



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

CIVIL APPLICATION 230 OF 2011

MWANGI GATHAIYU.....
.....1ST APPLICANT

MUIRURI NJOROGE.....2ND
APPLICANT

MBUTHIA KAHIGA.....3RD
APPLICANT

AND

KAMAU NGURE.....
.....RESPONDENT

(Application for stay of execution pending the filing, hearing and determination of an intended appeal from the ruling/order of the High Court of Kenya at Nyeri (Sergon, J.) dated 5th February, 2010

in
H.C.C.C NO.252 OF 1983)

RULING OF THE COURT

Before us is an application brought under Rule 5(2)(b) of the Court of Appeal Rules, by way of a notice of motion filed on the 14th September, 2011. Two reliefs are sought namely: -

(i) That this Honourable Court be pleased to order a stay of execution of the Ruling/Order of the High Court at Nyeri (Hon. Justice J.K. Sergon), dated 5th February, 2010 in HCCC No.252 of 1983, pending the filing, hearing and final determination of an appeal by the applicant herein from the said Ruling/Order.

(ii) That the costs of this application be provided for.

The application is anchored on the grounds in the body of the application, contents of the supporting affidavit of **Mwangi Gathaiyu** deponed on the 13th day of September, 2011 and filed simultaneously with the application as well annexures thereto.

On the hearing date, learned counsel **Ms. Muriithi**, holding brief for **Tim Okwaro**, for the applicant, urged us to allow the application on the grounds that a stay order is necessary in the circumstances of this case because the respondent, who is currently registered as owner of the subject property, may transfer the suit property to a 3rd party and thereby occasion injustice and prejudice to the applicant, who has been living on the suit land for long. Secondly, that the applicant has an arguable appeal.

In response to those submission, **Mr. Wachira**, learned counsel for the respondent, on the other hand, has urged us to dismiss the application on the grounds that there is no appeal pending in respect of which a stay order can issue pending its disposal because the application to extend time for filing of the notice of appeal was dismissed; a draft memorandum of appeal has not been annexed to show the merits or arguability of the intended appeal; the intended appeal, if any, will not serve any useful purpose, because the judgment complained of was issued in the year 1989; the said judgment ordered eviction of the applicants and they were duly evicted on 29th December, 1999 but they came back to the land; they thereafter filed an application for review in the year 2000, which they failed to prosecute forcing the respondent to steer its prosecution resulting in its dismissal 10 years later.

Mr. Wachira submitted further that no useful purpose will be served by this court granting an order of stay because the applicant did not appeal against the judgment issued in 1998 and executed in 1999 and for this reason their intended appeal against a refusal to review the 1998 judgment by the High Court is an exercise in futility. Lastly that a dismissal order being a negative order it cannot invite the issuance of an order of stay as there is nothing to be stayed.

We have given due consideration to the rival arguments advanced above. We have considered the validity or otherwise of the notice of appeal on the record. We have also taken note of the absence of a draft memorandum of appeal. In our view, upon consideration of all the above factors we feel without giving any detailed reasons for fear of prejudicing any bench which will hear the appeal should it come up, that the intended appeal is not arguable. Having ruled so, we feel there is no need for us to interrogate the second ground advanced of its being rendered nugatory. We accordingly dismiss the application with costs to the respondent.

Dated and Delivered at Nyeri this 5th day of July, 2012.

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

R.N. NAMBUYE

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR