



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Application 116 of 2011

MORAA NDEGE.....APPLICANT

AND

MOENGA MOENGA.....RESPONDENT

*(An application for stay of execution arising from the Judgment/Decree of the High Court of Kenya at Kisii (Hon. Musinga, J.) dated 30<sup>th</sup> September, 2010*

*in*

*H.C.C.C. NO. 211 OF 2002 (OS)*

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**JUDGMENT OF THE COURT**

1. By a notice of motion dated 9<sup>th</sup> May, 2011, brought under **Rule 5(2)(b)** of the Court of Appeal Rules, 2010 as read together with **section 3A and 3B (5)** of the Appellate Jurisdiction Act, **Moraa Ndege**, hereinafter referred to as the applicant, seeks an order “***that the status quo currently prevailing and/or that there be a stay of execution of the decree in Kisii HCCC No. 211 of 2002 (OS) as ordered by the said Court on 30<sup>th</sup> September 2010***”. The applicant is apprehensive that the respondent has embarked on the process of executing the decree in *HCCC No. 211 of 2002*, and fears that this action will be adverse to the applicant’s title known as **West Mugirango/Bonyamatuta/526**.
2. In his affidavit sworn in support of the application, the applicant swears that judgment was entered against her on 30<sup>th</sup> September, 2010; that she instructed her advocate to appeal against the judgment; and that a notice of appeal was duly filed but the applicant’s advocate has not received copies of proceedings from the High Court to facilitate the filing of a record of appeal.
3. Learned Counsel **Mr. Soire** who appeared for the applicant submitted that the applicant was effectively seeking to restrain the fixing of the boundary, as that would be prejudicial to the rights of the applicant who has already filed an appeal. The applicant therefore urges this Court to maintain the status quo.
4. The application is opposed through a replying affidavit sworn by **Moenga Moenga** who is the respondent in the appeal. The intended respondent points out that the applicant and her counsel have

contradicted each other on when the counsel was allegedly given instructions to file the appeal. Learned counsel **Mr. Momanyi** who appeared for the respondent pointed out that there was nothing for the Court to stay as the applicant's suit in the High Court was dismissed, and therefore, there was nothing for execution. Counsel submitted that the intended appeal is not arguable as no expert evidence was produced by the surveyor.

5. The application before us is hinged on the applicant's suit in *High Court Civil Case No. 211 of 2002 (OS)*, which was for a declaration that she is entitled by way of adverse possession to a portion of an undivided share of a parcel of land known as West Mugirango/Bonyamatuta/525 registered in the name of the respondent. During the hearing of the suit before **Musinga, J.** the applicant testified that West Mugirango/Bonyamatuta/526 was allocated to her late husband **Ndege Nyamora**. However, during the land adjudication, the land was surveyed without the consent and knowledge of her late husband, and an error was made by the surveyor who annexed part of the land measuring 0.7 hectares, which should have formed part of West Mugirango/Bonyamatuta/526, to the defendant's land parcel known as West Mugirango/Bonyamatuta/525.

6. In his judgment, **Musinga, J.** found that the applicant's suit was *res judicata* as there had been previous suits between the parties involving the same dispute. He noted that there was an order made by the High Court in *HCCC No. 118 of 1993* directing the District Surveyor to fix the actual boundary between West Mugirango/Bonyamatuta/526 and West Mugirango/Bonyamatuta/525. The trial Judge therefore found that the applicant had failed to establish her claim and dismissed the applicant's suit. This is the judgment that the applicant intends to appeal against and in respect of which the order of status quo and/or stay of execution is sought.

7. In his submissions, counsel for the applicant stated that the applicant was effectively seeking to restrain the fixing of the boundary as such an action would be prejudicial to the right of the applicant. If that be the case, then the applicant is in effect seeking to stay the order made in *HCCC No. 118 of 1993* directing the District Surveyor to fix the actual boundary between the two parcels of land. Nonetheless, that is not the application before us. Although the order made in *HCCC No. 118 of 1993* was referred to by the trial Judge in *HCCC 211 of 2002*, and an opinion expressed that the District Land Registrar ought to proceed to fix the boundary, the comments made by trial Judge were *orbiter* and not capable of any execution. The decree issued on 4<sup>th</sup> May, 2011 in regard to the judgment delivered on 30<sup>th</sup> September, 2010 in *HCCC 211 of 2002*, was in the following terms:

**“DECREE**

***This suit coming up for hearing on 11<sup>th</sup> May, 2010 in the presence of both parties and Bosire Gichana as the counsel for the plaintiff and Momanyi Aunga as the counsel for the defendant and was adjourned 27<sup>th</sup> of May, 2010 and also 22<sup>nd</sup> of July, 2010 for both parties to file their respective submissions and on 30<sup>th</sup> day of September, 2010 whence the Judgment thereof was delivered and IT WAS DECREED AND ORDERED AS FOLLOWS:***

- a) ***That this suit is res judicata to KISII HIGH COURT CIVIL CASE NO. 118 OF 1993.***
- b) ***That there being an order made by this court in the said KISII HIGH COURT CIVIL CASE NO. 118 OF 1993 directed to the District Surveyor to fix the actual boundary between parcels Nos. West Mugirango/Bonyamatuta/525 and 526 as per registry index map sheet No. 20 and as it appears as the exercise was not conducted in spite of the letter dated 18<sup>th</sup> November, 2002 by the District Land Registrar Nyamira informing the parties herein that he will fix the boundary on 10<sup>th</sup> December, 2003, the said Land Registrar ought to proceed to do so.***
- c) ***That the plaintiff having failed to establish her claim herein this suit be and is hereby dismissed.***
- d) ***That the plaintiff be and is hereby condemned to pay costs of this suit.”***

That decree was not correct as the trial Judge simply expressed an opinion that the District Land Registrar ought to proceed in accordance with the previous order made in *HCCC No. 118 of 1993*. There was no new order made by the trial Judge capable of execution in regard to the fixing of the boundary. The execution of the order for the fixing of the boundary can only be done through *High Court Civil Case No. 118 of 1993*. Thus, prayer (3) of the aforementioned decree was misleading and the applicant's anxiety regarding the execution of the decree, misconceived.

8. Under **Rule 5(2)(b)** of the Court of Appeal Rules, the Court has powers to order stay of execution, an injunction or stay of any further proceedings on such terms as it may think just. Although this power is discretionary, it is trite law that the Court will only grant orders under **Rule 5(2) (b)** of the Court of Appeal Rules where an applicant has satisfied the court that the appeal or intended appeal is arguable, and that unless the order sought is granted, the appeal will be rendered nugatory (*Kileleshwa Service Station Limited vs. Kenya Shell Limited [2008] KLR 55*). In this case, it is evident that the applicant's suit having been dismissed, and no orders capable of execution having been made, an order for stay of execution will not serve any useful purpose as there is nothing to stay or execute, nor will the applicant's appeal be rendered nugatory if such orders are not issued.

9. Moreover, the applicant has not availed any draft memorandum of appeal, nor has she demonstrated to this court that she has any arguable grounds of appeal against the judgment or decree made on 30<sup>th</sup> September, 2010 in *Kisii HCCC No. 211 of 2002 (OS)*. In the circumstances, we find that there is no justification for this court granting the orders sought by the applicant. In light of the above, we dismiss the application dated 9<sup>th</sup> May, 2011, and *suo moto* correct the decree dated 4<sup>th</sup> May, 2011 by deleting the order shown as (b) in the decree.

Those shall be the orders of this Court.

***Dated and delivered at Kisumu on this 10<sup>th</sup> day of October, 2012.***

***ALNASHIR VISRAM***

.....  
***JUDGE OF APPEAL***

***H. M. OKWENGU***

.....  
***JUDGE OF APPEAL***

***D. K. MARAGA***

.....  
***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**