



IN THE COURT OF APPEAL  
AT NYERI

(CORAM: BOSIRE, AGANYANYA & VISRAM, J.J.A.)

CIVIL APPLICATION NO. NAI. 146 OF 2011

BETWEEN

M'MWONGERA MIRURI ..... APPLICANT

AND

NANCY KANUGU MBAYA ..... RESPONDENT

*(Application for temporary injunction and inhibition pending the intended appeal from the ruling and order of the High Court of Kenya at Meru (Lesiit, J.) dated 2<sup>nd</sup> June, 2011*

in

H.C.C.C. NO. 60 OF 2011)

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RULING OF THE COURT

By his notice of motion dated 5<sup>th</sup> June, but filed in Court on 10<sup>th</sup> June, 2011, respectively, **M'Mwongera Miruri** (the applicant), seeks an order inhibiting the registration of parcel Nos. Kiirua/Naari/1404, 1405, 1406, 1407, 1408 and 1409 in favour of third parties, and also an order of injunction restraining **Nancy Kanugu Mbaya**, the respondent, from alienating, transferring, selling or in any way whatsoever, interfering with the applicant's possession and user of two parcels of land, to wit, Kiirua/ Naari/1404 and 1409 until an intended appeal against the decision of the High Court (Lesiit, J.) given on 2<sup>nd</sup> June, 2011 at Meru is determined. The application is expressed to be brought under sections "3A, 3B of Cap 8, Order 5(2)(b) Court of Appeal Rules" and section 128 of Cap 300 Laws of Kenya. It is quite clear that the provisions cited at the heading of the motion are wrong as Cap 8, which is the **Judicature Act** does not have sections 3A and 3B. Likewise, the Rules of the Court of Appeal do not have Orders. This motion would have been struck out for that reason but for the provisions of **Article 159 (2) (d)** of the Constitution of Kenya, 2010, which provides that courts must determine disputes between parties without undue regard to technicalities. That provision gives the Courts discretion to consider whether or not any defect noted in a matter would fatally affect the competence of it. The motion was drafted by an advocate who should have known better, but these mistakes clearly show that even advocates do at times act negligently. A careful reading of the application reveals to us the nature of the applicant's motion.

The relevant provision under which the application before us should have been brought is **rule 5(2) (b)** of the Court of Appeal Rules, and possibly **Sections 3A** and **3B** of the Appellate Jurisdiction Act. On the assumption that those are the provisions that the applicant and his legal advisers had in mind, we will set out the background facts, in resume form, before considering the merits thereof.

The subject parcels of land were the subject matter of a Succession Cause relating to the estate of one, **Ayub Mbaya Mwongera**, the deceased. The applicant by an Originating Summons dated 2<sup>nd</sup> October, 1995, sued the deceased, before the Chief Magistrate's Court at Meru, inter alia, for a declaration that he held 2 acres out of L.R. No. Kiirua/Kiirua/324 in trust for him. In an affidavit in support of that suit, he deponed inter alia, that he and the deceased bought that land jointly, on the understanding that the applicant would be entitled to 2 acres thereof. However, the deceased, in breach of their agreement, registered the entire land in his name and refused to share it with the applicant and hence the prayer for a declaratory order. The deceased however, died before the suit could be heard. His widow, the respondent herein, applied for letters of administration intestate, and upon confirmation of the grant, the applicant unsuccessfully applied for revocation of the grant.

It is apparent from the record of the application before us that the applicant thereafter successfully applied under **section 18** of the Civil Procedure Act, for the transfer of that suit to the High Court. The order of transfer was made on 13<sup>th</sup> April, 2011. Thereafter, the applicant moved the High Court, at Meru, for an Order of inhibition to stop registration of the aforesaid parcels of land in favour of third parties pending determination of that motion or until further orders of the Court. The application was dated 20<sup>th</sup> April, 2011 and was heard by Lesiit, J. After hearing the parties, she dismissed the application on 2<sup>nd</sup> June, 2011. It is that dismissal against which, the applicant intends to appeal.

The application before us is almost on same terms as the one Lesiit, J. dismissed. Mr. C. Kariuki, who appeared for the applicant, submitted before us that the applicant has been in occupation of the suit property for a very long time, and the dispute between the parties being one over land, he pleaded with us to preserve the land until the hearing and final determination of an intended appeal against Lesiit, J.'s aforesaid decision.

Mr. Ringera, for the respondent, expressed the view that the matter is res judicata and that being so, he said, the applicant's intended appeal is not arguable. He further submitted that the applicant is no longer in possession and for that reason, the motion has been overtaken by events.

In reply, Mr. Kariuki, submitted that the Originating Summons is still pending and the applicant should therefore be given a chance to prosecute it to the end.

It is trite law that this Court in applications of this nature, has to be satisfied, first that the applicant's intended appeal or appeal is arguable, and in addition that unless the court grants a stay, inhibition or injunction as the case may be, and that appeal were to be eventually successful, the success would be rendered nugatory.

There is no doubt that the applicant has been in possession of two acres of the suit property for a long time. The alleged sale of the property to the deceased and the applicant took place in or about April, 1976, well over 30 years ago. The mere fact of that possession is prima facie, evidence of some understanding between the deceased and the applicant, the truth as to how and on what basis the applicant took possession of the two acres will not emerge unless the intended appeal and possibly the Originating Summons are heard to their logical conclusion. We are minded to grant the orders sought, and accordingly order that an inhibition issue as prayed in **prayers (1) and (2)** of the Motion dated 8<sup>th</sup> June, 2011 and filed in Court on 10<sup>th</sup> June, 2011. The costs of the motion shall be to the respondent in view of the anomalies in the motion we pointed out earlier.

***Dated and delivered at Nyeri this 2<sup>nd</sup> day of December, 2011.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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

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

**DEPUTY REGISTRAR**