



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), NAMBUYE & OKWENGU, J.J.A)

CIVIL APPLICATION NO. 73 OF 2020

BETWEEN

HANNAH NJERI KOGI.....1ST APPLICANT

LABAN MWANGI GICHAGA.....2ND APPLICANT

AND

SAMUEL MUNYUA GICHAGA.....RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and determination of an intended appeal from the Ruling and Order of the Environment & Land Court of Kenya at Nyahururu (**Hon. Oundo, J**) dated 29th October, 2019 in Nyahururu ELC No. 14 of 2017)

RULING OF THE COURT

The 1st applicant is the widow of Elijah Kogi Gichaga, who was the 1st plaintiff in the suit from which the intended appeal arose. The late Elijah Kogi Gichaga, the 2nd applicant and the respondent are brothers. It is the applicants' case that land parcel No. 60- Ngorika (now Nyandarua/Ngorika/346 - the suit property) was purchased by their father in 1964 and settled his family including his two wives and their children.

After many years, the applicants learnt in 1988 that the respondent had transferred the suit property to himself and subsequently sold tElijah Kogi Gichaga's portion of the suit property measuring 8 acres to a third party. From that point on, the dispute has been taken through the Land Disputes Tribunal, High Court and even before the criminal court.

The applicants have insisted that the respondent holds the title to the suit property in trust for himself and for the applicants. They have demanded that the suit property be distributed and transferred to each beneficiary according to their share and further that any subsequent titles that may have been created out of the property be cancelled.

The respondent denied the above claims asserting, instead that, having been employed by the white settlers in 1905, he was allotted by the settlers the suit property which was subsequently registered in his name.

In resolving the rival contentions, the learned Judge. (Oundo, J.) found no evidence in support of the applicants' claim that the suit property was held by the respondent in trust to be shared equally between the deceased's children. Similarly, she was not convinced that there was any contribution by the applicants towards the development of the suit land.

In the end the Judge dismissed the action with costs and issued orders of mandatory and permanent injunctions against the applicants directing them to vacate the suit property within 90 days of the delivery of the judgment, failing which, the respondent was authorized to use the assistance of the police for maintenance of law and order during the eviction of the applicants from the suit property.

The applicants intend to challenge this decision on appeal to this Court and have, in the meantime, taken out this motion under **Rule 5 (2)(b)** of the Court's rules for orders that there be a stay of execution pending the lodgment and determination of the intended appeal.

The respondent in opposing the application has asked us to bear in mind that he is the registered proprietor of the suit property; that the 1st applicant is a trespasser; that without any colour of right, she buried her husband on the suit property; that the respondent filed an action to

have the remains of the deceased exhumed, which action is pending in court; and that the 2nd applicant was evicted from the suit property in 2010 and has never returned.

In an application under **Rule 5 (2)(b)**, the applicant must satisfy the court of the existence of an arguable appeal and secondly, the applicant must demonstrate that if the appeal or intended appeal were to succeed it would be rendered nugatory if the impugned orders are not stayed.

We have identified as arguable the question whether the respondent was registered to hold the suit property as a trustee for himself and his siblings.

On the second limb, it is conceded that, at least the 1st applicant is in occupation of the suit property and her husband's remains have been interred there. There is an order for her eviction. Should this happen, and in the event the appeal was to succeed, that outcome will be of no purpose.

Having satisfied the two limbs, we allow the application and order that there shall be an order staying execution of the decree from the judgment of the High Court issued on 29th October, 2019 pending the lodgment and determination of the appeal. The appeal shall be lodged and served within 30 days of the date of this ruling, failing which the orders we have issued herein shall be vacated without any further orders. Costs to be in the appeal

Dated and delivered at Nairobi this 18th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR