IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

(CORAM: MWERA, OUKO & MURGOR JJ.A)

CIVIL APPEAL NO. 31 OF 2013 (UR 21/2013

BETWEEN

REBECCA MORAA OCHI & 43 OTHERS…….APPLICANTS

AND

KIOGORO LAND DISPUTES TRIBUNAL & 10 OTHERS..…RESPONDENTS

(An application for stay of execution and further proceedings pending the hearing and determination of the intended appeal from the ruling and order of the High Court of Kenya (Sitati J.) delivered on 31st January 2013

in

MISC. CIVIL APPLICATION NO. 81 OF 2011)

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RULING OF THE COURT

The facts in this dispute are fairly straight forward and largely uncontroverted. Those facts may be stated as follows:-

In 1966 the 8th respondent (Makori Samarere) and two colleagues, Ochi Gekonge (Ochi) and Kenyariri Kenyariri (Kenyariri) set out on an ambitious but progressive and forward-looking investment when they jointly purchased a parcel of land known as *NYARIBARI/KEUMBO/900* measuring approximately 7.89 Hectares, with each holding 1/3 of the undivided share.

After the death of Ochi and Kenyariri the 8th respondent claimed that the family of the late Ochi occupied a larger portion than what they were entitled to, and that the family of Kenyariri had also encroached on the 8th respondent's portion of the land. As a consequence of these allegations, the 8th respondent made a reference to the Kiogoro Land Dispute Tribunal in claim No. 4 of 2010, against the widows of the two of his deceased co-owners of the suit property.

In his claim before the Tribunal, the 8th respondent had sought:-

a) confirmation of the size and boundaries of the suit land.

b) sub-division of the suit land into three equal portions by the District Surveyor and the amendment of the registry index map to conform with the sub-division.

After hearing witnesses, the Tribunal, on 26th May 2011 made these orders:-

> ***"a) A declaration that the claimant is a legal partner and beneficiary of part (1/3) of that land parcel known as Nyaribari Keumbu/960 of an approximate area of 7.89 Ha (seven point eight nine Ha) whose current nature of title is absolute under the proprietorship of Ochi Gekonge, deceased, Kenyariri Kenyariri deceased and Makori Samarere the claimant.***
>
> ***b) The suit land's size and boundaries to be confirmed by a common surveyor who should be provided by the district survey office.***
>
> ***c) The size and boundaries of the respective parcels of land which are believed to be equal also to be confirmed by the district surveyor with the assistance of those to be hired by individual families on private basis and if any anormally*** *(sic)* ***will be noted the surveyor to rectify it and determine boundaries or put up new ones as the ground might dictate after which the registry index map will be rectified so as to confirm with what will be on the ground.***
>
> ***d) The claimant is entitled to his costs of this suit which should be paid by the objectors.***
>
> ***e) It is so ordered."***

Although this claim was, as explained above, between the 8th respondent and the four (4) widows of the two deceased co-owners of the suit property, the latter together with 39 other interested parties brought a judicial review application in the High Court at Kisii being H.C. JR Misc. Appl. No. 81 of 2011 against the 8th respondent and 10 others, represented by the Attorney General. They did not participate in the argument of the application and also have not participated in this appeal. The applicants' motion for judicial review sought the quashing of the decision of the tribunal by an order of *certiorari* and an order prohibiting the respondents from implementing the orders issued by the Tribunal.

The applicants contended before the High Court that:-

> *i) by dint of* ***Section 159*** *of the* ***Registered Land Act*** *the Tribunal lacked jurisdiction to deal with the suit property.*
>
> *ii) That the Tribunal was in error for entertaining the dispute in the absence of the legal representatives of the two deceased co-owners of the suit property.*
>
> *ii) That the Tribunal failed to consider the fact that there were other interested parties who ought to have been heard.*

The learned judge after considering these grounds and submissions came to the conclusion that the Tribunal had jurisdiction to entertain the dispute pursuant to **Section 3 (1) (a)** of the repealed Land Tribunals Act. The basis for this conclusion was that, the matter related to a dispute on the location of the boundaries between the three owners in common within the suit property. The learned judge also found that the four widows participated in the Tribunal hearing and, therefore the rules of natural justice were complied with. She then went on to direct that:-

> **"The orders in the judgment of the Tribunal therefore have not been challenged and therefore <u>the respondent can go ahead and have them implemented</u> unless otherwise ordered."**

With that the applicants' application challenging the decision of the Tribunal was dismissed. Being aggrieved they have brought the instant motion dated 13th February 2013, and following the recent establishment of the Court of Appeal at Kisumu, they have filed the main appeal at Kisumu.

The motion before us, and to which this ruling relates, seeks, in the main, an order of stay of execution of the orders of the Tribunal and stay of further proceedings in Kisii H.C. Misc. Civil Application No. 81 of 2011 pending the hearing and determination of the intended appeal (now filed). Following the dismissal of the judicial review application, the applicants are apprehensive that, the respondents may proceed, in the absence of an order of stay, to survey the suit land and adjust the boundaries to their detriment, the applicants, some of whom have lived on the property for over 40 years and made developments thereon.

In response to these averments, the 8th respondent has filed both a notice of preliminary objection and a replying affidavit, the combined effect of which may be summarized thus:-

> *i) That the Notice of Motion is incurably defective as primary documents, namely decrees in CMCC No. 59 of 2011 and Kisii H.C. Misc. Civil Application No. 81 of 2011, have not been exhibited.*
>
> *ii) That the prayer to stay the proceedings of Kiogoro Land Disputes Tribunal case No. 4 of 2011 are unattainable as such proceedings have been concluded.*
>
> *(*We note that the prayer relates to Kisii H.C. Misc. Civil Appl. no. 81 of 2011 and not the case at the Tribunal).
>
> *iii) That the Tribunal had jurisdiction to hear and determine the application, and*
>
> *iv) That there are no arguable grounds in the appeal*

Before we consider the merit of this application, it is necessary to make the following two points. Generally speaking, where an application has been dismissed, as is the case here, this Court has held many times, that an application for stay under **Rule 5 (2) (b)** of the Court of Appeal Rules does not lie as such dismissal order is incapable of execution. See **Sonalux Ltd. & Another V. Barclays Bank of Kenya Ltd. & Others** Civil Application No. Nai. 219 of 2007.

In this case, the learned judge, who was only required to either quash the decision of the Tribunal or reject the application went on to order that the respondents were at liberty *"to go ahead"* and execute the order issued by the Tribunal. That is a positive order capable of execution and therefore may be stayed.

The second issue which was raised in opposition to the application relates to the failure by the applicants to exhibit copies of certified decrees. The short answer to this objection is that, under **Rule 5 (2) (b)** of the Court's Rules, there is no requirement that copies of the decree be exhibited. It is enough for an applicant to rely on such evidence as will enable him to satisfy the twin principles, namely that there exists an arguable appeal and that should the application for stay be rejected and the appeal ultimately succeeds, that success will be rendered nugatory.

In considering these principles, it must be borne in mind that at this stage the court has not been invited to make any determination on merit, that being the province of the bench that will hear the main appeal. The second factor in considering an application for stay under **Rule 5 (2) (b)** is that, the applicant need only show a solitary arguable ground. The third consideration is that both principles must be satisfied.

Bearing in mind these strictures, the applicants have raised several points to show that they have arguable grounds. We shall only consider one; the claim before the Tribunal was filed against the widows of the two deceased co-owners of the suit property, not as their personal representatives, and both the Tribunal and the learned judge were alive to this fact. The learned judge made no finding on that point, even though it was a ground in the application for judicial review. It is established that only one's personal representatives can be sued in respect of a dispute involving a deceased person. The High Court having

found that there was a boundary dispute between the 8th respondent and two others, who were by that time deceased, ought to have borne this in mind in reaching its decision. Therefore this is an arguable ground on appeal.

On the question whether the appeal will be rendered nugatory if this application is not granted, we are persuaded that should the survey proceed as ordered by the Tribunal and confirmed by the High Court, the character of the suit land will considerably altered. The applicants and the interested parties have permanent developments on the suit property that may be irreversibly altered, if demolished in the course of survey and sub-division.

For these reasons, we are satisfied that the applicants have satisfied the twin principles and deserve the relief of stay. We accordingly order that there will be a stay in terms of prayer 2 of the notice of motion dated 12th February 2013.

Costs will be in the appeal.

Dated at Nairobi this 26th day of July 2013.

J. W. MWERA

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JUDGE OF APPEAL

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W. OUKO

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JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR