Kavulani & another v Wambugu (Representing the Estate of Joshua Wambugu) (Civil Application E133 of 2021) [2022] KECA 1219 (KLR) (4 November 2022) (Ruling)

Neutral citation: [2022] KECA 1219 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E133 OF 2021

PO KIAGE, M NGUGI & F TUIYOTT, JJA

NOVEMBER 4, 2022

BETWEEN

ISAIAH KAVULANI ..... 1ST APPLICANT

JOSEPH SHIYENJI ..... 2ND APPLICANT

AND

CALEB MINJIRE WAMBUGU ..... RESPONDENT

REPRESENTING THE ESTATE OF JOSHUA WAMBUGU

(Application for stay of execution of the order and ruling of the High Court of Kenya at Kitale (M. Njoroge, J.) dated 18th July, 2019 in Kitale Environment and Land Case No. 19 of 2011)

RULING

1. We have before us a Notice of Motion dated September 16, 2021 in which Isaiah Kavulani and Joseph Shiyenji, the applicants, seek stay of execution of the judgment delivered by Njoroge, J in Kitale Environment and Land Court (ELC) Land Case No. 19 of 2011 pending the hearing and determination of Civil Appeal Number 44 of 2020. The application is brought under Rule 5 (2) (b) of the *Court of Appeal Rules*, 2010 but also cited is Section 3A of the *Appellate Jurisdiction Act*.

2. The 1st applicant swore an affidavit on September 16, 2021 in support of the motion. He is the chairperson of Mungoma Self Help Group which is a duly registered self-help group. The group is the registered owner of land known as Kaplamai/Kachibora Block 3/Muhuti/110(plot 110) while the father of Caleb Minjire Wambugu, Justus Wambugu Minjire (the deceased), is the registered owner of Kaplamai/Kachibora Block3/Muhuti/109 (plot 109). The two properties abut one another.

3. The deceased filed the ELC suit claiming that the applicants had trespassed on his land and erected a permanent structure on it. In the amended plaint dated February 3, 2016, the deceased sought an order of eviction against the applicants and his prayers were granted by Mwangi Njoroge, J in a judgment

delivered on July 18, 2019. The judgment aggrieved the applicants and is sought to be impeached in Civil Appeal No. 44 of 2020, which is yet to be heard.

4. In that appeal, the applicants raise the following grounds:

    1. That the learned Trial Judge erred in law in failing to address critically the evidence and report filed in court by the two surveyors so as to reconcile the differences and determine which report was more credible and reliable.

    2. That the learned Trial Judge erred in law in relying on the RIM in respect of land parcel number Kaplamai/Kachibora Block 3/Muhuti/109 which had glaring errors regarding arrangements of plots.

    3. That the learned Trial Judge erred in law in holding that plot number 109 belonged to the Respondent as per the report of the Registrar and surveyor.

    4. That the learned Trial Judge erred in law in relying on expert evidence which had been vigorously challenged and rendered valueless.

    5. That learned Trial Judge erred in law completely ignoring and failing to address the issue of locus standi of the Respondent to act in place of his deceased father.

    6. That the learned Trial Judge erred in law in failing to correctly and properly analyse the evidence presented by the parties and arrive at ration decision.

    7. That the learned trial Judge erred in law failing to address or have regard to submissions filed by the parties Advocates.

    8. That the learned trial judge was biased in making a determination in favour of the Respondent.

    9. That the learned trial Judge finding was against the weight of available evidence.

5. We are told that the appeal is arguable.

6. It is further deposed that members of the self–help group have been in occupation of the suit land since 2001 without any objection from the respondent and if stay is not granted, they will face imminent eviction and the applicants are likely to be committed to civil jail. In a word, that the appeal will be rendered nugatory if we do not grant stay.

7. The application is resisted. In a replying affidavit sworn on May 18, 2022, the respondent avers that he is the administrator of the estate of the deceased. He deposes that the applicants trespassed on the land of the deceased and continue to occupy the land, albeit unlawfully. The respondent's case is that at the heart of the dispute was whether the applicants occupy plot 109 or plot 110 on the ground. He takes the view that the controversy was resolved when, on the strength of a consent order, the County Surveyor visited the ground in the presence of the parties and established that the applicants were in occupation of plot 109, registered in the name of the deceased. A report to that effect which was produced before the ELC is annexed to his affidavit. Further, that one Joseph Richard Sivachi (DW1), when fielding questions in cross-examination, admitted that no surveyor ever pointed out boundaries to plot 110 to the applicants before they took occupation. These depositions are made to illustrate that the appeal is not arguable.

8. The respondent states that the appeal will not be rendered nugatory if stay is not granted, as plot 110 is available for occupation by the applicants.

9. We have read and considered the application, the response, and the submissions filed by the parties and return the following answer.

10. The considerations upon which this Court exercises its unfettered discretion as to whether or not to grant stay under Rule 5 (2) (b) are well known. The applicant must demonstrate that the intended appeal is arguable. The threshold for arguability is low. An arguable appeal is one which, while it may not necessarily succeed, deserves interrogation by the court that will hear the appeal. Even one arguable point in the intended appeal suffices- see *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR (Civil Application No. Nai. 31 of 2012).

11. The applicants argue that the grant on which the respondent was allowed to join the proceedings as an administrator of the estate of the deceased was in fact for the estate of Esther Nyakaruru Wambugu and not the deceased. A copy of that grant is annexed to the affidavit in support of the motion. On the other end, the respondent deposes that the order for substitution of the deceased was made on October 21, 2016 and was not challenged by way of appeal. He annexed a copy of the letters of administration intestate of the estate of the deceased made in his favour on July 21, 2015.

12. These are rival arguments as to whether the current respondent had capacity to continue with the proceedings upon the death of the deceased. Whether the respondent was allowed on account of a proper grant and whether the matter can be raised now in the absence of a challenge of the order allowing substitution are matters, which in our view, deserve further interrogation by the bench that will hear the appeal. That single matter is arguable.

13. On the second limb, it is common ground that the applicants are in occupation of the suit property and have been for some time now. The applicants say that it is since November 20, 2001, about 21 years now. The respondent does not dispute that date. The implication of not granting the stay will be to open the applicants to eviction from the land and removal of the structures they have erected on the disputed land. Given the long possession of the land, eviction will not only be distressful to the applicants but will also be to affect the status that has long held. The pain of eviction and change of possession may not be alleviated simply because of the availability of alternative land as the case of the applicants is that they occupy land that truly belongs to them. The appeal is therefore likely to be rendered nugatory if stay is not granted.

14. The circumstances of the case lean in favour of granting stay and we allow the Notice of Motion dated September 16, 2021.The costs shall be in the appeal.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 2022.

P.O. KIAGE

JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

.....

F. TUIYOTT

JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR