



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 52 OF 2017 (O.S)**

JOHN NJUE NJAGI.....1<sup>ST</sup> APPLICANT  
BERNARD NDWIGA.....2<sup>ND</sup> APPLICANT  
LUCY KINA NJAGI.....3<sup>RD</sup> APPLICANT  
PETER MURIITHI NJAGI.....4<sup>TH</sup> APPLICANT  
JEREVASIO NDWIGA NJAGI.....5<sup>TH</sup> APPLICANT  
ANGELA NJOKI NJAGI.....6<sup>TH</sup> APPLICANT  
ANN NDIA NJAGI.....7<sup>TH</sup> APPLICANT

**VERSUS**

SPORTLIGHT INTERCEPTS AUCTIONEERS.....1<sup>ST</sup> RESPONDENT  
JOYCE KAGECI GITHUIYA.....2<sup>ND</sup> RESPONDENT  
NATIONAL BANK OF KENYA.....3<sup>RD</sup> RESPONDENT

**RULING**

1. By an originating summons dated 8<sup>th</sup> March 2017 brought under **sections 37 and 38 of the Limitation of Actions Act (Cap 22), Order 37 Rule 7 of the Civil Procedure Rules** and **all the enabling provisions of the law**, the Applicants sought an order of temporary injunction to restrain the Respondents from auctioning *Title No. Kyeni/Kigumo/1723* (hereinafter called the *suit property*) pending the hearing and determination of the said originating summons.
2. The said application was canvassed by the parties through written submissions and vide a ruling dated and delivered in open court at Embu on 8<sup>th</sup> March 2018, the court dismissed the said application for interim injunction with costs to the 3<sup>rd</sup> Respondent.
3. The Applicants being dissatisfied with the said dismissal order filed a notice of appeal intimating their intention to appeal to the Court of Appeal against the said order on or about 21<sup>st</sup> March 2018.
4. By a notice of motion dated 18<sup>th</sup> May 2018 filed under the provisions of **Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules** and all enabling provisions of the law, the Applicants sought an order of **stay** of the auction of the suit property pending the filing, hearing and determination of the intended appeal.
5. The said application was based upon the various grounds stated on the face of the motion. The main grounds were that the Applicants had a good and arguable appeal; that they stood to suffer substantial loss unless the stay was granted; and that the intended appeal would be rendered nugatory should it be successful.
6. The said application was supported by an affidavit sworn by the 1<sup>st</sup> Applicant on 18<sup>th</sup> May 2018. The affidavit reiterated and expounded upon the grounds contained in the motion. The 1<sup>st</sup> Applicant stated that he believed that the Applicants had a strong claim for adverse possession since they had resided on the suit property for over 50 years. It was contended that the 3<sup>rd</sup> Respondent was seeking to auction the suit property which was worth over Kshs 10 million over failure to pay a “paltry” loan of Kshs 100,000/-. It was further contended that

should the suit property be auctioned, the Applicants might be rendered homeless in consequence of which they would suffer substantial loss.

7. The said application was opposed by the 3<sup>rd</sup> Respondent which is the chargee of the suit property. The replying affidavit in opposition was sworn by Simon Munene Wachira on 8<sup>th</sup> June 2018. The record shows that Mr Simon Wachira is the advocate for the 3<sup>rd</sup> Defendant in this suit. It was contended that the Applicants were seeking to obtain a temporary injunction through the backdoor since they had failed to obtain an injunction in their earlier application dated 8<sup>th</sup> March 2017. It was further contended that the instant application was not filed without unreasonable delay and that the delay had not been explained in any way.

8. The 1<sup>st</sup> and the 2<sup>nd</sup> Respondents did not respond to the Applicants' said application. They do not appear to have entered an appearance to the proceedings.

9. When the said application was listed for hearing on 11<sup>th</sup> June 2018, the advocates for the Applicants and the 3<sup>rd</sup> Respondent consented to canvass the said application through written submissions. They were given 60 days within which to file and exchange the submissions and the matter was fixed for ruling on 29<sup>th</sup> November 2018.

10. The record shows that the Applicants filed their submissions on 18<sup>th</sup> October 2018 but the 3<sup>rd</sup> Respondent had not filed any by the time of preparation of this ruling.

11. The court has considered the Applicants' said notice of motion, the replying affidavit in opposition thereto and the Applicants' written submissions on record. The court has also considered the record of proceedings herein. It is evident from the record that the court order made on 8<sup>th</sup> March 2018 merely *dismissed* the Applicants' application for a temporary injunction. It did not grant any positive or executable order. In the opinion of the court, a dismissal order cannot be stayed in the manner contemplated under **Order 42 Rule 6 of the Civil Procedure Rules**. An order of stay would have the effect of suspending or postponing the operation of an order issued previously. That is not the case here.

12. Whereas a court which has dismissed an application for injunction may grant a temporary injunction pending the filing and hearing of an application for such relief before an appellate court, no such injunction has been sought in the instant application.

13. For the foregoing reasons, the court finds no merit in the Applicants' notice of motion dated 18<sup>th</sup> May, 2018. The said application is consequently dismissed with costs to the 3<sup>rd</sup> Respondent.

14. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **22<sup>ND</sup>** of **NOVEMBER, 2018**.

In the presence of Ms Ngige holding brief for Mr Mugambi Njeru for the Applicants and in the absence of the Respondents.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**22.11.18**