



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 297 & 205 OF 2009

FN APPLICANT

AND

VWN.....RESPONDENT

(An application for injunction and stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (Rawal, J.) dated 24th October, 2008

in

H.C.C.C. NO. 2125 OF 2008)

RULING OF THE COURT

In his motion dated 1st October, 2009 and filed on 6th October, 2009, FN (“F”) seeks the following orders under **rules 5 (2) (b)** of the rules of this Court:

- “1. THAT the respondent by herself, her servants and/or agents be restrained by way of injunction from transferring, selling, alienating, disposing, taking possession of or in any way at all dealing with Land Reference Number xxx (original number xxx) pending the hearing and final determination of Civil Appeal No. 179 of 2009.
2. THAT there can be an order of stay of execution of the judgment and decree dated 24th October, 2008 pending the hearing and final determination of Civil Appeal Number 179 of 2009.”

The respondent (“V”) was the wife of F since 1966 until about 1980 when they parted company. Their disagreement however started much earlier forcing V to file suit in the High Court (H. C. C. C. No. 534 of 1982) seeking the subdivision of LR No xxx, measuring about 5.1 acres, situate in Karen (“the Karen property”) which was registered in their joint names. F acknowledges the joint ownership but denies that V had any interest in the property as he was the sole purchaser of it. He also counterclaimed two pieces of land in Ngong registered in the sole name of V (Ngong/Ngong/xxx and xxx) (“the Ngong property”)as well as other properties acquired during coverture.

The High Court (Owour, J. as she then was) decided the matter in favour of V on 7th October, 1993 giving her ½ share of the Karen property and declaring that F had no interest in the Ngong property or other properties registered in the sole name of V. F appealed to the Court of Appeal (C. A. No. 44 of 1999) and the decision was set aside and a retrial *de novo* ordered on 22nd September, 2000. The Court of Appeal also made an order that the fresh proceedings be commenced by originating summons which was filed in December that year. Upon considering all the evidential material placed before it, the superior court (Rawal, J.) decided on 24th October, 2008, that Vand F held the Karen property as equal beneficial owners and ordered that the joint ownership be severed and the two hold the property in common in equal shares together with the mesne profits accruing therefrom. The Court also found that V was the sole proprietor and was entitled to full ownership of the Ngong property.

Francis was once again aggrieved by that decision and filed a notice of appeal on 28th October, 2008. Subsequently Civil Appeal No. 179 of 2009 was filed on 7th August, 2009 raising 17 grounds of appeal and seeking in the end to have the superior court’s judgment set aside and orders made that F was the sole owner of the Karen property; that in the alternative he should be awarded 90% or over 50% of its share; that the Ngong property be shared equally and the balance thereof be paid to F or in the alternative, the value of the half share be credited to F in the Karen property. No order was sought or granted for stay of execution of the superior court’s orders pending the hearing and determination of that appeal.

Long before the appeal was filed, on 10th February, 2009, V through her lawyer, Ms. Judy Thongori gave notice to the lawyers acting for F alerting them that they were intent on enforcing the decree of the superior court and sought their co-operation on survey and subdivision of the property failing which V would proceed on her own. The response made on 1st April, 2009 was that there was an intention to appeal against the judgment of the superior court. By June 2009 V had completed the process of subdivision and on 12th June, 2009 she was issued with a Certificate of Title for LR. No. xxx measuring 1.032 Hectares (approx. 2.55 acres) which was a sub-division of the Karen property. The Deed plan in support of the Certificate of Title had been prepared on 29th November, 1993 before the reversal by the Court of Appeal of the first decision of the superior court in favour of V. By letter dated 11th September, 2009, F, through his lawyers was informed about the position and V sought to take possession of her property. That is what prompted the motion before us.

Since the filing of the motion, there have been affidavits upon affidavits filed on either side of the argument, with leave of the court, seeking to clarify contentious issues. There are four of them. The altercations in those affidavits, coupled with the grounds of appeal which is already filed, affirm the view we take, despite protestations from Ms. Thongori, that the appeal is not frivolous. That is not to say that it will ultimately succeed. For purposes of this motion, the applicant therefore surmounts the first test on applications made under **rule 5 (2) (b)**.

It is also our view, upon perusal of the record, the affidavits on record and hearing counsel on both sides, that the prayer for stay of execution has been overtaken by events. There can be no denying, whatever challenges may be made in the appeal on the process adopted, that there is already a registered title which has been issued to the respondent and *prima facie* it is a valid one, issued pursuant to a decree of the superior court. That prayer is not for granting and we decline to do so.

Will the appeal be rendered nugatory if prayer one is not granted? Mr. Mwangi, learned counsel for the applicants submits that V could alienate the property further now that she has Title to it, thus, putting it beyond reach. He further disclosed that there was a caveat registered against the new title by the Registrar of Titles "*pending determination of the matter in court*". Ms. Thongori on the other hand did not allay any fears by the applicant that the respondent wishes to take physical possession of the property and exercise her rights under the Certificate of Title and the law. She submitted that the applicant was to blame for his indolence since he was duly notified about execution of the decree but refused to co-operate for one year because he was benefiting fully from the property. It would be unjust therefore, she submitted, to deprive the respondent of her rights any further since it has not been shown that possession of the property would render the success of the appeal nugatory.

We have considered this aspect of the matter and we are not persuaded that the taking of possession of the subdivision of the disputed property would render the success of the intended appeal nugatory. There was a decree of the superior court issued in her favour which remains valid until it is overturned by this Court, and as stated earlier there was no stay of execution sought or granted until it was executed. Whether the execution was regular or not is not for us to decide at this stage.

There is also evidence that a caveat has been placed against the new title and therefore the fear of alienation before the appeal is determined is minimized. To reinforce that caveat however, we are inclined to grant in part the prayer for injunction to restrain the respondent from transferring, selling, alienating or disposing of or mortgaging Land Reference No. xxx (original LR No. xxx) pending the hearing and determination of Civil Appeal No. 179/09 or further orders of this Court. That order shall issue forthwith, but the application is otherwise dismissed. The costs of the application shall be in the main appeal.

Dated and delivered at Nairobi this 19th day of November, 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR