



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPLICATION NO. 3 OF 2020**

**BETWEEN**

**PIUS ISAIGA & 57 OTHERS.....APPLICANTS**

**AND**

**SAMMY KIPROTICH KOSGEI.....1<sup>ST</sup> RESPONDENT**

**CLEMENT KIPROTICH LAGAT.....2<sup>ND</sup> RESPONDENT**

*(Being an application for temporary injunction to restrain the respondents from evicting the applicants pending the hearing and determination of their appeal from the Ruling of the High Court of Kenya at Eldoret (S.M. Githinji, J.) delivered on 17<sup>th</sup> December 2019 in Eldoret High Court Succession Cause No. 221 of 2015)*

**RULING OF THE COURT**

1. By their application dated 6<sup>th</sup> January 2020, the applicants seek an order of temporary injunction, under Rule 5(2)(b) of the Court of Appeal Rules, to restrain the respondents from evicting them from land parcels known as Nandi/Kapkangani/1371,1372,1373,1374,1375,1376,1377,1378, 1379,1380,1381,1382,1383,1384 being subdivisions of the original parcel Nandi/Kapkangani/272 pending the hearing and determination of their appeal from the ruling of the High Court at Eldoret delivered on 17<sup>th</sup> December 2019.

2. Before the High Court, the applicants complained that parcel Nandi/Kapkangani/272 formed part of the estate of the late Kipkosgei Chepturo, deceased; that before filing and obtaining grant of representation in Succession Cause No. 221 of 2015, the respondents unlawfully and fraudulently subdivided Nandi/Kapkangani/272 into the said subdivisions, Nandi/Kapkangani/1371-1384, and transferred the same to themselves; that there is pending before the High Court an application to revoke a grant of representation obtained by the respondents; that pending the hearing and determination of the summons for revocation of grant, the applicants applied for interlocutory orders which were rejected by the High Court in

its ruling given on 17<sup>th</sup> December 2019, the subject of the intended appeal.

3. The applicants assert that they, and their families are in occupation of the parcels of land in question and face eviction unless the orders sought are granted in which event their intended appeal will be rendered nugatory.

4. In an affidavit in support of the application before us, Pius Isaiga on behalf of the applicants states the applicants' forefathers migrated to the property in 1969, having purchased the same from the deceased. The applicants assert that the manner in which the respondents dealt with the property Nandi/Kapkangani/272 and subdivided the same amounted to intermeddling; that the High Court erred in the impugned ruling of 17<sup>th</sup> December 2019, in striking out, on the basis of a preliminary objection, their application for interlocutory relief dated 22<sup>nd</sup> October 2019 pending the hearing and determination of the summons for revocation of grant.

5. In a replying affidavit sworn by Sammy Kiprotich Kosgei, the 1<sup>st</sup> respondent, on his own behalf and that of the 2<sup>nd</sup> respondent, it is deponed that the High Court correctly struck out the applicants' application on the basis that the applicants have engaged in a plethora of suits against the deceased and subsequently against the respondents; that the matter is *res judicata*; and that as the Judge correctly held, the applicants do not have locus standi to challenge the grant in respect of the estate of the deceased.

6. In written submissions filed by the firm of Seneti Oburu & Co Advocates on behalf of the respondents, it is urged that the intended appeal is not arguable, and it is not demonstrated that the intended appeal will be rendered nugatory if we decline the orders sought.

7. We have considered the application, the affidavits and the submissions. In an application of this nature, the applicants should demonstrate that the intended appeal is arguable and that if we decline to grant the orders sought, the intended appeal, if successful, will be rendered nugatory. As this Court stated in ***Ishmael Kagunyi Thande vs. Housing Finance of Kenya Limited Civil Application [2007]eKLR***:

***“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] These principles are now well settled. For an application to succeed he must not only show 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 the appeal will be rendered nugatory.”***

8. In his ruling the subject of the intended appeal, the learned Judge held that the applicants did not have locus standi in the matter as they had “*not proven that they are beneficiaries, purchasers or even that they are in occupation of the suit land legally*”; that in Constitutional Petition No. 6 of 2016, the court held that the applicants “*did not have any rights to the suit land*”; that in Kitale ELC 167 of 2017 the court held that applicants suit based on adverse possession was res judicata; and that the application before him was res judicata. In concluding the impugned ruling, the learned Judge stated:

***“The applicants have sought for orders to stop the eviction of the applicants from the suit land. The evictions are as a result of a court order issued on the 7th March 2018 and the eviction was carried out on 9th October 2018. The applicants were seeking an appeal through the back door. They were better placed to appeal the judgement that resulted in the eviction and they did not. The application lacks merit and is struck out with costs to the respondents.”***

9. The applicants lodged a notice of appeal dated 18<sup>th</sup> December 2019 intending to challenge that decision. They also applied for typed proceedings and the ruling. It seems that the issues to be canvassed in the intended appeal are that the conclusions reached by the Judge that they did not have locus standi and that the matter is res judicata are not well founded. Bearing in mind that an arguable appeal is not one that must necessarily succeed, we think the intended appeal is arguable.

10. As to whether the intended appeal will be rendered nugatory unless we grant the orders sought, the status on the ground is not crystal clear. In their application before us the applicants seek orders to restrain the respondents “*from evicting or further evicting the applicants and or their family members or dependants*” from the suit land, pending hearing and determination of the intended appeal. That would suggest their eviction from the property had already commenced. As an alternative prayer, the applicants seek an order “*to maintain and or extend the orders of status quo issued by the Superior court on 17<sup>th</sup> December 2019 allowing the respondents to remain in occupation and use of the suit parcel or parcels of land*” and that such orders to remain in force until final determination of the appeal. The learned Judge also indicated in the impugned ruling that the eviction had already taken place.

11. However, in the more recent replying affidavit sworn by the 1<sup>st</sup> respondent on 16<sup>th</sup> March 2020, he deponed that “*the applicants are seeking orders of injunction after being removed by way of eviction on the 9<sup>th</sup> October 2019 pursuant to orders issued by the Resident Magistrate in Eld. CMCC No. 794 of 2019 hence they are now trespassers hence the remedy of injunction cannot be available to parties who are with impunity defying court orders and continue trespassing...*”. Though that statement is somewhat contradictory, it would appear, based the respondents’ averment that the applicants are still in occupation and their eviction would render the appeal, if successful, nugatory.

12. In the foregoing circumstances, we allow prayer 3 of the applicants’ application dated 6<sup>th</sup> January 2020 and hereby order that the respondents, whether by themselves, their servants or agents, are hereby restrained from evicting the applicants or their family members from the properties known as Nandi/Kapkangani/1371,1372,1373,1374,1375,1376,1377,1378, 1379,1380,1381,1382,1383,1384 being subdivisions of the original parcel Nandi/Kapkangani/272 pending the hearing and determination of the intended appeal.

13. The costs of the application shall abide by the outcome of the intended appeal.

***Dated and delivered at Nairobi this 7<sup>th</sup> day of August, 2020.***

**D.K. MUSINGA**

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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**