



IN THE COURT OF APPEAL

AT NYERI

Civil Application 256 & 178 of 2009

EDWIN MWAI KIRUAI APPELLANT

AND

PETER WAMBUGU GICHOMO RESPONDENT

*(An application for stay of execution of the orders of the High Court of Kenya at Embu (Khaminwa, J.) dated 10th December, 2007
in*

H.C.S.C.C.NO.37 OF 2006)

RULING OF THE COURT

This is an application under **Rule 5(2)(b)** and **42** of this Court's Rules for stay of execution of orders of the superior court (**Khaminwa, J.**) given on 10th December, 2007 in **Succession Cause No. 37 of 2006** at Embu pending the hearing and determination of the intended appeal against the ruling of superior court (**Karanja, J.**) delivered on 30th July 2009 at Embu in the succession cause mentioned above. On 10th December, 2007, the superior court ordered that the applicant be evicted from a 3 acre portion of land he occupies namely **Baragwe/Thumaita/487** but the applicant denies service of the application which led to the eviction order being granted. Upon

learning of the existence of the ex-parte orders, the applicant by an application dated 12th June 2008 sought to have the orders set aside or reviewed by the superior court. However, the application was dismissed on 30th July 2009 hence the application before us.

The application is based on the grounds set out in the body of the application and in the affidavit in support of the application sworn by applicant on 27th August, 2009. The application is opposed on the basis of the respondent's affidavit in reply sworn by him on 25th October, 2010.

At the hearing, the applicant was represented by *Miss Njuguna C.N.*, learned counsel whereas the respondent was represented by *Mr Mugo*, learned counsel holding brief for *Mr Igati Mwai*.

Miss Njuguna for the applicant in her submissions stated that the 3 acre portion the subject of the ex-parte orders issued on 10th December, 2007 is part of land parcel Baragwe/Thumaita/487 and is registered in the names of *Nahasho Ngigi Gichoma* (deceased) and that the applicant came into possession of the 3 acre portion on 10th December 2007 by virtue of having purchased the same from the children of the deceased; that on 24th July 2002 in Succession Cause 55 of 1996 the resident magistrate made an order enjoining the applicant as a beneficiary in the succession proceedings and in this connection the applicant had a judgment in his favour in respect of the portion in question in senior resident magistrate's court *Case No. 87 of 1993*; that the applicant had developed the said 3 acre portion of land by planting there 1600 coffee bushes and 500 banana stems; that the interest of the applicant in the land could only be taken care of in the succession proceedings which are currently pending in the superior court hence the need to stay the intended eviction. The learned counsel would up his submissions by stating that in the draft memorandum of appeal, the applicant had raised two arguable grounds first, that the respondent had no locus standi in the eviction proceedings in that he was not the legal representative of the deceased estate and had no superior right to the applicant as a purchaser from the deceased and second, the eviction orders had been obtained ex-parte and without a hearing on merit. *Miss Njuguna* submitted that since the applicant was in possession of the land and had also extensively developed it, failure to grant the stay would render any success in the intended appeal nugatory.

Mr Mugo for the respondent submitted that the intended appeal was against the dismissal Order in the application for review and that there was no appeal against the eviction order and as such no stay was merited in the circumstances. He further submitted that the land in question was developed by the respondent but the applicant took possession of it in 2000 and finally that no leave was obtained to institute the appeal pursuant to *section 75* of the Civil Proceedings Act and *Order 42* of the Civil Procedure Rules and therefore since no appeal lies a stay cannot be granted.

We have considered the submissions of counsel including the contents of the affidavits in support and in reply. We agree with the learned counsel for the applicant that in the past where there is evidence of occupation of a disputed parcel of land, this Court has invariably stayed any intended eviction pending a full hearing on merit see *Beth Kaari & another vs M Nyeri*

M'Rimunya No. Nai 352 of 2009 (unreported); Kanwal Sarjit Singh Dhiman vs Keshavji, Jivray Shah, Civil Application No. Nai 320 of 2006 (unreported); Dr Kea N Barua & another vs Town Construction Company Ltd, Civil Application No. Nai 47 of 2005 (unreported) and Wairimu Mukoma vs Hannah Wambui Githere & 4 others, Civil Application No. Nai 322 of 2007 (unreported).

Although we acknowledge the force of the respondent counsel's argument concerning the two orders made by the superior court we are not also oblivious to the need for the Court to note that the intended appeal arises from interlocutory orders one of which has inter-alia been challenged on the basis that the order was granted ex-parte. In the circumstances prevailing, we consider that the justice would be served better by taking a broad view of the two orders granted and treating them as substantively stemming from the same matter. With this in view we consider it proper to restrain the eviction and preserve the status quo. Such an approach is in our opinion within the ambit of the overriding objective. When doing so, we have taken into account that the intended grounds of appeal cannot be said to be frivolous and further that in the event of an eviction the success of the intended appeal would be rendered nugatory.

In the result, we grant orders in terms of prayer three (3) of the application dated 20th August, 2009 and further order that the costs of the application abide the outcome of the intended appeal.

It is so ordered.

DATED and delivered at Nyeri the 12th Day of November, 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR