



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Civ Appli 342 of 2005

MALCOM BELL..... APPLICANT

AND

HON. DANIEL TOROITICH ARAP MOI 1ST RESPONDENT

THE BOARD OF GOVERNORS, MOI HIGH SCHOOL, KABARAK 2ND RESPONDENT

(An application for stay of execution of the judgment and decree of the High Court of Kenya at Nakuru (Muga Apondi J.) dated 31st October, 2005

in

H.C.C.C. NO.14 OF 2004)

RULING OF THE COURT

This is an application under **rule 5(2)(b)** of the Court of Appeal Rules (**the Rules**), brought by the unsuccessful party in **Nakuru High Court Civil Case No. 14 of 2004**, Malcom Bell (**the applicant**). The suit related to two consolidated suits, one by the applicant against Hon. Daniel Toroitich Arap Moi (**the 1st respondent**) and The Board of Governors of Moi High School, Kabarak (**2nd respondent**), for possession of a piece of land measuring about 110 acres, mesne profits and costs. The other suit was by the 2nd respondent against the applicant for an order that that piece of land be declared to have been acquired by the school by adverse possession, and for an order that the applicant execute all necessary documents for the land to be transferred to the school failing which the Deputy Registrar of the High Court execute the same.

The two suits were consolidated with the consent of the parties. On 31st October, 2005 the superior court (*Muga Apondi J.*) dismissed with costs the applicant’s suit and decreed that the 2nd respondent had acquired title to the disputed land by adverse possession, ordered the applicant to execute all necessary transfer documents to effect the transfer, in default the Deputy Registrar of the court to do so. The disputed land is part of L.R. 6207/02 registered in the name of the applicant.

The applicant was aggrieved by the decision of the superior court and timeously filed a notice of appeal on 1st November, 2005 declaring his intention of appealing against that decision, and on 22nd December, 2005 brought this application.

The jurisdiction of the court under **rule 5(2)(b)**, above, is not only original, but it is also discretionary; and as such it must be exercised on the basis of sound legal principles. Two main principles guide the court in its exercise of that discretion, namely, for the applicant to succeed he must not only show he has an arguable appeal or that his appeal or intended appeal is not frivolous, but also that unless granted an injunction, stay of decree or of further proceedings, as the case may be, his appeal or intended appeal, if successful, will be rendered nugatory. Several authorities on this were cited to us, among them, **National Irrigation Board v. Mwea Rice Growers Multi-Purpose Co-operative Society & Another**, Civil Application No. NAI.153 of 2001 (83/01 UR); **Municipal Council of Kisumu v. Nella Bhanubhai Patel T/A Chemhard Agencies** Civil Application No. NAI 29 of 2001 (16/2001 UR) and **The Standard Limited v. G.N. Kagia T/A Kagia & Co. Advocates** Civil Application No. NAI 193 of 2003. We have read them all and we agree that they set out the correct principles to be applied.

The background facts to this matter are brief. The applicant inherited the suit property from his father, the late Walter Bell. The land abuts Moi High School, Kabarak, which according to the applicant, is a private school owned by the 1st respondent. In his amended plaint filed in the superior court on 18th November, 2004 the applicant avers that in or about 1981 the 1st respondent through his agents who were the administrators of Moi High School, Kabarak, encroached into and by threats and force carved out 110 acres of his land, fenced it off and blocked a road which was passing through it, then being used by Walter Bell, demolished some house structures and a cattle dip which were thereon and excluded him from using the land. The applicant further averred that because the 1st respondent was then the President of the Republic of Kenya and by virtue of the Constitutional Provisions, no civil action could be brought against him while in office and hence the delay in bringing civil action against him. His prayer is substantially for possession of the land and mesne profits at the rate of Kshs.4,000 per acre per year.

The 2nd respondent's suit was brought by way of originating summons under **Order XXXVI rule 3D** of **Civil Procedure Rules, sections 3(1); 37 and 38** of the **Limitation of Actions Act Cap 22 Laws of Kenya**, among other provisions. In the affidavit leading the summons, Henry K. Kiplagat, the Principal of the School, depones, inter alia, that the school was initially started as a Harambee school but was, in 1983 confirmed as a Harambee assisted school to be managed by a Board of Governors. The school was later still given full registration status as a public school and stands on land which was donated by the 1st respondent. The suit land, he says, was donated to the school by Walter Bell, the applicant's father. The school, in appreciation thereof, constructed a cattle dip for him, supplied electricity and attempted though unsuccessfully, to drill a borehole for the late Walter Bell. The school also undertook other various developmental activities on his land. All these are disputed by the applicant who contends that electricity was supplied under the Rural Electrification Programme and that the school came into existence as an entity only in 1992, when, in his view, the limitation period could start to run in favour of the school. There are other arguments but we do not consider it necessary to outline them here, this not being the appeal.

Muga Apondi J. received evidence on the consolidated suits. The school called some of the applicant's neighbours who testified regarding Walter Bell's donation of the suit land. They also called a lady by the name **Mrs. June Elizabeth Dykes**, who for sometime cohabited with the late Walter Bell, until his death. She testified that the late Bell, indeed donated the land to the school, and in return the school agreed to assist him have mains electricity connected to his farm, a borehole be sunk on his land and a new cattle dip built on the remainder of the land.

The trial Judge's decision was mainly based on credibility of witnesses. Before us, however, it was urged on behalf of the applicant by his counsel Mr. Waitindi, inter alia, that the 2nd respondent did not have the capacity to sustain a claim over the suit land by adverse possession as the school is private and by virtue of **section 10** of the Education Act was not entitled to have a Board of Governors, and that the learned trial Judge did not consider permissive occupation of the land by the school, which had he done he would have found that time could not and did not start running against the applicant; that the learned Judge failed to appreciate that because of the immunity against suits which the 1st respondent enjoyed under **section 14** of the Constitution, he could not be sued.

In answer Mr. Kiplenge for 1st respondent submitted before us that the school was not an agent of the 1st respondent, as it had previously sued and been sued as an entity, and besides, the applicant himself brought action against it, in effect acknowledging that the school had the legal capacity of suing and being sued. Mr. Sunkuli for the 2nd respondent adopted the same submission on the issue.

It is quite clear from the facts and circumstances of this case that neither the applicant nor the 2nd respondent is comfortable with the situation as it is on the ground. The applicant is apprehensive that unless he is granted a stay there is the danger that the 2nd respondent may execute decree in its favour and thus deprive him of land which he claims rightly belongs to him. He fears that in the event the property may be disposed of thereafter to third parties and he will thereby lose it permanently. Likewise the 2nd respondent fears that since the applicant is the registered owner of the disputed land, there is nothing to stop him from alienating it and thus permanently deprive it of the same, with the result that it will be left with a bare decree. In either case the suit land needs to be preserved.

Several legal issues have been raised by the applicant which clearly show the applicant has an arguable appeal, the most important of which is whether the 2nd respondent's possession of the suit land was permissive or hostile to the interests of the applicant or his father before him. If possession was permissive, then time would not possibly run against the applicant. If otherwise, however, then, subject to the finding whether or not the late Bell had donated to or given his land to the 2nd respondent in consideration of services rendered, the decision of the superior court cannot be properly challenged.

In the foregoing circumstances, the interest of justice demands that an order issue which we hereby make, not only granting a stay of execution of the decree of the superior court dated 31st October, 2005 but also to the effect that the applicant should neither dispose of, charge, or in any way deal with the suit property until his intended appeal against the decree of the superior court dated 31st October, 2005, is determined. In the meantime as the 2nd respondent has been in possession of the subject parcel of land for well over 20 years, we order that it continues in its possession of it pending the outcome of the intended appeal. The costs of this application shall be costs in the appeal.

Dated and delivered at Nakuru this 10th day of November 2006.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR