



IN THE COURT OF APPEAL
AT NYERI
CIVIL APPLICATION NO. NAI 49 OF 2010 (UR 31/2010)
(CORAM: BOSIRE, AGANYANYA & VISRAM, J.J.A.)

BETWEEN

1. MWANGI KIUGU
2. JOHN KARIUKI
3. CHRISTOPHER KARIUKIAPPLICANTS

AND
WAHIGA KIUGURESPONDENT

(An application for stay of execution and injunction pending an appeal from the judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated 26th February, 2009 in H.C.Succ. Cause No. 9 of 1999)

RULING OF THE COURT

This Notice of Motion Application dated 5th March, 2001 and amended on 13th May, 2001 is expressed to be made under **rules 5(2)(b)** and **42** of the Court of Appeal Rules. It seeks the following orders; namely:

- “1. THAT the Honourable Court order stay of execution of the order/decree given on 26/02/2009 distributing estate herein.
2. THAT the Honourable Court be pleased to order an injunction restraining the respondent by himself, his servants, agents or whatsoever from sub-dividing alienating or in any way adversely dealing with OTHAYA/KIHUGIRU/204 or any part thereof or dispossessing the respondents of the same or in any way interfering with the occupation and use of the same by the respondents pending the hearing and determination of the Appeal No. 222 of 2009.
3. THAT an order for the maintenance of status quo as at the time of lodging of this application pending Appeal 222/09 be issued.
4. THAT costs of and incidental to this application abide the result of the appeal.”

The application is based on the grounds specified thereon, as follows:-

- “ (a) The applicants have already filed and served notice and Appeal No. 222 of 2009.
- (b) The Applicants have appeal with arguable grounds and with high chances of success.
- (c) The respondent has already applied to subdivide and transfer shares of the beneficiaries and status quo on the ground will be disturbed as applicants will be moved from where they have developed with permanent structures and therefore irreparable loss and Appeal be rendered nugatory.
- (d) Applicants live with their families in the subject herein and they have done extensive development.
- (e) The superior Court dismissed application for stay of execution and injunction to maintain status quo on the ground of delay yet the Applicants had applied for delay way back on 28/04/09 and yet the judgment challenged was delivered on 26/2/2009.
- (f) The respondent will not be prejudiced by the orders sought.”

The application was also supported by the affidavit of the 2nd applicant, **John Kariuki Kiugu** sworn on 13th May, 2011 stating that though he lodged an application for stay of execution on 28th April, 2009 at the High Court, the advocate had delayed in prosecuting the same, leading the applicants to appoint another firm of advocates. As a result of advice by the latter firm of advocates the applicants withdrew the first application and filed afresh one on 26th October, 2009 which was heard on 14th December, 2009 and a ruling dismissing that application was delivered on 26th February, 2010. According to the affidavit the application for stay at the High Court was dismissed on the ground that there was a delay in filing the same and that the High Court decision had been implemented although this was not the correct position since the subject matter of the appeal had not been subdivided. He deponed further that the respondents had only applied for consent of the land control board which was yet to approve it.

A replying affidavit sworn by the respondent deposed that the estate for which the application for stay was made had already been subdivided and the beneficiaries had been allocated their portions; hence there was nothing to stay. He deposed further that he had been informed by his advocates, which information he believes as true, that the applicant had filed the appeal out of time without the Court's leave and had not explained the reason for the delay; hence the prayer for an injunction will only cause prejudice, anxiety and injustice to the respondent. That it is the applicants who have been delaying this matter from being concluded thus denying him the fruits of the judgment.

In this Court on 27th October, 2011 **Mr. Kariuki**, learned counsel for the applicant submitted that not all the estate in dispute is matrimonial property and that only five (5) acres was to be distributed. He stated further that consent to subdivide had not been obtained because of this pending application and that the notice and record of appeal had already been filed.

Mr. Wachira, learned counsel for the respondent opposed the appeal and referred the Court to the respondent's replying affidavit and argued that there was no arguable appeal. According to his submissions not all the applicants are objecting to the subdivision of the land and that parties were heard in the High Court and a decision was arrived at and the estate already distributed. Thus there is nothing to stay.

The dispute between the parties herein relates to a piece of land registration number **Othaya/Kihuguru/204** registered in the name of one Kiugu Mwangi, deceased. He died in 1972 leaving behind two (2) wives and several children. One of his wives Wahiga filed an application at the High Court at Nyeri to have the grant confirmed but the 2nd applicant herein and one Mhora protested claiming that although the whole property comprising 16 acres was registered in the deceased's name only 5 acres belonged to him and available for subdivision to his two houses. The 2nd applicant said he had purchased 6 acres comprised in the land from various people whose names he gave, hence it should not be included in the deceased's estate. After hearing the parties, in the matter, the High Court (Kasango, J.) rejected the 2nd applicant's protest that he and his brothers from the first house (*Wanjeri was his mother*) had purchased individual plots included in Othaya/Kihuguru/204 and directed that the whole land be subdivided equally between the deceased's two houses.

An application for stay of execution of the decision of *Kasango, J.* was dismissed by *Sergon J.* on 26th February, 2010, hence this application for the same order before this Court.

Under **rule 5(2)(b)** of this Court's Rules,

“Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentences or to stay execution but the Court may:-

(a) ...

(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75,

Order a stay of execution, or an injunction or a stay of any further proceedings on such terms as the court may think just.”

In either granting or refusing to grant a stay or injunction the Court exercises its discretion on the basis that there is an arguable appeal and in addition that the success of the appeal will be rendered nugatory if the order sought is not granted. An arguable appeal is not necessarily one which must succeed but that it should not be frivolous.

On the first principle both the notice and record of appeal have been filed and it is our view that the grounds specified in the copy of the memorandum of appeal attached to the application before us raise substantial legal points which cannot be wished away at this point. It is important to determine whether it was only 5 acres which the deceased owned in the suit property or more than that, or whether or not he held the rest of the land on trust for the applicants.

As regards the nugatory aspect the respondent appears to be in a hurry and has already applied for the consent of the Land Control Board to subdivide the land and possibly relocate the parties on the ground and in the event that this happens and the appeal eventually succeeds, the situation on the ground might be altered and as a result might entail further proceedings to correct the situation on the ground and at great expense to them.

In the circumstances we are of the view that this is a proper case for the order of stay sought to be granted. We therefore grant the same and direct that it remains in force pending the hearing and final determination of the appeal. Costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nyeri this 2nd 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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR