



REPUBLIC KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION NO.263 of 2004

MOHAMED SAID AHMEDAPPLICANT

AND

GRAND BATIAN HOTEL LTD. RESPONDENT

RULING OF THE COURT

Mohamed Said Ahmed, the applicant herein, is seeking from the Court an order of an injunction under Rule 5(2)(b) of the Court's, Rules. He had unsuccessfully sought for such an order in the High Court where Okwengu, J, thought he was not entitled to such an order. He proposes to appeal against the order of Okwengu, J, refusing to grant him the injunction he had sought. He has filed a notice of appeal and has in fact filed a record of appeal. Pending the determination of the appeal, the applicant now wants us to grant an injunction,

“ to restrain the respondent whether by itself, its servants and/or agent from dumping building materials and or constructing a building on plot NO. NYERI MUNICIPALITY BLOCK II/953 originally Plot NO. 7 Swahili Line I in Nyeri Municipality or be restrained from in any way interfering with the quiet possession of the applicant of the said plot until after the hearing and final determination of the applicant's appeal to this Honourable Court or until further Orders that this Honourable Court may deem fit to grant.”

The application being one under Rule 5(2)(b) of the Court's Rules, the applicant was obliged to show to the Court, first, that he has an arguable appeal, i.e. an appeal that is not frivolous. As far as we were able to gather from Mr. Muraguri Mwangi, learned counsel for the applicant, the applicant's claim to the land in dispute i.e. Nyeri Municipality Block II/953 is based on the fact that on 1st April, 1921, some eighty-four years ago, the Commissioner of Lands entered into an agreement with one Dafina bin Mohamed and according to that agreement Dafina bin Mohamed was given a licence to occupy the disputed land for nine (9) months. The nine months expired and it was agreed the licence to occupy the land was not renewed. But the applicant says that though the licence was not renewed, Dafina bin Mohamed continued to occupy the land until she died and that upon her death, her daughter Amina Dafina “inherited” the land in accordance with Islamic law. Amina Dafina in turn died on 4th February, 1988 whereupon the applicant was granted letters of administration to her estate on 4th December, 2004. So the applicant appears to say he is the owner of the disputed land, despite the fact that on 1st October, 2002, the respondent, Batian Grand Hotel Limited, was granted a 99 year – lease over the same land by the Commissioner of Lands. Mr. Mwangi says the applicant's claim to the land is founded on section 30 of the Registered Land Act, Cap 300, Laws of Kenya. That section deals with overriding interests which need not be registered and those interests are listed as:-

“(a) rights of way, rights of water and profits subsisting at the time of registration under this Act;

- (b) natural rights of light, air, water and support;
- (c) rights of compulsory acquisition, resumption, entry, search and user conferred by any written law;
- (d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;
- (e) charges for unpaid rates and other moneys which, without reference to the registration under this Act, are expressly declared by any written law to be a charge upon land;
- (f) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.
- (h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law.”

Mr. Mwangi relied particularly on paragraph (g) and said they have been in possession or occupation since 1921. But Mr. Mwangi also conceded that they were not claiming adverse possession; they could not do so against the government. It appears that the applicant would be asking in his pending suit that the title of the respondent be cancelled; even if the applicant was to be successful in that respect, the title to the land would simply revert to the Commissioner of Lands. It would not confer any title upon the applicant. Mere possession or occupation could not, in the circumstances, confer any kind of title recognizable in law upon the applicant. We are, in the circumstances, of the considered view that the applicant does not really have an arguable appeal. In the High Court, the learned Judge was of the view that he had not shown a prima facie case with a probability of success. We ourselves are of the view that he has not satisfied us that he has an arguable appeal.

That being our view of the matter, we do not have to decide the other issue of whether his appeal will be rendered nugatory if it were to be successful and we do not grant to him an injunction.

Before we leave the matter, there is something else which we wish to comment on. One Rashid Omar who says that he is the Kadhi for Mount Kenya Region swore an affidavit in support of the applicant’s motion. A Kadhi is a judicial officer and we doubt the propriety of such officers getting involved on one side in disputes pending in the courts. We will go no farther than that.

The applicant’s notice of motion dated 27th October, 2004 and lodged in the Court on 28th October, 2004 fails and we order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 20th day of May, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.