Mokua v Beri & 3 others (Civil Appeal (Application) 260 of 2020)
[2022] KECA 1148 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1148 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 260 OF 2020

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

OCTOBER 21, 2022

BETWEEN

BENJAMIN OMWANA MOKUA ..... APPELLANT

AND

BISHENDASS BERI ..... 1ST RESPONDENT

MAALIM DAKANE ALI ..... 2ND RESPONDENT

CHIEF LANDS REGISTRAR NAIROBI ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an application for injunction pending appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (E. O. Obaga, J.) delivered on 13th February 2020 in E.L.C Suit No. 1288 of 2015 Consolidated with E.L.C Cause No. 692 of 2014 (O.S)

RULING

1. The applicant (Benjamin Omanwa Mokua) took out an Originating Summons dated 4th June 2014 in the High Court of Kenya at Nairobi (ELC Division) Cause No. 692 of 2014 (OS) seeking a declaration that the 1st Respondent's (Bishendass Beri's) title to all that the piece of land known as LR No. 209/3630 registered under Grant No. IR 9417 (Nairobi South B) (the suit property) had been extinguished in favour of the applicant by virtue of adverse possession pursuant to sections 37 and 38 of the *Limitation of Actions Act* (Cap. 22). He claimed to have occupied the suit property for more than 12 years preceding the filing of the suit. Accordingly, he prayed that the 1st respondent's title be cancelled and the suit property registered in his name.

2. The applicant's Summons was supported by his affidavit sworn on June 4, 2014, and was anchored on 4 grounds, namely: that the applicant had since March 12, 1998 been in peaceful, uninterrupted and open occupation of the suit property for a period exceeding 12 years; that he had acquired prescriptive

rights over the suit property; that the 1st respondent had never upset the applicant's status by way of interruption thereof; and that it was in the interest of justice that the Summons be allowed. The record as put to us does not disclose whether the applicant's Summons was duly served on the 1st respondent and, if it was, whether it was opposed.

3. Despite a temporary injunction having been granted on September 18, 2015 to restrain the 1st respondent from evicting or threatening to evict the applicant pending hearing and determination of the Summons, the 2nd respondent evicted the applicant from the suit property prompting the ensuing suit against the respondents.

4. In a plaint dated December 14, 2015, the applicant sued the respondents (Bishendass Beri, Maalim Dakane Ali, the Chief Land Registrar, Nairobi and the Attorney-General) praying for: a declaration that transfer by the 1st respondent of the suit property to the 2nd respondent (Maalim Dakane Ali) on or about July 19, 1989 was fraudulent, null and void; cancellation of the transfer effected by the 3rd respondent to the 2nd respondent; an order for rectification of the certificate of title to read the name of the 1st respondent as the registered owner of the suit property; and costs of the suit and interest thereon.

5. In his judgment dated February 13, 2020, the learned Judge (E. O. Obaga, J.) observed that, even though the 1st and 2nd respondents had been served with summons to enter appearance by way of substituted service, they neither entered appearance nor filed defence. On the other hand, the 3rd and 4th respondents entered appearance and filed a defence, but did not appear at the hearing of the suit. It is noteworthy that their defence is not contained in the record of appeal before us.

6. The applicant's Summons and subsequent suit were consolidated, heard and determined. In his judgment delivered on February 13, 2020 dismissing the applicant's claims with no order as to costs, the learned Judge observed:

> " ... The manner in which the plaintiff was evicted may have been unprocedural, but this does not have any bearing to the transfer which was effected on July 19, 1989. The plaintiff has failed to adduce any evidence of fraud, there is no basis upon which he can base a claim for adverse possession. Even if the court was to find that the registered owner of the suit premises was the 1st defendant in the second suit, the plaintiff would not have succeeded in his claim on adverse possession. This is because he was invited into the house of his son who was a tenant. He was living in the house at the invitation of his son who was a tenant and there is therefore no way he could have claimed ownership through adverse possession."

7. Dissatisfied with that judgment, the applicant moved to this Court on appeal on 9 grounds set out in his Memorandum of Appeal dated June 26, 2020, which we need not replicate here. Suffice it to observe that he faults the learned Judge for: holding that the appellant failed to provide a certified copy of the register in High Court ELC No. 692 of 2015 (OS) even though he had produced the same in High Court ELC Suit No. 1288 of 2015, which suits had been consolidated; treating the two suits differently; separating the evidence put to him despite consolidation of the two suits; failing to appreciate that a certified copy of the register was a matter of evidence to support the claim for adverse possession; holding that, even if the court found that the 1st respondent was the registered owner, the appellant's claim for adverse possession would have failed, having been invited to the suit property by his son, who was the previous tenant; failing to appreciate that the appellant's son left in March 1998 when his tenancy came to an end; failing to consider the evidence produced by the applicant showing that his subsequent occupation of the suit property was not based on any tenancy agreement, but was actual, open, uninterrupted, notorious, exclusive and continuous; failing to find fraud in the transfer of the suit property to the 2nd respondent; failing to find that the two suits were undefended, and that

the evidence adduced by the applicant was unrebutted; and for failing to address the issue of fraud despite having found that the applicant had been evicted un-procedurally.

8. In his Notice of Motion dated November 11, 2021 supported by his affidavit sworn on November 11, 2021, the applicant seeks: an order of inhibition against the suit property pending hearing and determination of the appeal; a temporary injunction restraining the 1st and 2nd respondents from demolishing, constructing and/or making any further improvements in the property pending the hearing and determination of the appeal; and that costs of his application be provided for. The Motion is made under Rule 5(2) (b) of this *Court's Rules*, and is anchored on 15 grounds set out on the face of the Motion, essentially narrating the historical background of his claim over the alleged prescriptive rights, which we need not restate, complaining of the ongoing demolition and excavation of the suit property, and construction. Though served, the respondents have not filed any affidavit or submissions in reply.

9. Having considered the Applicant's Notice of Motion, the affidavit in support thereof, the record of appeal, the written and oral submissions of the learned counsel for the applicant, we form the considered view that the applicant's Motion stands or falls on two main grounds: whether the appeal is arguable, which is to say that it is not frivolous; and whether the appeal, if successful, would be rendered nugatory if the inhibitory orders and the injunctive relief sought are not granted.

10. The principles that apply in applications under Rule 5(2) (b) of the *Court of Appeal Rules* for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. The applicant must satisfy both principles, it would not suffice to satisfy only one.

11. These principles were enunciated in, among others, the following judicial pronouncements of this Court, including those cited by the applicant, and to which we now turn. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay or injunctive relief, be rendered nugatory (see also *Kenya Tea Growers Association and Another vs. Kenya Planters Agricultural Workers Union* [2012] eKLR; and *Ahmed Musa Ismail vs. Kumba Ole Ntamorua and 4 Others* [2014] eKLR).

12. As regards the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this Court in *Yellow Horse Inns Limited vs. A. A. Kawir Transporters & 4 Others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.

13. Be that as it may, we find nothing on the record before us to suggest that the applicant had, as of right, sued the respondents to assert any rights adverse to those of the registered proprietor premised on mere occupation, rights that do not avail a tenant or licensee. The evidence adduced at the trial was that the applicant had been accommodated by his son with whom he lived in the suit premises. The son was a tenant thereat. The son's subsequent departure leaving the applicant behind, and the appellant's continued occupation, did not in itself constitute him a claimant as of right. He became a licensee to whom prescriptive rights do not avail. He has clearly no arguable appeal on this account.

14. In reaching this conclusion, we take to mind the provisions of sections 37 and 38 of the *Limitation of Actions Act* pursuant to which prescriptive rights take effect upon recognition under an order of

the court, and an entry in that regard made in the title register. In any event, the applicant's eviction by the rightful owner on December 4, 2015 before obtaining and registering in the register of titles any court order in recognition of his claim for the alleged prescriptive rights brought his claim to a dead end. It is instructive that the 2nd respondent asserted his claim as the registered proprietor, made an effective entry and dispossessed the applicant, who did not assert any claim adverse to that of the 2nd respondent otherwise than as a licensee. Moreover, by the conceded and undisputed eviction, the registered proprietor had already asserted his rights and made an effective entry into the suit land (see *Wanyancha Gibiti & 3 others vs. Waigoge Nyahiri Sinda* [2015] eKLR).

15. Having carefully considered the applicant's Motion, the grounds on which it is made, the annexed affidavit in support thereof, the grounds on which the appeal is anchored, the relevant statute and case law, the written and oral submissions of learned counsel for the applicant, we reach the inescapable conclusion that the applicant has not presented before us an arguable appeal. In the circumstances, we need not pronounce ourselves on the second limb of the twin principle for grant of orders on application under Rule 5(2) (b) of this *Court's Rules*. In effect, the applicant's Motion fails and is hereby dismissed with no orders as to costs. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR