



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: TUNOI, AGANYANYA & NYAMU, J.J.A.)

CIVIL APPLICATION NO. NAI 286 OF 2010 (UR 199/2010)

BETWEEN

PETER MAINA MAINGIAPPLICANT

AND

LUCY KAGURE WANJOHIRESPONDENT

(Being an application for stay of execution pending the hearing and determination of the appeal against the judgment and decree of the

High Court of Kenya at Nakuru (Koome, J.) dated 20th June, 2008

in

H.C.C.A. No. 66 of 2005)

RULING OF THE COURT

The application before us expressed to have been filed under **rule 5(2)(b)** of the Court of Appeal Rules seeks the following orders:-

“1. ...

2. That pending hearing and determination of this application, inter parties there be a stay of execution of the decree passed on 23rd March, 2005 in Nyahururu PMCC No. 140 of 2003 and confirmed in Nakuru H.C.C.A. No. 66 of 2005

3. That pending hearing and determination of Civil Appeal No. 95 of 2010 by this honourable Court, there be a stay of execution of the decree passed on 23rd March, 2005 in Nyahururu PMCC No. 140 of 2003 and confirmed in Nakuru HCCA No. 66 of 2005.

4. That costs of this application be provided for.

The application as grounded on the grounds set out on the face thereof; namely:

(a) Notice of Appeal was filed on 7th April, 2010 pursuant to leave granted on 1st April, 2010 against dismissal of the applicant’s appeal in NAKURU H.C.CA. No. 66 of 2005.

(b) A record of Appeal was subsequently filed on 21st April, 2010 in the matter vide Civil Appeal No. 95 of 2010.

(c) The appellant’s application to the superior court for stay of execution of the decree passed in Nyahururu P.M.C.C. No. 140 of 2003 was on 4th June, 2010 dismissed.

(d) The appellant’s objection to the Notice to Show Cause why the decree issued in Nyahururu PMCC No. 140 of 2003 should not be executed was on 2nd September, 2010 dismissed and execution ordered to proceed.

(e) Unless the Honourable Court makes an order for stay of execution pending the hearing and determination of the appeal execution will proceed rendering the appeal nugatory.

(f) The Honourable Court’s discretion to grant a stay of execution in this matter should be granted.

(g) There is no overwhelming hindrance why a stay of execution in this matter should not be granted.

(h) The Honourable court ought to consider the special circumstances of the case in line with the judgment of the superior court delivered on 20th June, 2008.

(i) It is the interest of justice and fair play that a stay of execution ought to be granted to prevent ends of justice from being defeated.

There was also a supporting affidavit to the application sworn to by the applicant. In the affidavit the applicant repeats the main grounds set out on the face of the application and added that if there was any fraud or mistake in the sale of the suit land to the applicant the respondent's late husband, the applicant was not involved and that pending the hearing of the appeal by this Court the applicant had been served with an application for execution. He adds that the appeal filed has high chances of success.

In a replying affidavit deponed to by **Bernard Kinyua Njogu**, learned counsel for the respondent states *inter alia* - that the execution of the decree in Nyahururu **PMCC No. 140 of 2003** entails cancellation of the applicant's certificate of lease and if the transfer of the suit property to the respondent succeeds the suit property will revert back to the appellant and the transfer of the suit property to the respondent and any subsequent transactions involving the suit property will be rendered a nullity.

The application was heard by this Court on 23rd February, 2011 when **Mr. Gakuhi Chege**, learned counsel for the applicant submitted that the appeal filed is not frivolous as no fraud or mistake in the sale transaction was attributed to the applicant who was an innocent purchaser. That if execution is allowed to proceed the appeal will be rendered nugatory.

Mr. Njogu, learned counsel for the respondent submitted that what was in issue was cancellation of certificate of title to land registration of plot *No. Nyahururu Municipality/Block 5/84* in the name of the respondent; and that since none of the parties is in physical possession and the plot is undeveloped there is no risk of the appeal being rendered nugatory as retransfer can be done if the appeal succeeds.

In an application of this nature two principles should be satisfied, namely that the appeal is arguable and that if the appeal is successful, its result will be rendered nugatory – see **Trust Bank Limited & Anor v. Investech Bank Limited & 3 Others – Civil Application No. Nai. 258 of 1999 (UR)**. The copy of the memorandum of appeal annexed to this application, already filed includes grounds which raise substantial points of law and the view we take, despite protestation from Mr. Njogu is that the appeal is not frivolous. This is not to say it will ultimately succeed. For the purposes of the present motion the applicant surmounts the first test on applications made under **rule 5(2)(b)**.

On the second limb, we agree with Mr. Gakuhi that since the applicant has the certificate of title to the suit plot which is still vacant, it would be cumbersome to have the certificate cancelled and later, should the appeal succeed, have it retransferred back to the applicant. Even of greater concern to us is that the suit plot is undeveloped and the possibility of it being sold to third parties by the respondent is not remote. In the event that this happens, the respondent has not given an undertaking as to damages should the appeal succeed. For those reasons we grant the order of stay in terms of the Notice of Motion dated 8th and lodged in Court on 9th December, 2010. Costs thereof will abide the result of the appeal.

Dated and delivered at Nairobi this 25th day of March, 2011

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR