



IN THE COURT OF APPEAL AT KISUMU

Civil Application 30 of 2012

TIMEOH S. MASINJILA APPLICANT

AND

GIDEON MASINJILA RESPONDENT

(Application for stay of the Judgment of the High Court of Kenya at Kakamega (Kimaru, J) dated 16th May, 2011

in

HCCC NO. 93 OF 2006)

RULING OF THE COURT

1. **TIMEOH S. MASINJILA** (the applicant) filed this application under **Rule 5(2) (b)** of the **Court of Appeal Rules** seeking for an order of stay of execution of the decree in **HCCC No. 93 of 2006** pending the hearing and determination of his intended appeal. The decree sought to be stayed is from the judgment of Kimaru, J. delivered on 16th May 2011, in which the learned Judge made the following orders:

“(i) *This Court declares that, the applicant is the owner of 12.6 acres of the parcel of land known as Butsotso/Shikoti/1934 having occupied the same for a period of more than twelve (12) years peacefully, continuously and without any interruption.*

(ii) *The respondent is hereby declared to be the owner of the parcel of land known as Idakho/Shikulu/975.*

(iii) *The respondent is entitled to 3.1 acres in parcel No. Butsotso/Shikoti/1934. This acreage shall be hived off and excised from the suit parcel of land and transferred to the respondent.*

(iv) *The respondent shall refund to the applicant the sum of KShs.31,000/= within thirty (30) days from the date of this judgment.*

(v) *Each party shall bear their own cost.”*

2. Being dissatisfied with the above decree, the applicant intends to appeal, and in the draft memorandum of appeal attached to this application, the applicant is principally challenging the legality of the above orders which he contends were not supported by the evidence. The suit involves a dispute over ownership of the suit land between the applicant and the respondent who are brothers. Mr Machafu learned counsel for the applicant, relied on the matters deposed to in the supporting affidavit sworn by the applicant on 26th January, 2012. In further arguments, counsel submitted that the appeal has good chances

of success as the applicant still maintains that there was no adverse possession proved by the evidence on record. There was only a temporary exchange of land pending a transfer by both parties and the respondent was staying on the suit land with the consent of the applicant emanating from the agreement.

3. On the part of the respondent, Mr Mwenda learned counsel opposed this application on the grounds that the applicant failed to annex copies of the pleadings. In the absence of pleadings and record of proceedings it is difficult for this court to appreciate the basis of the judgment. The suit involved two brothers who exchanged their respective parcels of land in 1988 and each one of them took possession. Nonetheless counsel conceded that the decree from the judgment referred to parcel No. **975** instead of **795** which is an error and can be corrected under **Section 99 of the Civil Procedure Act**. According to the respondent the appellant was awarded 3.1 acres that was owned by the respondent thus there would be no prejudice.

4. This application invokes the exercise of judicial discretion. As it has been stated by this Court in numerous cases especially in the case of **TRUST BANK LIMITED AND ANOR VS INVESTECH BANK LTD & 3 ORS, Civil Application NOs. NAI 258 & 315 OF 1999, (Unreported)**:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionally and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case.”

5. Applying the above principles to the facts of this case, we find the evidence by both parties conflicting. It is not clear whether the respondent was in occupation of the suit land by adverse possession or by agreement. There was undisputed evidence that both parties had agreed to exchange their parcels of land but we need not delve into the details of the said agreement.

6. These issues are best left for hearing and determination in the pending appeal. Taking into account the circumstances of this case; and considering that the respondent is to take a piece of 3.1 acres from the applicants’ parcel of land and also that some money was ordered to be paid, the balance of convenience tilts in favour of granting an order to maintain the status quo until the appeal is heard and determined.

7. For the foregoing reasons, this application is allowed, we grant a stay of execution of the decree of the High Court in Civil Case No. 99 of 2006 until the determination of the intended appeal. The applicant is ordered to file the appeal within six (6) months and in default, this order will be deemed to have lapsed.

Cost of this application shall be in intended appeal.

Dated and delivered at Kisumu this 10th day of October, 2012.

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR