REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCA NO 11 OF 2015

JOYCE CIERURI.....1ST APPELLANT

HARUN SIMON.....2ND APPELLANT

SAMWEL MATI SIMON .....3RD APPELLANT

GACHERI SIMON.....4TH APPELLANT

VERSUS

FREDRICK NTONGAI.....RESPONDENT

R U L I NG

This application is dated 3rd March, 2015 and seeks Orders:-

a. THAT the application because of its nature be certified urgent and the same be heard ex-parte in the 1st instance.

b. **THAT the Honourable Court be pleased to issue an order staying the execution of the decree herein pending the hearing and determination of this application.**

c. **THAT the Honourable Court be pleased to issue an order staying the execution of the decree herein pending the hearing and determination of the appeal herein.**

d. **THAT the Honourable Court be pleased to grant such other and or better orders as may meet the ends of justice.**

The application is supported by the affidavit of **SAMWEL MATI SIMON** and has the following grounds:-

i. **In the Judgement dated 05/02/2015 the court ordered for the eviction of the appellants from the suit land.**

ii. **The appellants have preferred an appeal against the Judgement.**

iii. **The appellants face imminent eviction unless stay is ordered**

iv. **The appellants risk losing the only land where they have lived all their lives and their**

homes.

v. **The appeal herein has overwhelming chances of success.**

vi. **The appellants stand to suffer irreparable and substantial loss.**

vii. **This application has been without undue delay.**

The appellants have submitted that they are members of the same family being mother, sons and a daughter. They say that the trial Court ordered their eviction out of LP 5390 KANGETA ADJUDICATION SECTION which they claim to be their only family Land and that they know no other land they can call home.

They submit that at this stage, the question should not be about the merits or chances of success of appeal but rather their imminent eviction if the orders they seek are not granted at this interlocutory stage.

The Respondent has objected to the application and said that except for the allegation that the suit land was family Land, the appellants had nothing to show in support of this position whereas the respondent had produced a copy of a sale agreement and proffered evidence that he owned the suit land.

The respondent has termed the appellant's appeal as frivolous and had no arguable ground. He termed the appeal a mere delaying tactic and urged the Court to balance the interest of both litigants as it would be unfair for a Court to deny a successful litigant the fruits of his Judgement unless there was a pellucid reason for doing so. The respondent cited the case of Geoffrey Kamau Njathi Versus Naivas Ltd (2013) e KLR as his authority for this proposition.

The Respondent also submitted that in the case of Kenya Industrial Estates and 2 others Versus Richard Omondi Odhiambo (2006) eKLR, the Court had enunciated the Principle that failure by Applicants to state their readiness to furnish security for the due performance of such decree as may ultimately be binding upon them is fatal as stay is predicated upon an applicant's likelihood to suffer substantial loss. The respondent has also argued that this appeal was filed 4 weeks after delivery of Judgement and the appellants had not explained reasons for the delay. The respondent has concluded that this application lacks merit and deserves dismissal with costs.

I have carefully examined the pleadings, submissions and the authorities proffered.

It is not controverted that through CMCC No 9 of 2008 at Maua a Judgement which had the effect of evicting the Appellants from land Parcel No. 5390 Kangeta Land Adjudication Section was delivered.

The appellant sued the respondent, among others, in PMCC No 61 of 1997 where she was claiming ownership of parcel No 2188 Kangeta Land Adjudication Section which parcel spawned parcel No. 5390 Kangeta Land Adjudication Section. The suit was dismissed with costs on 18th December, 2000. This Court has perused copies of both the Plaint and Judgement.

Following that Judgement, the 1st appellant appealed to the High Court on 3rd January, 2001 through Meru High Court Civil Appeal No 1 of 2001. This appeal was dismissed by the Hon. Lady Justice Ruth N. Sitati, Judge, on 15.11.2005. This judgement established that Joyce Cheruri, the 1st Appellant in this application, and who was sole appellant in Meru High Court Civil Appeal No 1 of 2001, had no valid claim to the disputed land. That issue having been resolved through the said judgement, It is clear that the 1st Appellant never appealed against that Judgement.

It is not controverted that the 1st appellant was on 15th July, 2008 convicted in Maua Principal Magistrate's Criminal case No 650 of 2007 and fined Kshs. 7,000 and in default to serve a six months jail term. The charge related to malicious damage to property standing on the disputed land.

I have read the Judgement which has Spawned this appeal. I agree with the Learned Trial Magistrate that

the issue of ownership of Land Parcel No. Kangeta Land Adjudication Section was conclusively decided by the Hon. Lady Justice Ruth Sitati in Meru High Court Civil Appeal No. 1 of 2001 (***op. Cit)***. I however find that the appeal was filed timeously. I also find that the appellants have not attempted, even pretended, to furnish security for due performance of the challenged decree or order as required by Order 42 Rule 6 (2).

The above observations notwithstanding, I need to point out one important issue. The 2nd ,3rd and 4th appellants are children of the 1st Appellant. As already pointed out, Meru High Court Civil Appeal No 1 of 2001 had definitively found that the 1st appellant had no valid claim to the suit land. The 2nd, 3rd and 4th appellants/applicants are basing their claim to an interest on the suit land because they are children of their mother. Their mother, obviously, can not bequeath a claim upon the suit land, when she has no valid claim against it. The ***latin maxim ''Nemo Dat Quod Non Habet"*** is veritably apposite. One can not give what he/she does not have. I pose the Question: "What would a studious bystander who is informed, reasonable, right minded and Conversant with local judicial processes, realistically and practically conclude regarding such Judicial Vacillations?." My answer is that he would be veritably discombobulated with the effect that he would strongly put to question the obeisance to the Principle of finality of litigation in our judicial processes.

I decry the rather non-charlant propensity by the 1st appellant/applicant to keep on filing suits and applications when ownership of the suit land had been decided a long time ago. If this Court Condones this practice, Judgements and Rulings of Courts will be rendered inconclusive even in cases where litigants had not appealed against such Judgements and Rulings. This will have the consequences of turning our judicial processes into Judicial Circuses and veritable theatres of the absurd at the whims of adventurous and creative litigants. Just because a litigant adds the names of her children to the suit does not render the suit a new and distinct one. The maxim "*Interest Republicae Ut sit finis Litium*" is veritably apposite here. It is for the public good that there be an end to ligation at some point.

In the circumstances, this application is dismissed. One of the effects of this dismissal is that any interlocutory Orders granted in this matter are set aside and vacated.

I award Costs to the Respondent.

It is so ordered.

Delivered in Open Court at Meru this **31st day of July, 2**015 in the presence of:

Cc:Daniel

Mutunga holding brief for Kiautha Arithi for the Respondent

Mutunga holding brief for Mokua for the Appellants

P.M. NJOROGE

JUDGE