



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OKWENGU, GATEMBU & MURGOR J.J.A)

CIVIL APPEAL (APPLICATION) NO. 183 OF 2018

BETWEEN

PERIS WANJIKU KARAGU.....1ST APPLICANT

GLADYS WAMBUI PERIS.....2ND APPLICANT

KENNETH KINUTHIA WANJIKU.....3RD APPLICANT

ALPHAXARD KARAGU WANJIKU.....4TH APPLICANT

AND

FRASHIA NJERI MUTHAKA.....RESPONDENT

(Being an application for stay of execution and further proceedings pending the hearing and determination of the appeal)

RULING OF THE COURT

1. Before us is an application dated 14th November 2018 made under Rule 5(2)(b) of the Court of Appeal Rules. The applicants seek an order of stay of execution of the judgment and orders of the Environment and Land Court (ELC) at Murang'a (**G. Kemei, J.**) given on 12th April 2018. In the said judgment, the ELC declared that the applicant was registered as owner of the property known as Loc3/Gituru/72 in trust for herself and the respondent; and that the sub-division of that property carried out by the 1st applicant that resulted in parcel numbers Loc 3/Gituru/1131, 1132 and 1133 registered in the names of her children the 2nd to 4th applicants are null and void. The court further directed the Land Registrar Muranga to cancel the titles relating to those subdivisions and for the land to revert to Loc3/Gituru/72 and the same be divided equally between the applicant and the 1st respondent. The Land Registrar, Murang'a was mandated by the court to execute the necessary documents to effect those changes. Aggrieved, the applicants lodged a notice of appeal dated 20th April 2018 on which the present application is hinged.

2. We have reviewed and considered the application; the supporting affidavit of the 1st applicant, Peris Wanjiku Karugu; and the submissions by Mutua Nyongesa Muthoka advocate on behalf of the applicants; the replying affidavit of Frashia Njeri Muthaka, the 1st respondent; and the submissions filed by Kirui, Mwangi Ben & Co Advocates for the respondent.

3. In brief, what emerges is that the 1st applicant and the respondent are sisters. They are the only children born to their late parents Alphaxard Karagu and Gladys Wangui Karagu to whom the property Loc3/Gituru/72 belonged. According to the respondent, it was resolved in 1975 that the property be registered in the name of the 1st applicant to hold in trust for the two of them. The 1st applicant on the other hand contends that the land was an absolute gift to her.

4. The respondent filed suit before the ELC complaining that the 1st applicant had, in breach of the trust, subdivided the property as though she was the absolute owner, and ‘dished it out’ to her children, the 2nd to 4th respondents. As already noted, the ELC agreed with the respondent holding that the 1st applicant held the title to the property in trust; ordered the cancellation of the titles relating to the subdivisions; and ordered that the property revert to title number Loc3/Gituru/72 and be divided equally between the two sisters.

5. To succeed in the present application, it is incumbent on the applicants to demonstrate that their appeal, which they say has already been filed, is arguable and that unless we grant the orders they seek, and the appeal ultimately succeeds, the same will be rendered nugatory. (See for instance *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR*). To that end, the applicants assert that at the hearing of the appeal, they will demonstrate that the Judge misapprehended the evidence; and that it was established at the trial that the property was an absolute gift to the 1st applicant during the lifetime of their mother. The respondent on the other hand urged that the appeal is frivolous and that the judgment of the ELC is unassailable.

6. We think it is arguable whether the finding by the trial court that the 1st applicant held the property in trust is well founded in evidence. One arguable point is sufficient. We bear in mind that an arguable appeal is not one that will necessarily succeed. We are satisfied that the applicants’ appeal is not frivolous.

7. As to whether the appeal will be rendered nugatory if we decline the application, the 1st applicant deposed that she and her children have occupied and utilized it for over 30 years; that after the judgment of the ELC was delivered, and despite a consent order having been recorded on 31st May 2018 staying execution of the judgment, the respondent hired goons and invaded the property in November 2018 and attempted to fence it off and there is a real threat of the land being sold to a third party.

8. The respondent on her part states that the orders of stay of execution recorded in the lower court had a lifespan of 60 days and that the judgment was executed prior to the presentation of the present application and each one of them is occupying their respective parcels; that pursuant to the judgment, two separate titles were issued by the Land Registrar Murang’a; that the 1st applicant is currently registered as owner of her portion Loc3/Gituru/1475 although she had declined to take her title while the respondent is registered as owner of Loc3/Gituru/1474; and that the proper order for this Court to make is for maintenance of the status quo for each party to restrict themselves to their own portion of land.

9. We note that exhibited to the respondent’s replying affidavit is a copy of title deed in respect of parcel number Loc3/Gituru/1474 issued to the respondent on 22nd October 2018. In effect, the judgment of the ELC was carried into effect prior to the filing of the present application which is dated 14th November 2018. That being the state of affairs, it would be in vain to seek to stop that which took place prior to the filing of the application and the question of the appeal being rendered nugatory if we decline the prayers sought does not therefore arise.

10. The result is that the application fails. It is accordingly dismissed. Given that the protagonists are sisters, we make no orders as costs of the application.

Dated and delivered at Nairobi this 19th day of February, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR