



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR 157 OF 2018

BETWEEN

STEPHEN ROBERT GITONGA NJAGI.....APPLICANT

AND

CHARLES NTIRITU M'IKUNYUA.....1ST RESPONDENT

STEPHEN MUTHEE M'IKUNYUA.....2ND RESPONDENT

MOSES MURIUKI M'IKUNYUA.....3RD RESPONDENT

PETER GACHIENJA M'IKUNYUA.....4TH RESPONDENT

*(Application for injunction pending the hearing and determination of an intended appeal against the judgment and decree of the Environment and Land Court of Kenya at Meru (Cherono, J.) dated 14th June 2018*

*in*

*ELCC No. 26 of 2011)*

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RULING OF THE COURT

The motion on notice dated 31st December 2018 was taken out by *the applicant, Stephen Robert Gitonga Njagi* and seeks an order for injunction to restrain the respondents from interfering with the property known as *Kiirua/Naari/1178 (the suit property)* pending the hearing and determination of an intended appeal against the judgment and decree of the *Environment and Land Court at Meru (Cherono, J)*, dated 14th June 2018. By that judgment the learned judge awarded the suit property to the respondents after he found that they had acquired title thereto by adverse possession.

The applicant's defence was that his late mother purchased the suit property from the respondents' late father in 1980 and allowed him and his family to continue using it for subsistence farming as she was working in Nairobi and had no immediate need for it. He further averred that his late mother transferred the suit property to him to the 23rd April 2010 and therefore the respondents' occupation was permissive rather than adverse. The learned judge however, found that the applicant's mother could not have permitted the respondents to use the suit property because she never took possession of the suit property.

After filing a notice of appeal evincing intention to appeal against the said judgment, the applicant lodged this application for injunction contending that he was apprehensive that the respondents may be registered as proprietors of the suit property and thereafter sell the same. The applicant added that his intended appeal was arguable because the learned judge erred, in among others, by finding that the respondents' occupations was adverse and by disregarding letters produced in evidence indicating that the respondents' occupation was with the permission of his mother. He rehashed this position in his written submissions dated 9th March 2021

Although the respondents were duly served with a hearing notice and directions to file their written submissions, none are on record. That, however does not obviate the burden on the applicant to satisfy us that his intended appeal is arguable and that unless we grant an order of injunction, it will be rendered nugatory if it succeeds. (See *Exclusive Estates Ltd v Kenya Posts and Telecommunications Corporation &*

**Another [2005] 1 EA 53).**

We are satisfied that the issues that the applicant intends to urge before this Court are not frivolous and therefore the intended appeal is arguable. We bear in mind that an arguable appeal is not one that must necessarily succeed when the appeal is heard. On the contrary, it is one that raises even one bona fide issue that the Court needs to consider in full. (See **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR).**

As regards whether the intended appeal will be rendered nugatory, all we have before us is the applicant's "fear", the basis of which is not disclosed. In his submissions the applicant blandly states:

*"...in the event the orders sought are not granted, the suit property may be sold to third parties and thus may be out of reach of the applicant..."*

An order under **rule 5(2) (b)** will not be granted on the basis of speculation. There is no evidence on record that the respondents intend to sell or transfer the suit premises. On the contrary, the evidence on record shows they have lived on it for a long time, whether with or without permission, and have substantially developed the same. Transfer of the suit property to their names can be easily undone if the appeal succeeds. In addition, transfer of the suit property is not *ipso facto* evidence that the respondents intend to sell and transfer the property to a third party.

The applicant has therefore failed to satisfy the second consideration. He is obliged to satisfy both considerations and satisfying only one is not good enough. (See **Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31).** Accordingly, this has no merit and is dismissed with costs to the respondents.

**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**