



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CIVIL APPLICATION 129 OF 2009

BETWEEN

JOSEPH MUTHEE KAMAU
DAVID MWANGI MUTHEE.....APPLICANTS

AND

DAVID MWANGI GICHURI
JOHN MAINA GICHURI.....RESPONDENTS

(Application for stay of execution of the judgment and decree of the High Court & CM's Court Civil Suit pending the hearing and determination of an intended appeal of the High Court of Kenya at Nyeri (Kasango, J.) dated 23rd April, 2008

in

H.C.C.A. NO. 152 OF 2002)

RULING OF THE COURT

On 31st January 1999 in the evening, there was physical confrontation between the appellants **Joseph Muthee Kamau**, and **David Mwangi Muthee** on the one hand and the respondents **David Mwangi Gichuri** and his brother **John Maina Gichuri** on the other hand which resulted into physical injuries to the respondents and some injuries to the applicants. The applicants were arrested, charged with the offence of assault in Mukurweini Law Courts, convicted and each fined Ksh.5,000/=. They did not appeal against that conviction. Later the respondents moved to the Chief Magistrate's Court at Nyeri and each filed a civil suit against the applicants. These were Civil Case Nos. 410 and 411 of 2000. The suits were consolidated and heard together. The respondents each claimed special and general damages against the applicants. The applicants denied liability in the defence and counter-claimed. It would appear that as at the time the suits were filed, the said Resident Magistrate (M. N. Omoga), had no pecuniary jurisdiction to award an amount above Ksh.300,000/=. We say so because, from the record before us, his pecuniary jurisdiction was enhanced to Ksh.500,000/= vide Gazette Notice dated 2nd August 2002, whereas the suits were filed in the year 2000 and judgment in respect of the consolidated suit was delivered on 30th August 2002, few days after the Gazette Notice. Be that as it may, the learned Resident Magistrate, after hearing the consolidated suits awarded the first respondent Ksh.450,000/= and second respondent Ksh.350,000/=. She also awarded Ksh.100,000/= to each of the appellants in respect of their counter-claim. The appellants felt aggrieved by that decision. They appealed against it to the superior court. The superior court (Kasango J.), after hearing the appeal, dismissed it with costs to the respondents. The respondents are still not satisfied and have come to this Court by way of Civil Appeal No. 54 of 2009. That appeal is pending hearing in this Court.

In the meanwhile, the appellants have moved this Court by notice of motion dated 28th April, 2009 and filed on 30th April 2009 seeking orders:-

“1spent.

2. That there be a stay of execution of the judgment and decree of the superior court in Nyeri High Court Civil Appeal No. 152 of 2002 and Nyeri Chief Magistrates Court Civil Suit No. 410 of 2000 and all subsequent order thereto if any, pending hearing and determination of the intended appeal.

3. That the costs of this application be in the cause.”

Two grounds are cited in support of the application. These are first that the appeal already filed is arguable and second, that should this Court refuse to grant this application and the appeal eventually succeed, that success would be rendered nugatory. Mr. Mindo, the learned counsel for the applicant submits in support of the arguability of the intended appeal, that the learned Magistrate had no jurisdiction to make the awards he made which were far in excess of his jurisdiction when he heard the matter before him. His contention is that as at the time the learned Magistrate heard the matter her pecuniary jurisdiction did not exceed Ksh.300,000/=, but just before the judgment was delivered, his pecuniary jurisdiction was enhanced to Ksh.500,000/= and he relied on that when he made the awards. That he said, was not in law proper. On nugatory aspect, Mr. Mindo submitted that the respondents were threatening to sell the appellants’ land and if that is not stayed, the success of the appeal would be rendered nugatory as the appellants will have lost that land which may not be recovered.

While opposing the application, Mr. Nderitu Komu, conceded that the appeal is arguable, but submitted that the success of the appeal would not be rendered nugatory as the respondents would be able to refund whatever payment is received in execution of decree. Besides, he said this was a monetary decree and it was unlikely the success of the intended appeal would be rendered nugatory.

This notice of motion is brought pursuant to **rule 5 (2) (b)** of this Courts Rules. It is common ground that the appeal is arguable particularly on the issue as to whether or not the learned Resident Magistrate had jurisdiction to make the awards he made. The superior court held she had jurisdiction. We agree with the learned counsel that the intended appeal is arguable.

Under **rule 5 (2) (b)**, a party seeking orders of stay of execution, stay of proceedings or injunction must satisfy the court on two issues, i.e. that the intended appeal, as is the case here, is arguable and secondly and in addition, that should the appeal succeed, such success will be rendered nugatory by our refusal to grant the orders sought. The question of arguability is disposed of as stated above. The next question is as to whether the success of the appeal, if it eventually succeeds, will be rendered nugatory. In our view, as Mr. Mindo says that the applicants’ complaint is mainly confined to the amount awarded in excess of the Magistrate’s jurisdiction, the amount that was given within the jurisdiction should not be unnecessarily withheld as it may not be in dispute after all.

That being our view, what commends itself to us is to grant conditional stay of execution. Each applicant shall deposit within 45 days from the date hereof. Ksh.300,000/= into a joint bank account in the names of the advocates for the applicants and for the respondents. Upon such deposit within the stipulated time there shall be stay of execution of the orders of the Resident Magistrate and confirmed by the High Court till the Civil Appeal No. 54 of 2009 in this Court is heard and determined. Costs of this application shall be in the appeal.

Dated and delivered at Nyeri this 24th day of June, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR