



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI & MURGOR J.J.A)

CIVIL APPLICATION NO. 24 OF 2020

BETWEEN

HELENA NDULU WAMBUA.....APPLICANT

AND

SALOME WANJIKU KIBUL.....RESPONDENT

(An application for stay of execution against the orders of the Environment and Land Court at Nyahururu (Oundo, J) delivered on 29th October 2019

in

ELC Case No. 373 of 2017

RULING OF THE COURT

The Notice of Motion dated 4th March 2020 is brought pursuant to **section 3A** of the **Civil Procedure Rules 2010**. It seeks orders of stay of execution of the judgment of the High Court at Nyahururu (*Oundo, J*) delivered on 29th October 2019, pending the hearing and determination of an intended appeal.

As a brief background to the dispute, **the respondent, Salome Wanjiku** filed Originating Summons dated 30th November 2011 seeking determination of the question of whether she had acquired title by adverse possession over the suit property known as *Land Reference No. Nyandarua/Olkalau Salient/570 (the disputed property)* measuring 2.2 Hectares that was registered in the name of **the applicant, Helena Ndulu Wambua** and whether as a consequence, the disputed property should be registered in her name.

The application was opposed by the applicant for the reason that she was the registered proprietor of the disputed property which she claimed she purchased from one Peter Mutua Kitaka.

Based on the evidence, the trial court found that the respondent had taken possession of the disputed property having purchased it in 1982, and that subsequently it was registered in the applicant's name in 1990; that the applicant did not at any time thereafter take any steps to take over possession of the disputed property or assert her rights as the registered owner, with the result that the trial court found that the respondent had proved on a balance of probabilities that she had indeed acquired title to the disputed property through the doctrine of adverse possession. The applicant was ordered to execute all the transfer documents in the respondent's name, and in default, the Deputy Registry to execute the documents as necessary.

The applicant was aggrieved and has filed this motion seeking to stay the orders of the trial court. Her contention is that if the stay of execution is not granted, the intended appeal will be rendered nugatory; that she is holding the title deed for the disputed property and if compelled to transfer ownership to the respondent, she will be denied her constitutional right to own property.

In her written submissions, the respondent contended that the intended appeal was not arguable, since the trial court rightly found that the respondent had satisfactorily demonstrated that she had acquired the disputed property through adverse possession; that the intended appeal would not be rendered nugatory since, the applicant is still holding the title documents; that in fact,

it is the respondent who stands the greater risk of the applicant disposing of the disputed property to defeat the trial court's judgment.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Upon considering the application, the affidavit in support and the submissions, the applicant's grievances are; that the learned judge failed to properly evaluate the evidence, and to ascertain when time began to run in a claim for adverse possession. In view of the many and consistent decisions of this Court that registration of property in the name of a party does not affect time which has already begun to run in an adverse possession claim, the applicant will be hard pressed to sustain her argument.

As to whether the intended appeal would be rendered nugatory, the applicant is holding of the title documents, while the respondent is in occupation of the disputed property. So far, the applicant has provided no material that demonstrates that the appeal would be rendered nugatory. She has not stated that the respondent has demanded her title from her or requested for the transfer documents to be executed in her favour.

Accordingly, since the applicant has failed to satisfy the two conditions necessary for an order of stay of execution, the Notice of Motion dated 4th March 2020 fails, and is dismissed. Costs in the intended appeal.

It is so ordered.

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

M.K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

.....

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