



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Application 253 of 2011

DAVID NKANATA MAGIRI..... APPELLANT

AND

BERNARD BENEDICT MUNGANIA..... 1ST RESPONDENT

GHADIALY & COMPANY ADVOCATES..... 2ND RESPONDENT

MARY WOTHAYA GEORGE..... 3RD RESPONDENT

GITONGA & CO. AUCTIONEERS..... 4TH RESPONDENT

KENYA COMMERCIAL BANK LTD.....5TH RESPONDENT

(An application for stay of execution pending appeal from the Decree of the High Court of Kenya at Meru (Hon. M. Kasango, J.) dated 30th June, 2011

in

H. C. C. C. No. 3 of 2003)

RULING OF THE COURT

This is an application under **Rule 5(2) (b)** of the Court of Appeal Rules of an order that the execution of the judgment and consequential decree of the High Court be stayed pending the hearing and determination of the Civil Appeal No. 194 of 2011.

By the impugned judgment which is the subject of this application, the High Court allowed a suit filed by Mungania Kungania against the applicant and four others to recover land title No. Kiirua/Ruiri/35 (suit land), which had been sold by Kenya Commercial Bank (KCB), to Mary Wothaya George who in turn had sold the land to the applicant. The High Court ordered, *inter alia*, that the register of the suit land be rectified by cancelling the registration of Mary Wothaya George and subsequent registration of David Nkanata Magiri (applicant), and that the suit land revert to the name of the deceased Mungania Kungania.

It is not necessary to recount in detail the long history relating to the suit land. It is sufficient for the purpose of this application to state the following facts.

The deceased was the proprietor of the suit land comprising of approximately 7.73 Hectares. Sometime in

1971, the deceased obtained a loan of about ten thousand shillings (shs.10,000/-) from KCB which was secured by the suit land. However, the extract of the register does not show that a legal charge was registered in favour of the bank against the title. The deceased fell into arrears and in 1974, the bank through its lawyers demanded payment of shs.9,280. Bernard Benedict Mungania the deceased's son testified at the trial that the deceased made three payments of shs.6,000; shs. 2,800/- and shs. 480/- in the month of May 1974 in repayment of the loan, but the Title Deed was not released to him. Later the deceased discovered that Mary Wothaya George was registered proprietor of the suit land on 30th November, 1978 and the applicant was subsequently registered as proprietor on 10th December 1982.

Sometime in 1983 the deceased filed a suit against five parties, including Mary Wothaya George, the auctioneer, the applicant and KCB. He averred, among other things, that he had repaid the entire loan by 1974; that he learnt that the suit land was auctioned to Mary Wothaya George for shs. 10,000/-; that he learnt in 1982 that the land had been sold to the applicant; and that the sale by KCB after he had repaid the loan was null and void.

Mary Wothaya George pleaded in her defence that she bought the suit land in a public auction on 4th May, 1974 while the applicant pleaded in the defence and counterclaim, *inter alia* that he purchased from Mary Wothaya George, the suit land for value and without notice of the deceased's interest by agreement dated 24th March, 1980. He counterclaimed for eviction of the deceased. The bank (KCB) also filed a defence denying among other things, that the deceased had paid the whole loan.

The deceased died sometime in 2007 before the hearing of the suit commenced. The deceased's son Bernard Benedict Mungania prosecuted the suit as the deceased's legal representative. Only two defendants gave evidence at the trial, the applicant herein and Evan Mwenda Marete who gave evidence on behalf of KCB. The latter confirmed that the auctioneer appointed by KCB sold the suit land to Mary Wothaya George for shs. 10,000/- on 4th May, 1974. The applicant in his part testified that he bought the suit land from Mary Wothaya George for shs.145,00/- by agreement of sale dated 24th March, 1980 but had not taken possession to-date.

The High Court after appraising the evidence came to the conclusion that the sale of the suit land by KCB was unlawful, as KCB gave a month's statutory notice instead of the three months notice prescribed by law. The High Court further made a finding that the applicant was not an innocent purchaser. The High Court nullified the transaction as already indicated for the two reasons. The applicant challenges the judgment of the High Court in the pending appeal.

The present application was made in the name of the deceased, Mungania Kungania. The application was however amended at the hearing with the leave of the Court and Bernard Benedict Mungania joined as a party in place of the deceased.

At the hearing of the application, Murango Mwenda, learned counsel for the respondent produced a copy of the register of the suit land. It shows that by entry No. 13 dated 21st July 2011 the registration of the applicant as the proprietor of the land was cancelled and the land reverted to Mungania Kungania pursuant to the decree of the High Court. It follows that when the present application was filed on 31st October, 2011, the decree of the High Court had already been executed.

In that event Mr. Muia Mwanzia, learned counsel for the applicant applied for a conservatory order in the nature of a prohibition invoking the overriding objective principle under section 3A and section 3B of the Appellate Jurisdiction Act. He submitted that if status quo is not maintained, the appeal would be rendered nugatory as succession case will be filed and the suit land distributed amongst the deceased's beneficiaries.

The application for a conservatory order is opposed on two grounds namely; that section 3A and section 3B are not applicable in the circumstances of this application and secondly, that the court cannot grant a prayer which is not specifically sought in the application.

The application for stay of the execution of the judgment and decree of the High Court pending the hearing and determination of the appeal cannot be granted because execution had already taken place by the time of making the application.

However, the applicant who has already filed the appeal seeks, in the essence, the preservation of the suit land pending the hearing and determination of the appeal.

It is true as submitted by the 1st respondent's counsel that such an order was not sought in the application. The order sought is discretionary. The applicant is not seeking any positive order. He is not praying either that the 1st respondent be dispossessed or that the registration of suit land in the name of the 1st respondent be cancelled and his name restored on the register. It is highly probable that if the land, the subject matter of the appeal is not preserved, succession proceedings would be instituted leading to the distribution of the suit land to the beneficiaries. That would render the prosecution of the appeal futile.

The Court has jurisdiction either under the overriding objective principle or under the inherent jurisdiction of the Court as stipulated in Rule 1(2) Court of Appeal Rules 2010, to grant any interlocutory order that may be necessary for the ends of justice, even on its motion as a Court of justice. In our view, it is just in the circumstances that the suit property should be preserved pending the determination of the appeal.

Accordingly, in lieu of the application, we order that status quo in respect of the register of the land title No. Kiiua/Ruiri/35 as of 21st July 2011, as reflected in entry No. 13 of the copy of the register, be maintained until the determination of the appeal or further orders of the Court. For avoidance of doubt, this means that the deceased Mungania Kungania will remain the registered proprietor and his estate will retain possession of the land, but there will be no registration of any dealing with the suit land until the determination of the appeal or until further orders of the court.

The costs of the application shall be costs in the appeal.

Dated and delivered at Nyeri this 1st day of November, 2012.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR