



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: O’KUBASU, WAKI & VISRAM, JJ.A.)
CIVIL APPLICATION NO. NAI. 7 OF 2011 (UR.6/2011)

BETWEEN

LAZARO KABEBE.....APPLICANT

AND

NDEGE MAKAU.....1ST RESPONDENT
ANJELO NJAIBU MUGO.....2ND RESPONDENT

(Application for stay of execution from the judgment of the High Court of Kenya at Nairobi (Osiero, J.) dated 27th February, 2006

in

H.C.C.C. NO. 1222 OF 1999)

RULING OF THE COURT

The applicant, **LAZARO KABEBE**, was the plaintiff in the High Court Civil Case No. 1222 of 1999 while the 1st Respondent, **NDEGE MAKAU** and 2nd Respondent, **MUGO** were the 1st and 2nd Defendants respectively. The applicant filed an Originating Summons seeking orders of declaration that he had become entitled to the suit land **L.R. No. Baragwi/Thumato/429** by virtue of adverse possession. The Originating Summons was placed before Osiero, J. for determination. In a short five page judgment the learned judge concluded thus:-

“The sale of the suit land to the plaintiff became null and void due to failure to obtain the Land Control Consent as required by the Land Control Act. But he had taken possession and could claim the suit land by virtue of adverse possession. But since there was interruption in 1977 and 1987 in respect of the 3 acres which were later transferred to the 2nd defendant he cannot claim title by virtue of adverse possession as far as the 3 acres were concerned. The title to the 3 acres was legally passed to the send (sic) defendant who lawfully purchase (sic) the same and managed to obtain consent for subdivision and transfer. But for the remaining 2.5 acres which have been in possession of the plaintiff for the last 26 years continuous and uninterrupted he has proved that he is entitled to the same by virtue of adverse possession.”

Accordingly I enter judgment as follows:

The plaintiff is entitled to 2.5 acres by virtue of adverse possession and the 2nd defendant is entitled to 3 acres which he purchased and were registered in his name. Each party bears own costs.

That judgment was delivered in Nairobi on 27th February, 2006. It would appear that the applicant was not satisfied with that judgment and hence through his advocates filed a notice of appeal on 15th March, 2006. It is not clear whether the appeal was filed but the applicant and his legal advisers waited until this year when a Notice of Motion dated 19th January, 2011 was filed in this Court on 21st January, 2011. In that Notice of Motion the applicant seeks orders that:-

“(a) Stay of execution of the decree passed by the Superior Court on 27th February, 2006 be granted pending the hearing and determination of the appeal.

(b) An injunction do issue restraining the second respondent and his employees and/or agents from entering and/or encroaching on the suit properties known as Baragwe/Thumaita/817 and Baragwe/Thumaita/818 and/or occupying, harvesting the crops thereof and dealing howsoever with the same till the hearing and determination of the appeal.

(c) Costs of this application abide the result of the said appeal.”

The application which was supported by the affidavit of the applicant was based on the following grounds:-

“(a) The pending appeal hereof has high chances of success and the same will be rendered nugatory unless the orders sought are granted.

(b) The appellant will suffer substantial loss and damage unless an order of injunction is issued in terms as sought in the application.

(c) The appellant is ready to abide by such terms as this Honourable will deem apt to impose in the circumstances of this appeal.

(d) The Second Respondent has threatened to invade the suit properties and there is imminent and real danger that the appellant’s properties will be substantially damaged and destroyed unless this court grants the orders sought.”

When the application came up for hearing before us on 2nd June, 2011, Mr. Stephen Mose appeared for the applicant, while Mr. N.K. Nyariki appeared for the 2nd respondent. There was no appearance for the 1st respondent. In his submissions, Mr. Mose stated that his main ground of appeal will be that the superior court held that there was interruption in occupation when there was no evidence adduced to support that finding. Finally, Mr. Mose submitted that if the orders sought are not granted, the crops and developments on the suit land will be destroyed leading to substantial loss. To buttress his arguments, Mr. Mose handed in his list of authorities.

In opposing the application, Mr. Nyariki submitted that the superior court merely declared the legal position that the applicant was entitled to 2.5 acres while the 2nd respondent was entitled to 3 acres. In Mr. Nyariki’s view, there was nothing the 2nd respondent was required to do which the court can order to be stayed.

Mr. Nyariki further submitted that the applicant appeared to think that the 2nd respondent intends to evict him from his 3 acre property but the 2nd respondent has no intention of evicting the applicant.

In urging us to dismiss the application, Mr. Nyariki submitted that the applicant had failed to demonstrate that he had an arguable appeal and that if the orders sought are not granted his intended appeal would be

rendered nugatory.

We have given the factual background to this matter and the rival submissions by counsel appearing for the applicant and the 2nd respondent. The applicant is seeking a stay of execution of a decree and an injunction to restrain the 2nd respondent from encroaching on the suit properties.

The principles for granting a stay of execution, an order of injunction or an order of stay of further proceedings under **Rule 5(2(b))** of the Rules of this Court are well known – see **BUTT V. RENT RESTRICTION TRIBUNAL** [1982] KLR 47, **J.K. INDUSTRIES V. KENYA COMMERCIAL BANK LTD. & ANOTHER** [1987] KLR 506 and **BOB MORGAN SYSTEMS LTD. & ANOTHER V. JONES** [2004] 1 KLR 194. In exercising its unfettered discretion, the Court must be satisfied that the appeal or intended appeal is an arguable one, that is, that it is not frivolous, and that if an order of stay or injunction as the case may be, is not granted the appeal or intended appeal would have been rendered nugatory by the refusal to grant the stay or injunction sought. Those guiding principles must of course be considered in the context of **Sections 3A** and **3B** of the Appellate Jurisdiction Act.

We have already stated elsewhere in this ruling that the judgment of the superior court which applicant intends to challenge was delivered way back on 27th February, 2006 while this notice of motion seeking an injunction was filed on 21st January, 2011. Taking into account the time the superior court gave its judgment and the time this application was filed, it would appear that the applicant had nothing urgent to be determined by this Court. Indeed when it comes to the effect of the judgment, it is clear that the superior court had given each of the parties herein his own portion. Even Mr. Nyariki in his submissions pointed out that the 2nd respondent has not threatened to evict the applicant from his portion of land. We do not see how the applicant will be prejudiced if we refused to grant the orders sought. There is no order capable of being executed against the applicant since each party has been living on their respective portions as ordered by the superior court.

Even assuming for a moment that the applicant has an arguable appeal, we are not satisfied that the success of the intended appeal would be rendered nugatory if we did not grant the injunction sought.

That being our view of the matter, it follows that this application lacks merit and we order that the same be and is hereby dismissed with costs to the 2nd respondent.

Dated and delivered at NAIROBI this 8th day of July, 2011.

E.O. O’KUBASU

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR