



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: TUNOI, O'KUBASU & AGANYANYA, JJ.A.)

CIVIL APPLICATION NO. NAI. 101 OF 2011

BETWEEN

FLORENCE NYABOKE MACHANIAPPLICANT

AND

1. MOGERE AMOSI

OMBUI

2. SIMON TENERI

MOGERE

3. WELSON OMWENGA NYAKUNDIRESPONDENTS

(Being an application or stay of execution or an injunction pending the lodging, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Kisii (Makhandia, J.) dated 29th October, 2010

in

H.C.C.C. No. 139 of 2009)

RULING OF THE COURT

This application is made under **rules 5(2)(b)** and **42** of the Court of Appeal Rules 2010. It seeks one main order, that:

“Pending the lodging hearing and determinations of the applicant’s intended appeal this Honourable Court be pleased to issue an injunction restraining the 2nd and 3rd respondents their agents or servants from disposing of, alienating constructing or otherwise howsoever manner interfering with land parcel Nos. ISOGE/KINENI/BLOCK 1/686 and 687; and that an order for the costs be provided for.”

The application was supported by the grounds set out on the face thereon as well as the averments in the supporting affidavit. The grounds on the face of the application are similar to the grounds set out in the draft memorandum of appeal while averments in the supporting affidavit give the background of the dispute between the parties.

Initially ***Naftali Machani Amosi***, the applicant (*deceased*) had a land dispute over plot No. Isoge/Kineni/Block1/70 with one ***Mogere Amosi Ombui***, 1st respondent (*his brother*). The case was filed as ***Kisii High Court Civil Case No. 139 of 2009***. It would, however, appear that either before or after the filing of this suit the parties had been summoned and they appeared before Borabu Land Disputes Tribunal in case No. 005 of 2007 on 20th September, 2007 wherein a decision was made awarding the 1st respondent 40 acres out of the applicant’s unregistered plot No. 15 Kineni Ranch. The applicant alleged he was not aware of the reading of the award until when he was summoned to appear before Keroka Law Court in ***Misc. Appl. No. 18 of 2007*** where the decision of the tribunal was read and confirmed as the judgment of the Court.

It would appear further that following the confirmation of the decision of tribunal as the judgment of the Court the 1st respondent moved fast and was issued with titles to his portion of 40 acres known as Isoge/Kineni/311 which he immediately subdivided to create land parcel Nos. Isoge/Kineni/Block/686 and 687. These new parcels were registered in the names of the 2nd and 3rd respondents respectively. In view of this change of title and ownership the applicant amended the plaint in the High Court which he filed on 11th February, 2010 to reflect the new position.

The suit sought various orders against the respondents, their agents, servants and or any other person claiming through them, including a permanent injunction to restrain them from entering, remaining on and/or otherwise howsoever manner to interfere with the suit land parcel Nos. Isoge/Kineni/Block 1/686 and 687, an order of eviction against the respondent from the suit land, an order directing the District Land Registrar Nyamira Land Registry to cancel title Nos. Isoge/Kineni/686 and 687 registered in the names of the 2nd and 3rd respondents respectively, and thereafter to cancel Nos. Isoge/Kineni/311 and the register be rectified to reinstate the original No. ISOGE/KINENI/BLOCK 1/70 in the names of the applicant and a declaration that the decision of the Borabu Land Disputes Tribunal Case No. 005 of 2007 was null and void. There was also a prayer for an order directing the District Land Registrar Nyamira Land Registry to expunge any document executed to effect any transfer of the suit land to the respondents arising from the decision of Borabu Land Dispute Tribunal No. 005 of 2007 and any other subsequent registration in favour of the respondents, an award of compensation and general damages, mesne profits, costs of the suit together with interest thereon at such rate and for such period of time as the Honourable Court would deem fit to grant and any such other or further relief as the

Honourable Court may deem appropriate.

In an amended written statement of defence and counterclaim filed on 26th August, 2009 the 1st respondent denied all the allegations in the plaint and put the applicant to strict proof thereof. Sometime before judgment was delivered, the plaintiff died and his daughter **Florence Nyaboke Machani**, the applicant was substituted as a legal representative of the deceased plaintiff. In a judgment delivered by the superior court on 29th October, 2010, the applicant's suit was dismissed with costs. The applicant was aggrieved with that judgment and lodged a notice of appeal to this Court on 1st day of November, 2010; hence the applicant by notice of motion, under **rule 5(2)(b)** of this Court's Rules as herein before stated.

It was heard by this Court on 15th June, 2011 when **Mr. Bosire** and **Mr. Abobo**, Learned counsel for the applicant and respondents respectively canvassed the application before us. Mr. Bosire submitted that the applicant was aggrieved by the decision of the superior court from which she intends to appeal and that there is already a memorandum of appeal copy whereof she had annexed to this application. According to counsel the grounds in the draft memorandum of appeal raise substantial arguable points. In particular the jurisdiction of the Borabu Land Disputes Tribunal as prescribed under **section 3** of Land Disputes Tribunal Act No. 18 of 1990 was not considered. He stated further that the respondents who have titles for Isoge/Kineni/686 and 687 intend to sell the parcels of land and that should this happen the result of the intended appeal will be rendered nugatory.

Mr. Abobo on the other had opposed the application terming it unmeritorious and stated that the prayers sought do not affect the 1st respondent. He however wondered whether the status quo cannot be maintained pending the hearing and determination of the appeal.

The points to be considered in an application under **rule 5(2)(b)** of the Court of Appeal Rules are well settled; firstly whether the appeal or intended appeal is arguable; not that the intended appeal must succeed but that it should not be frivolous. Secondly it should be established that if the application is not granted, the result of the appeal or intended appeal, if successful, will be rendered nugatory – see **CFC Financial Services Limited v. Juja Road Fancy Stone Limited, Civil Application No. Nai 328 of 2009 (UR)**.

The grounds on the face of the application on which the same was based which are a replica of the grounds in the draft memorandum of appeal are of substantial legal nature. One of them questions the jurisdiction of Borabu Land Disputes Tribunal to adjudicate over titled land. The other is the capricious manner in which the 1st respondent subdivided the parcel of land Isoge/Kineni/311 into two portions soon after he was awarded the land by the tribunal and registered them into the names of his son and a third party. He gave himself no portion though he still resides on the suit portion. On the nugatory aspect, the respondents have not denied the applicant's fear that they intend to dispose of the suit parcels of land and should this happen they will be out of reach of the applicant if the appeal succeeds. The applicant has thus satisfied the two limbs under **rule 5(2)(b)** of the Court of Appeal Rules.

In view of the foregoing, we are inclined to grant prayer 1 of the application dated 18th April, 2011 and lodged in Court on 19th April, 2011. However in the circumstances of this application the applicant is directed to give an undertaking as to costs of the appeal within 14 days from today and also to file the record of appeal within 30 days of today's date. Failure of fulfillment of any of the conditions given herein will result in the automatic dismissal of this application.

Dated and delivered at Kisumu this 29th day of July, 2011

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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