had been passed. It applied for a stay, and also to be joined as an interested party, but the application was dismissed by Bosire J on 18th October, 1994. The applicant filed an appeal against the decision of Shields J (Civil Appeal No.143/94) and also

obtained a stay of execution from this

Court on 18th November, 1994. Unfortunately, that appeal was struck out by this Court on 15th February, 1996, as the record of appeal did not contain a certified copy of the order appealed against. The applicant has obtained extension of time to lodge a new appeal and has filed a fresh notice of appeal on the basis of which it has now made the present application.

Following the judgment of Shields J, a vesting order was prepared transferring the suit land to the plaintiff and was registered in the Lands Office on 25th July, 1994. In its ruling on the previous application for stay made by the applicant, this Court found as a fact that the order made by Shields J on 5th October, 1993, was not brought to the attention of the applicant until October 1994. The Court also expressed the view that the applicant should have been joined as a defendant because both the plaintiff and the defendant were aware of its interest in the suit land. And the Court granted a stay. That is a good enough reason for us to allow this application. The complaint by the applicant that its property was taken away without being given an opportunity to be heard is a very serious complaint indeed, and one which should be investigated because, if it is true, the order made in favour of the plaintiff may well be reversed.

We are satisfied that the applicant has an arguable appeal which, if successful, would be rendered nugatory if a stay or injunction is not granted. The plaintiff has been registered as proprietor already. So it would be pointless making an order staying his registration. In the circumstances, we allow this application and issue an injunction restraining the plaintiff, his servants and agents from selling, disposing of, transferring or otherwise, dealing with the suit land pending the hearing and final determination of the intended appeal or further order. We also order that this order be registered against the title at the Lands Office. Costs of the application to be in the intended appeal.

Dated and delivered at Nairobi this 10th day of April, 1996.

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR