



COURT OF APPEAL AT NYERI

CIVIL APPLICATION 161 OF 2007(UR104/2007)

BENJAMIN ABURUKI APPLICANT

AND

SAMUEL KILINGO RESPONDENT

(Application for a stay of execution and injunction pending the hearing and determination of appeal from a ruling and order of the High Court of Kenya at Meru (Ouko, J) dated 24th May, 2007

RULING OF THE COURT

By a chamber summons dated 2nd May, 2007 and lodged in the High Court within Civil Case No. 31 of 2007, Benjamin Aburuki, the applicant before us, asked Ouko, J for an order that:-

“This Honourable Court be pleased to issue an order of injunction restraining the Defendant, his servants, agents or members of his family from entering, trespassing, interfering or in any way remaining on land parcel No. 3425 Ankamia pending the hearing of this suit.”

Ouko, J heard that application and by his ruling dated and delivered at Meru on 24th May, 2007, the learned Judge concluded that the applicant had not shown to him a prima facie case with a probability of success. He therefore dismissed the summons with costs. The applicant now comes before us under **Rule 5 (2) (b)** of the Court’s Rules and he asks us for two prayers, namely,

“1. That there be a stay of the Orders/Ruling of Meru High Court Case No. 31 of 2007 delivered on 24th May, 2007 pending the hearing and determination of the intended Appeal.

2. That the Respondent, his servants, or/and his agents be restrained from entering, trespassing, interfering or in any way remaining on Land Parcel No. 3425 – ANKAMIA until the intended appeal is heard and determined.”

As to the first prayer, we told Mr. Onganyi who appeared for the applicant before us that the learned Judge of the superior court having refused to grant an injunction to the applicant, there was really no order capable of being stayed, unless of course the applicant was asking us to stay the proceedings with respect to the case pending in the High Court. Mr. Onganyi then virtually abandoned the prayer for an order of stay. The truth of the matter is that there was really nothing in the order of the superior court which this Court could stay.

As to the prayer for an order of injunction, Mr. Onganyi knew that we could only grant such an order where an applicant has established before the Court, firstly, that the appeal intended to be filed is an arguable one, i.e. one which is not frivolous and secondly that if no order of an injunction is granted as requested, the success in the intended appeal would have been rendered nugatory. Mr. Onganyi himself cited to us the cases of **GITHUNGURI VS. JIMBA CREDIT CORPORATION [1983] KLR 838** and

NATIONAL BANK OF KENYA LTD VS. SAMCON LIMITED [2003] KLR 462. So nobody was in doubt as to the principles applied by the Court when dealing with an application under **rule 5(2) (b)** of its rules.

With regard to the first issue of whether the intended appeal is arguable, all that Mr. Onganyi told us was that the learned trial Judge's conclusion that no prima facie case with a probability of success was mistaken in view of the material evidence placed before the Judge. We have considered this submission along with the total of the material placed before us and which was placed before the superior court and all we can say at this stage is that we are not convinced that the issue is really such an arguable one. That is, of course, not the same thing as saying that the intended appeal could never succeed; we would have no basis for saying so at this stage. All we are saying is that we have not been convinced, prima facie, that the finding by the learned Judge was not supported by the evidence before him.

The second point of whether the appeal will be rendered nugatory unless an injunction is granted only arises for consideration when the Court finds that an appeal or intended appeal is arguable. We have found to the contrary and we accordingly need not consider the question of whether the success of the intended appeal will be rendered nugatory. But even if we were to consider that point, all that we were told is that the respondent is digging the land and erecting structures such as a latrine on the land. We were, however, not told that those actions are irreversible if the Court were to find for the applicant.

We agree with Mr. Mburugu, for the respondent, that the motion brought by the applicant has no merit and must fail. Accordingly we order that the notice of motion dated 6th July, 2007 and lodged in the Court on 10th July, 2007 be and is hereby dismissed with the costs thereof to the respondent.

Dated & delivered at Nyeri this 2nd day of November, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.