



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 52 OF 2017 (UR 34/2017)

BETWEEN

ZACHARY OMONDI ODONGO.....APPLICANT

AND

JOASH ONYANGO NYIERO.....RESPONDENT

(An Application for the order of stay of execution of the judgment

and decree of the High Court of Kenya at Kisumu,

(E.N. Maina, J.) dated 9th March, 2017

in

SUCCESSION CAUSE NO. 649 OF 2011)

RULING OF THE COURT

[1] This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules, 2010 for an order that the execution of the judgment and decree of the High Court (E. N. Maina, J.) in High Court **Succession Cause No. 649 of 2011** delivered on 9th March, 2017 be stayed pending the hearing and determination of the intended appeal.

[2] The relevant facts to this application as extracted from the judgment of the High Court are as hereunder:

The applicant is the administrator of the estate of **Albert Odongo Odhuno (deceased)**. He is also the son of the deceased. The respondent is a cousin of the deceased.

The deceased was the registered proprietor of land **Title No. South Ugenya/Yiro/1671**. The deceased had charged the land to the Kenya Commercial Bank as security for a loan advanced to the deceased.

The High Court made a finding that before his death, the deceased had sold the land to the respondent and that part of the proceeds of sale had been used to pay the loan but the deceased died before the loan and all charges had been fully paid and before the bank discharged the charge.

Thereafter, the respondent paid the remaining charges and the bank discharged the charge and released the title to the respondent who registered the transfer and caused himself to be registered as the proprietor.

The Court also found that the applicant filed the succession case and using an old certificate of search showing that the deceased was the registered proprietor caused himself to be registered as the proprietor on transmission. The High Court also made a finding that the applicant filed **Land Case No. 681 of 2015** in the Environment and Land Court challenging the title of the respondent and that the Court gave

judgment for the applicant on 29th June, 2016.

Thereafter, the respondent filed an application in the succession cause for revocation of the grant.

[3] The learned Judge made a finding thus:-

“It is my finding that the deceased having entered into a sale agreement with the applicant, having received the purchase price, having obtained the consent of the Land Control Board and subsequently executed a transfer of this asset to the applicant, he had ceded the ownership of the same to the applicant.”

Upon that finding, the High Court directed that the confirmed grant be rectified so that **LR Siaya/Yiro/1671** is vested to the respondent who was the applicant. The Court further ordered the applicant herein to deposit the original certificate of confirmation of grant with the Deputy Registrar of the Court within 14 days and a fresh certificate to issue.

[4] The application is supported by the affidavit of the applicant. The applicant’s counsel has also filed written submissions. The application is opposed on the grounds contained in the replying affidavit of the respondent. Similarly, the respondent’s counsel has filed written submissions.

[5] The applicant filed an application for stay of execution in the High Court but it was dismissed. The High Court was satisfied that the applicant has shown that he would suffer substantial loss if stay was not granted. However, the application was dismissed because the applicant had not indicated that he was willing to offer security and had not also exhibited a competent notice of appeal.

Nevertheless, this Court has jurisdiction to entertain a fresh application and exercise original jurisdiction. However, the applicant is required to demonstrate that the intended appeal or appeal is arguable and that unless stay is granted, the appeal would be rendered nugatory.

[6] The applicant states that he has appealed without annexing a notice of appeal or a memorandum of appeal. The respondent’s counsel states in the written submissions that he has now discovered that a notice of appeal is attached to the record of appeal and that the notice of appeal was lodged on 6th April, 2017, outside the stipulated 14 days. To ensure that justice is administered without undue regard to procedural technicalities as the Court is enjoined to do under **Article 159 (2) (d)** of the Constitution, we have ascertained from the registry that the applicant indeed filed *Civil Appeal No. 50 of 2017 on 23rd May, 2017 and that a notice of appeal dated 27th March and lodged on 6th April, 2017 is in the record of appeal.* That notice of appeal has not been struck out and, if filed out of time, it can be validated by an application for extension of time. It is sufficient for the purpose of this application.

[7] A draft memorandum of appeal or a copy of the memorandum of appeal already filed has not been annexed to the application. However, the applicant’s counsel states in the written submissions that the appeal is arguable and is not frivolous for the reason that the learned Judge misapprehended the judgment of the Environment and Land Court delivered on 29th June, 2016. It is evident from the impugned judgment that the applicant’s evidence was that the dispute between him and the respondent was settled by the judgment of the Environment and Land Court. In other words, his case is that the judgment of the Environment and Land Court which cancelled the respondent’s title on which there was no appeal conclusively determined the property rights. The judgment of the Environment and Land Court had not been availed but the decision of the Court is not disputed.

We are satisfied that the issue whether the decision conclusively resolved the dispute and whether the Probate and Administration court erred in re-opening the dispute is an arguable point of law.

There is a land dispute between relatives. The respondent had the title which was cancelled by the Environment and Land Court. The applicant got the title through the succession case. The High Court has now essentially cancelled the title and restored it to the respondent. The applicant told the High Court that he was still in possession of the land and that the respondent is not in possession. The applicant has appealed. If stay is not granted, the land may be out of reach of the Court by the time the appeal is determined. It is just in the circumstances, that the land should be preserved pending the determination of the appeal.

[8] In the premises, the application is allowed and the execution of the decree of the High Court is stayed pending the determination of the appeal.

This means that the surrender of the original certificate of confirmation of grant and the issuance of a fresh certificate of confirmation of grant are stayed. It also means that the status quo regarding possession of the disputed land shall be maintained pending the determination of the appeal.

In the event that a fresh certificate of confirmation of grant has already been issued, the registration of that certificate and the issuance of a title to the respondent is stayed pending the determination of the appeal.

Dated and Delivered at Kisumu this 22nd day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR