



IN THE COURT OF APPEAL
AT NYERI

CORAM: O'KUBASU, GITHINJI & ONYANGO OTIENO, J.J.A.

CIVIL APPLICATION NO. NAI. 149 OF 2011 (UR.99/2011)

BETWEEN

MURUNGI KIRIGIA.....APPLICANT

AND

CATHERINE KAGWIRIA.....RESPONDENT

*(Application for stay of execution from an order of the High Court of Kenya at Meru (Kasango, J)
dated 30th April, 2010*

in

H.C.C.C. NO. 134 OF 2003)

RULING OF THE COURT

In a plaint dated 27th November, 2003 and amended on 26th October, 2007, the respondent in this Notice of Motion dated 8th June, 2011, **CATHERINE KAGWIRIA MURUNGI**, sued the applicant **MURUNGI KIRIGIA** in the High Court at Meru seeking a declaration that the applicant held *L.P. NO. IGOJI/KIANGUA/310* which had been subdivided and was then *L.R. IGOJI/KIANGUA/2036, IGOJI/KIANGUA/2037* and *IGOJI/KIANGUA/2038* in trust for her benefit and sought that the pieces of land be transferred to her. The applicant denied those allegations in a statement of defence filed on 16th February, 2004, but when the suit came up for hearing, the applicant's counsel attended court and cross examined the respondent's witnesses but as the applicant was absent, his counsel applied for adjournment at the close of the respondent's case. That application for adjournment was refused and the court proceeded to consider the evidence before it and in a reserved judgment delivered on 9th July, 2009, the court entered judgment in favour of the respondent. The respondent was declared the right owner of the three parcels numbers *IGOJI/KIANGUA/2036, 2037* and *2038* and it was ordered that they be registered in her name. The judgment of the court was as follows:-

“(1) The registration of title Nos. IGOJI/KIANGUA/2036, IGOJI/KIANGUA/2037 and IGOJI/KIANGUA/2038 in the name of MURUNGI KIRIGIA are hereby cancelled.

(2) The Land Registrar is ordered to register IGOJI/KIANGUA/2036, IGOJI/KIANGUA/2037 and IGOJI/KIANGUA/2038 in the name of CATHERINE KAWIRA MURUNGI. In carrying that transfer Land Registrar shall dispense with production of the original titles.

(3) *The defendant shall pay plaintiff's costs of this suit.*

The applicant felt aggrieved by that judgment. He moved to the same court by way of chamber summons dated 9th November, 2009 and sought two main orders namely; that there be a stay of execution of the judgment which he termed *ex parte* judgment, and that the same judgment with all consequential orders made pursuant thereto be set aside and the case be heard de-novo. In a long ruling dated and delivered on 30th April 2010, the same learned Judge *Mary Kasango J.* dismissed it with costs and vacated temporary stay of execution orders given on 29th March, 2009. The applicant thereafter, undeterred, filed another application for stay of execution in the High Court pending the appeal. That was dismissed with costs on 18th May, 2011. Earlier, he challenged the ruling dated 30th April, 2010 vide which the application to set aside the judgment dated 9th July, 2009 was refused. He filed notice of appeal dated 6th May, 2010, intending to appeal against that ruling. This notice of motion is seeking two orders and these are:-

“1. That an order of stay of execution of decree in Meru HCC No. 134/03 be issued pending hearing and determination of the intended appeal.

2. That an order of temporary injunction be issued to stop the respondent her agent or anybody claiming through her from evicting alienating or whatsoever interfering with the applicant's occupation and user of IGOJI/KIANGUA/2036, 2037, 2038 until the intended appeal is heard and determined.”

The grounds in support of the application are that the applicant has filed notice of appeal and has sought proceedings which are yet to be supplied; that the applicant and his family are in occupation of the subject properties but the respondent has applied for his eviction, and should that happen he and his family will be rendered destitutes as they have nowhere else to go to and the intended appeal will be rendered nugatory; that he has an arguable appeal which will be rendered nugatory by refusal of this application. There is a supporting affidavit sworn by the applicant highlighting the allegations in support of the application.

The respondent opposed the application through *Mr. Muchiri wa Gathoni* who held brief for *Mr. Gitonga* the learned counsel for the respondent. In a replying affidavit sworn by the respondent, he deponed that the notice of motion was overtaken by events as the decree had been executed in its entirety in that the properties had been transferred from the applicant's name and registered as was decreed in the respondent's name. She further stated that the applicant had taken away from her a substantial portion of her father's land and thus could not claim that he would be rendered destitute.

In his address to us, *Mr. Kariuki*, the learned counsel for the applicant submitted that the applicant intends to set aside the judgment which he said was *ex parte* as in his view the applicant was entitled to a hearing before the High Court could reach a fair decision. He referred us to the draft memorandum of appeal and contended that notwithstanding the allegation that third parties not before court had since been registered as owners of two of the subject pieces of land, the issue was still alive and *status quo* required preservation. *Mr. Muchiri wa Gatheru*, the learned counsel for the respondent, on the other hand, opposed the application contending that the orders sought in the notice of motion cannot be granted as the decree issued by the High Court had long been executed. Further, two of the affected parcels are now in the names of third parties who are not before us in the application. Parcel No. 2037 is in the name of one ***Cleto Kithure*** whereas parcel NO. 2038 is now in the name of ***Samuel Murithi*** and only parcel NO. 2036 remains in the respondent's name. Thus any precipitating order will affect people not before the Court. Lastly, he submitted that the intended appeal lacks merit as the applicant deliberately failed to attend court on the hearing date.

The notice of motion is brought pursuant to ***Rule 5(2) (b)*** of this Court's rules. The principles that guide the court when considering an application under that rule are now well settled. The applicant needs to demonstrate that the intended appeal or if an appeal has been filed, then the appeal, is not frivolous i.e. that it is arguable. Having demonstrated that, the applicant needs to proceed further and demonstrate that should the intended or the appeal succeed, that success will be rendered nugatory by refusal to grant the

applicant stay of execution, or injunction or stay of proceedings, whichever is applicable. The Court, in deciding the application brought under that rule exercises original and unfettered discretionary powers which must not be exercised capriciously nor upon the whims of the court, but must be exercised judiciously. That being the case, the court is obliged to consider other aspects pertaining to the case as well in the exercise of that original, unfettered discretion.

In this notice of motion the first prayer is seeking stay of decree. The notice of appeal states clearly that the applicant is seeking to appeal against the ruling/order of *Kasango, J* given at the High Court at Meru on the 30th April, 2010. In law the notice of appeal is what confers on to this Court jurisdiction. The notice of appeal filed in this matter confers on us pursuant to **Rule 5(2) (b)** the jurisdiction to hear an application for stay in respect of the ruling dated 30th April, 2010 and certainly not a stay of a decree which was given in respect of a judgment dated 9th July, 2009. Thus the first prayer, in so far as it seeks stay of that decree in respect of which no notice of appeal has been filed, is incompetent, it cannot be granted.

The second prayer is, as we have stated, for temporary injunction to stop the respondent, her agent or anybody claiming through her from evicting, alienating or interfering with the applicant's occupation of her three pieces of land until the intended appeal is heard and determined. The respondent says through her counsel that of the three parcels *IGOJI/KIANGUA/2036, 2037 and 2038*, two are now registered in the names of people who are not parties to this suit and only one is in the name of the respondent. This assertion is confirmed by the ruling of the Court dated and delivered on 18th May, 2011, over one year after the court refused to set aside judgment. In that ruling, the learned Judge states:-

“The certificates of official search are attached to the plaintiff’s replying affidavit and they show that parcel number 2038 is registered in the name of Samwel Murithi. Parcel number 2037 is registered in the name of Cleto Kithure. Parcel NO. 2036 is registered in the name of the plaintiff. The stay, if granted, cannot reverse the registrations of those parcels of land. Also those persons who registered as owners of those parcels are not parties in this action to that extent, the judgment having been executed it cannot be stayed.”

That is the position in law. We cannot make precipitating orders against those who are not parties before us for the simple reason that they may be condemned unheard and also that such parties would not be said to be in contempt of the court if they fail to obey such a court order as it was, in the first place not made in a case in which they were a party. It looks odd that the applicant having heard the learned judge's sentiments we have reproduced hereinabove, on 18th May, 2011 was still prepared to file this notice of motion before us on 8th June, 2011 only about 21 days after that court had made it abundantly clear that stay order could not be granted as two parcels were registered in the names of third parties not before the court. It is admitted that one parcel i.e. No. 2036 is still in the name of the respondent, but the applicant does not state in which parcel he seeks to continue staying. He, in fact seeks injunction to issue in respect of all parcels, yet not all parcels are still in the name of the respondent. The court cannot grant such an order in the face of the facts before it as indeed the notice of motion has been overtaken by events, and the decree had been executed. Not only that but parts of the subject land are now beyond the applicant's reach as they are now registered in the name of people who are not parties to this matter.

In the event, we cannot exercise our discretion in this notice of motion for reasons stated above. It is dismissed with costs to the respondent.

DATED and DELIVERED at NYERI this 2ND day of DECEMBER, 2011.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR