



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, ASIKHE-MAKHANDIA & MURGOR, J.J.A.)

NYR. CIVIL APPLICATION NO. 36 OF 2019

BETWEEN

NDERI MWANIKI.....1ST APPELLANT/APPLICANT

BERNARD KINYUA.....2ND APPELLANT/APPLICANT

AND

JANE GACHUI MWANGI.....RESPONDENT

(Being an application for Stay of Execution from

the Ruling of the Environment & Land Court (ELC) at

Nyeri (L. Waithaka, J.) dated 11th March, 2019 in ELC Appeal No 9 of 2018)

RULING OF THE COURT

[1] *Nderi Mwaniki* and *Bernard Kinyua* the 1st and 2nd applicants respectively seek an order of stay of execution of the Ruling delivered on 11th March, 2019 by *Waithaka, J.* vide their notice of motion dated 20th August, 2018. A brief background will contextualize this Ruling, which is as follows; the raging dispute between the parties is over **LR No. Inoi/Thaita/77** (the original suit land). The applicants are sons of the late *Mwangi Mwaniki Simon* (the deceased) the proprietor of *the original suit land which was subsequently* subdivided into three parcels being **LR No. Inoi/Thaita/1001**, **Inoi/Thaita/1002** and **Inoi/Thaita/1003**. The respondent, *Jane Gachui Mwangi* is the widow of the deceased although the applicants dispute this and state that she was in a brief relationship with the deceased.

[2] Be that as it may, the parties were before the **Land Disputes Tribunal** to seek a resolution of the use and occupation of the deceased's original parcel of land and it would appear the award by this Tribunal was on 15th December, 1998, adopted on appeal by the **Nyeri Provincial Land Dispute Appeal Tribunal being Nyeri Appeal Case No Kirinyaga 68/98**. The two Tribunals were in agreement that the original suit land which was divided into three parcels should remain as per the deceased's wish, that is:-

- **Piece No. 1001 – Jane Gachui Mwangi**

- **Piece No. 1002 – children of the 2nd wife**

- **Piece No. 1001 – children of the 1st wife**

[3] The record shows Jane Gachui Mwangi (respondent) filed a suit against the applicants in **Nyeri Civil Suit No. 169 of 1995** wherein *J.S Mushelle*, Senior Resident Magistrate, ordered on 15th June, 1999 that all parties in the matter do comply with the decision made by the two tribunals and that the parties were ordered to stop using anything standing on the other parties' parcel of land and concentrate on using or utilizing only what was standing in their respective parcels.

[4] Subsequently, the respondent once again filed an application by way of a notice of motion dated 9th April, 2018 seeking eviction orders to be issued against the applicants from land parcels Nos. **Inoi/Thaita/1001** and **Inoi/Thaita/1002** (the suit premises) as per the decree passed

on 15th June, 1999. The application was based on the ground that the decision of the two tribunals was specific on the portions of land allocated to each party. That application fell for hearing before Senior Resident Magistrate, **R. Kefa**, who delivered a Ruling on 13th August, 2018 giving the applicants thirty (30) days within which to vacate the suit premises. In default, the applicants were to be evicted from the land with the aid of the Officer Commanding Kerugoya Police Station.

[5] Aggrieved by that order, the applicants unsuccessfully filed an appeal before the ELC at Nyeri and hence their intention to file the intended second appeal against the orders by **L. Waithaka, J.** dismissing their matter.

[6] The instant application is supported by the affidavit of the 1st applicant sworn on 28th March, 2019. He states that both he and his brother, the 2nd applicant are in possession of the **LR No. Inoi/Thaita/1002** which belongs to someone else who was never a party to the civil suit, namely **Haroun Kariuki Mwangi alias Haroun Karuri Mwangi**; that the respondent was previously married to 2 separate men and was not destitute and intentionally engaged in a brief liaison with their deceased father with the sole purpose of grabbing their land and disinheriting them; that they have lived on **LR No. Inoi/Thaita/1001** for more than fifty (50) years and the orders issued against them will cause them untold suffering and that they have an arguable appeal which is likely to be rendered nugatory unless the order staying their eviction from the suit premises is granted.

[6] On the part of the respondent, she opposed the motion vide her replying affidavit dated 24th April, 2019. In it she states that the applicants have been involved in lengthy and protracted litigation that goes back to the year 1995; that the applicants have not disclosed any reasonable or arguable ground of appeal in a matter that was settled by the deceased who directed how his land should be distributed among the beneficiaries and that she has been using the land and the two tribunals awarded her the land which award was adopted as an order of the court by the Magistrates court and also the High Court. That notwithstanding, the applicants have been harassing her and interfering with her peaceful enjoyment of the suit premises.

[7] We have considered this motion against the background of established principles under **Rule 5 (2) (b)** of this Court Rules, that for an applicant to succeed, it must be established that the intended appeal is arguable and not frivolous and that if the stay order sought is not granted, the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai 157 of 2006** (unreported) in which the principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

[8] We now wish to consider this application within the above set out principles to answer the twin issues of whether the applicants have an arguable appeal and secondly whether the appeal if successful will be rendered nugatory if an order of stay is not granted. It is common ground that the suit premises are part of family land which belonged to the deceased, the father of the applicants and perhaps the husband of the respondent (as the applicants seem to deny this). It is our considered view that even if the applicants may have an arguable appeal, on the nugatory aspect, no party will be rendered destitute by the enforcement of the orders as the orders merely direct each party to occupy their respective portions of land. The applicants have not demonstrated how the appeal can be rendered nugatory if they moved to the allocated parcels of land.

[9] We accordingly find the motion dated 28th March, 2019 devoid of merit and order it dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR