



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**Civil Appli 225 of 2008 (UR 141/2008)**

**CHARLES GITHINJI MUTURI..... APPLICANT**

**AND**

**JULIUS NDERITU KABERA..... RESPONDENT**

**(Being an application for stay of execution of the judgment and decree and all consequential orders,  
if any, of the High Court of Kenya at Nyeri (Makhandia J) dated 3<sup>rd</sup> June 2008**

**in**

**H.C.C.A. NO.68 OF 1999)**

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**RULING OF THE COURT**

This Court is asked under rule 5 (2) (b) of the Court of Appeal Rules to stay execution of the judgment and decree of the superior court made on 3<sup>rd</sup> June, 2008 and all other consequential orders thereto pending the hearing and determination of the appeal which has since the lodgment of this motion been filed before the Court.

The application before us was argued in the absence of the respondent and his counsel, who, though duly served with the hearing notice, was absent on being called out.

The dispute between the parties concerns a piece of land known as plot No. 50 at Chaka in Nyeri District. It measures approximately 50 ft by 100 ft. The respondent avers that he is the proprietor thereof and that some time in or about 1996 the applicant, without his consent, trespassed on it and erected structures thereon and has refused to vacate despite repeated demands by the respondent. The applicant, on the other hand, denied the allegations by the respondent. It is his case that he had purchased the suit land on 30<sup>th</sup> September, 1995 from two named persons who were the beneficiaries of one Moses Mwangi Kingori (deceased) the previous owner of the suit land. After purchase the applicant immediately moved to occupy it and has since extensively developed it. He lives on the suit land with his family and some tenants to whom he has rented out some of the structures.

The respondent instituted suit against the applicant in the Principal Magistrate's Court at Nyeri and pursuant to an application under order 35 rule 1 of the Civil Procedure Rules, that court on 30<sup>th</sup> June, 1999, entered summary judgment for the respondent and ordered that the applicant be evicted from the suit land on the ground that the defence filed by him to the claim was a sham. The defence was also struck out.

Naturally, the applicant was aggrieved by that decision and consequently lodged an appeal in the superior

court at Nyeri. In a judgment delivered on 3<sup>rd</sup> June, 2008, Makhandia J. held, inter alia, that:

*“... the respondent in his supporting affidavit had proved ownership of the suit premises. He produced a copy of the sale agreement and documents from Ndathi Mugunda Co. Ltd showing that the respondent was the owner.”*

and that:

*“The appellant had good opportunity to counter the respondents contention by producing his own set of documents. He did not. Failure to do so clearly showed that the defence was a mere sham to delay the court process”.*

The superior court dismissed the applicant’s first appeal and we were informed from the bar by Mr. Waweru Macharia, his counsel, that an appeal has since been lodged in this Court.

Mr. Macharia in his submission in support of the application raised several issues to demonstrate that indeed the appeal is arguable. In the main, he contended that the learned Judge failed to resolve the issue whether or not the magistrate’s court had jurisdiction over the dispute. He further submitted that the learned Judge erred in not appreciating that the suit land was agricultural land, and so the transaction over the suit land was governed by the provisions of the Land Control Act Cap 302 Laws of Kenya. Unfortunately, as stated earlier on in this ruling we do not have the benefit of the respondents’ reply to these submissions.

On our own consideration of these submissions together with the judgments of the two courts below and especially the fact that the defence of the applicant was struck out we are prepared to hold without deciding that indeed the appeal is arguable and is far from being frivolous.

The superior court dismissed the applicant’s appeal before it. It follows therefore in the circumstances that any execution can only be in respect of costs as that court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sums of money. Actually, in essence it would appear that there is nothing arising out of that court’s judgment for this Court to stay save for payment of costs. However, Mr. Macharia has argued that the respondent is likely to proceed to tax his costs and seek to recover them from the applicant by way of attachment and sale of the applicant’s property or by committing him to civil jail before the appeal is heard. He also expresses fear that the respondent may enforce the magistrate’s judgment by which the applicant was ordered to deliver vacant possession of the suit property to the respondent. Mr. Macharia submits that if we refuse to grant the applicant the order of stay as sought and his appeal were to succeed, that success would be rendered nugatory. In the particular circumstances of this case we would, with respect, agree with him.

Accordingly, the applicant’s notice of motion dated 21<sup>st</sup> July, 2008 and lodged in this court on 22<sup>nd</sup> July, 2008 is hereby allowed to the extent that we order that the status quo obtaining at the date of the High Court judgment shall be maintained pending the hearing and determination of the appeal. The costs of this application shall be in the appeal.

*Dated and delivered at Nairobi the 16th day of January 2009.*

**R.S.C. OMOLO**

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JUDGE OF APPEAL

**P.K. TUNOI**

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JUDGE OF APPEAL

**P.N. WAKI**

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JUDGE OF APPEAL

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

**DEPUTY REGISTRAR**