



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Application 21 of 2012

FREDRICK MUTONYI GITONGA.....APPLICANT

AND

DANIEL KIBE RITHO.....RESPONDENT

(An application for stay of execution of the Hgh Court of Kenya at Nyeri (Makhandia) dated 22nd July, 2009

in

HCCC NO.50 OF 2003)

RULING OF THE COURT

1. Fredrick Mutonyi Gitonga who is the applicant moved this Court by way of his homemade application that is not titled. He is seeking for an order of stay of execution of the judgment in Nyeri HCCC No.50 of 2003 pending the hearing and final determination of the intended appeal. The application was filed on 14th December, 2011. It is supported by his affidavit that annexes several documents to wit: a notice of appeal that was filed on 18th September, 2009; a certificate of delay issued by the Deputy Registrar, dated 28th November, 2011 indicating that it took 2 years for the court to prepare the proceedings, and a judgment the subject matter of the appeal that was delivered on 22nd July, 2009.

2. The applicant contends that he has been in occupation of the suit land i.e. parcel No.Othaya/Kianagu/754 since the early years of 1970; whereas the respondent's family have never been in occupation of the said land and they have no right to claim it. The applicant and his family will suffer irreparable damage and be left destitute if execution is ordered.

3. The respondent who was also representing himself appeared before us. He told us that he did not know court procedures and, therefore he had not filed a replying affidavit. He nonetheless, insisted on making oral arguments. Since this matter has taken several years to resolve, we allowed him to proceed and make his representations. The respondent submitted that the dispute dates back in 1989 and despite the fact that his father bought the suit land at a public auction for valuable consideration and was issued with a title deed on 14th September, 1988, the appellant has remained in possession thereto.

4. This application has not cited the rules under which it is brought, however by the nature of the prayers sought, it is not difficult to place it within the ambit of the provisions of Rule 5(2)(b) of the Court of Appeal Rules. The principles that guide this Court when dealing with this kind of an application are well settled. The applicant has to demonstrate first, that the appeal or intended appeal is arguable and secondly, if the Court refused to grant the order of stay and the appeal succeeds it would be rendered nugatory.

5. On the issue of the intended appeal being arguable, we have looked at the judgment sought to be appealed against. It is based on uncontested facts which were accepted by the trial court. The applicant was called upon to cross-examine the respondent but he declined. He also declined to give any evidence in defence or call any witnesses. From the evidence that was before the Court, the trial Judge stated the following in part of the judgment;

“What then I have before me is the unchallenged and uncontroverted evidence of the plaintiff. There is nothing to stop me from acting on such evidence. The plaintiff has candidly been able to demonstrate that he is the administrator of the estate of his deceased father. He tendered in evidence limited grant of letters of administration ad colligenda bona issued under Section 67(1) of the Law of Succession Act. His deceased father no doubt bought the suit premises at a public auction. From the entries in the green card that was also tendered in evidence, the defendant did charge the suit premises to secure a loan. However, on 14th September, 1988 the suit premises were transferred to the deceased by the chargee. I would want to assume that this was around about the time that the deceased must have purchased the suit premises at the auction. Subsequent thereto a title deed was issued to the deceased. A copy of the said title deed in respect of the suit premises was tendered in evidence. The title deed is explicit; the suit premises have been registered in the name of the deceased since 14th September, 1988. There is evidence that sometimes in 1989, the defendant sued the deceased, the Attorney General as well as Galaxy Auctioneer & Court Brokers over the auction. This was in Nyeri HCCC NO.7 of 1989. Apparently that case was dismissed for want of prosecution. However, it is not clear when this was. Since the defendant had sued the deceased as aforesaid time stopped running for purposes of section 38 of the Limitation of Actions Act. It only started running after the dismissal of the suit.”

6. This Judgment clearly shows the applicant declined to participate in the proceedings before the trial court and no reasons have been given for this. The judge arrived at a judgment based on uncontested issues. On the other hand the respondent demonstrated that his father purchased the suit land in an auction and he was issued with a title deed. The applicant’s claim, as we understand it, is that he is in possession of the suit land from the 1970's and as a result he acquired prescriptive rights by way of adverse possession. We do not think that this issue is arguable, as the applicant had refused to pursue his defence before the trial court. The respondent’s father purchased the suit property from a public auction and the applicant resisted all efforts to vacate. We however do not wish to say more on this issue of adverse possession at this interlocutory stage so as not to prejudice the intended appeal.

In the circumstances we find no merit in this application which we disallow. The parties were representing themselves, we make no order as to costs.

Dated and delivered at Nyeri this 6th day of February, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR