



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appli 152 of 2009 (UR 104/2009)

ANDREW CHERUIYOT 1ST APPLICANT

BETTY CHEPNG'ENO 2ND APPLICANT

AND

ANYOKA ROGITO RESPONDENT

*(Application for stay of execution of the ruling and decree of the High Court of Kenya at Kericho
(Ang'awa, J) dated 19th February, 2009*

in

H. C. C. C. No. 5 of 2003)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules (“the Rules”) for stay of execution pending the hearing and determination of an intended appeal.

The background to this application is as follows:

By a Plaint dated 22nd January, 2003 and amended 4th September, 2003, the respondent (plaintiff in the superior court) sought a declaration that the applicants had trespassed onto a portion of his land, and prayed that they be evicted. The applicants denied the allegation in a defence filed on 28th February, 2003 and amended 16th September, 2003.

On 24th May, 2007 the parties entered into a consent to refer the boundary dispute to the Kericho District Surveyor on the following terms:

“By consent of the parties herein it is mutually agreed that the Kericho District Surveyor do determine and fix the boundaries of parcel LR. Nos. KERICHO/631/1254 and 631/1255, which parcels of land are within the Kericho Municipality and submit his report to this court within 60 days from the date of service of this order. The parties herein to share the costs of survey if any.”

The above consent order was filed and recorded in the superior court at Kericho on 29th May, 2007. Thereafter, the Kericho District Surveyor, Mr. J. K. Kibuba filed his report dated 31st August, 2007 in the

aforesaid court, and following an application by the respondent, Ang'awa, J read and recorded the said report as a Judgment of the Court. In doing so, the learned Judge stated, in part:

“Findings

- 1. The surveyor’s report reflect the correct boundary of land parcels LR 631/1254 and LR 631/1255 Kericho.**
- 2. I am satisfied that this is a correct report. I hereby adopt the report and enter judgment making the report a judgment of this court.**
- 3. I make orders that the respondent/defendant do pay cash 7,000/= towards the surveyors fee not paid, within 30 days.**
- 4. I further order that there be and is hereby a declaration that the plaintiff accordingly is the owner of the said parcel of land as surveyed.**
- 5. I award the costs of this suit to the applicant herein.”**

It is against that Judgment that the applicants intend to appeal, and in the meantime seek stay of execution. In his submissions before us, Mr. Kipkoech B. Ngetich, learned counsel for the applicants, argued that the purpose of the consent entered into between the parties was simply to “determine” the boundaries, but not to render a final decision on the same, and secondly that in accordance with the consent, parties had agreed to share the costs whereas the learned judge ordered the entire costs to be paid by the applicants. He submitted that the intended appeal would be rendered nugatory unless the orders sought were granted as a portion of the applicants’ building appears to have been erected on land now claimed to belong to the respondent, and the same would have to be demolished.

Mr. N. O. Migiro, learned counsel for the respondent argued that the appeal was not arguable as the parties had consented to refer the dispute to arbitration, and that the arbitrator’s report represented the final judgment. He argued that the appeal if successful would not be rendered nugatory as his clients would be prepared to pay damages for the portion of the applicants’ building that would be demolished.

The discretion of the court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the court both that the intended appeal or appeal is arguable and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory.

Clearly, there is at least one arguable point that is evident – that the superior court ordered that the costs be paid by the applicants when the consent order recorded in court called upon both the parties to share those costs. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.

On the second point on whether the appeal will be rendered nugatory unless we grant a stay, we are satisfied that the same will be rendered nugatory. The applicants’ building allegedly protrudes onto the respondents’ land. That portion of the building which lies on the respondents’ land will have to be demolished, and if necessary, rebuilt in the event of a successful appeal, all at considerable expense.

Having considered the interests of both the parties, we have come to the conclusion that this application has merit. We allow the same and order that there be stay of execution as prayed. The costs shall be in the appeal.

Dated and delivered at Nakuru this 6th day of November, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR