REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civil Appli 300 of 2008

KENNEDY BOSIRE GICHANA .....APPLICANT

AND

THE REGISTERED TRUSTEES REDEEMED GOSPEL CHURCH.....RESPONDENT

(Application for an injunction and/or a stay of the orders of the High Court of Kenya pending the lodging, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Kisumu (Mwera, J) given on 22nd September, 2008

in

H.C.C.C. No. 58 of 2008)

****

RULING OF THE COURT

This application by notice of motion dated 3rd and filed in this Court's sub-registry at Kisumu on 4th November, 2008 seeks the following orders, namely:-

1. THAT pending the lodging, hearing and determination of the applicant's intended appeal, the execution of the decision of the Honourable Justice J. W. Mwera in Kisumu High Court Civil Case No. 58 of 2008 dated 22nd September, 2008 be stayed.

2. THAT pending the lodging, hearing and determination of the applicant's intended appeal, there be a stay of all further proceedings in the superior court at Kisumu High Court Civil Case No. 58 of 2008.

3. *THAT the costs of and incidental to this application be provided for*.

The application is founded on the grounds set out on the face thereof and also on the averments deponed to by the applicant in the supporting affidavit. The main grounds on the face of the application are that:-

(a) Unless the application which seeks a stay of execution of the ruling of the learned Judge is heard without delay the applicant and his tenant may be evicted from the land forming the subject matter and same taken over by the respondent who is most likely to change the nature and character of the suit plot and developments thereon, rendering the appeal nugatory and occasioning loss and prejudice to the applicant.

(b) The applicant has an arguable** (sic) **with overwhelming prospects of success.

The reasons for the arguability or success of the appeal are set out in subparagraphs, i-viii of paragraph (b) afore-stated. The grounds also include a balance of convenience which the application states clearly weighs in favour of the applicant in that the subject matter shall be preserved awaiting the determination of the intended appeal.

The supporting affidavit relies on grounds set out on the face of the application mostly that the intended appeal is arguable and that if the order of stay is not granted the appeal will be rendered nugatory.

When the application was placed before this Court on 25th March, 2009 for hearing ***Mr. Momanyi***, learned counsel for the applicant, referred to the grounds on the face of the record and submitted that the learned superior court Judge did not peruse the documents annexed to the application. In counsel's view, the learned Judge decided the main suit in favour of the respondent at an interlocutory stage. He submitted that the appeal, already filed, is not frivolous and that if this application for stay of execution is not granted and the appeal succeeds, its success will be rendered nugatory. He stated further that the respondent had written to the applicant's tenant who is residing on the suit plot asking him to vacate the same and was ready to demolish the premises on the plot belonging to the applicant, and that the respondent may put up a building on the suit plot to change the nature of the property.

Mr. Oguttu, learned counsel for the respondent, opposed the application submitting that although the applicant had initially been issued with an allocation letter for the suit plot by the Commissioner of Lands, this allocation letter was later found to have been a forgery and the title documents cancelled. According to counsel, at the time the order of injunction was issued by the superior court the applicant had no title to the suit plot; hence he has no arguable appeal. Counsel submitted further that the applicant had not demonstrated that the appeal were it to succeed, would be rendered nugatory if this application fails, since he is not in possession and/or has no title to the plot, and that in the event of the applicant suffering any loss, he has a statutory remedy in the award of damages.

The principles which should guide this Court in an application under ***rule 5(2)(b)*** of the Court of Appeal Rules have been set out in the case of ***Reliance Bank Limited (in Liquidation) v. Norlake Investments Limited*** ***(Civil Application No. Nai 93 of 2002*** – unreported).

"1. ***That the appeal or the intended appeal is an arguable one, that is that it is not frivolous;***

2. That if an order of stay or injunction as the case may be, is not granted, the appeal or the intended appeal were it to succeed would have been rendered nugatory by the refusal to grant the stay or injunction."

As to whether or not the appeal filed herein is arguable we wish to refer to the learned Judge's ruling where he said:-

"***Having heard both counsel, and gone over the annexures tendered, this Court is inclined to grant the orders sought by the Plaintiff church. For now it holds a lease over the said plot. The lease once held by the defendant was expunged. Whether that act was unlawful or irregular, that is not the issue to resolve in these proceedings at all. Up to this moment, the defendant has nothing to depend on to claim rights over the subject plot."***

Together with these findings is a letter from one ***P.M. Muthwethau*** for Commissioner of Lands and dated 12th October, 2007 which directed the District Land Registrar Kisii to expunge the lease documents prepared and certificate of lease issued to the applicant from the records as the same was a forgery and as they did not emanate from the office of the Commissioner of Lands.

Apart from the foregoing, there appear to be a case of double allocation here which would require that the Commissioner of Lands be cited as a party to this suit, which has not been done, this may well render the proceedings in the superior court unmaintainable. Moreover, the superior court ruling was arrived at in

exercise of the learned Judge's discretionary authority which this Court would be reluctant to interfere with unless it is shown that the Judge applied wrong principles of law or that he reached a conclusion which would work manifest injustice to the applicant, which we do not find; ***Khan v. Roshan* [1965] E.A. 289.** With respect to Mr. Momanyi, we do not think the appeal is really arguable.

As to whether or not the appeal will be rendered nugatory if this application is not granted, we can only state that having held that the appeal is not really arguable that issue does not arise for consideration. The applicant can only succeed in the application if he satisfies the Court on both limbs of the requirements. In view of the forgoing we are of the view that this application for stay has no merit and we order it to be dismissed with costs.

Delivered and dated at Nairobi this 8th day of May, 2009

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR