



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & MURGOR, J.J.A)

CIVIL APPLICATION NO. 82 OF 2020

BETWEEN

GEORGE MWICIGI GITHENGI.....1ST APPLICANT

MIRIAM WAITHIRA GITHENGI MWICIGI.....2ND APPLICANT

AND

JOHN BAPTISTA MURIRA KWERI.....RESPONDENT

(Being an application for stay of the orders of the Environment and Land Court at Murang'a pending the hearing and determination of an intended appeal (J. K. Kemei, J.) dated 11th December, 2019

in

ELC Case No. 5 of 2019)

RULING OF THE COURT

1. The suit that gave rise to the instant application involved a dispute over a parcel of land in Murang'a known as **LOC 16/KIARUTARA/43** (the suit land) where the applicants were pursuing a claim of trust or adverse possession against the respondent. The respondent successfully challenged the said suit on the grounds that the applicants had litigated on the same issue before the Chief Magistrate's Court at Thika in **Case No. 1146 of 2002**. The same matter was filed before the Environment and Land Court (ELC) **ELC No. 856 of 2012 Nairobi** which was transferred to Murang'a and was registered as **ELC No. 75 of 2018**. The learned Judge ruled the matter was *res judicata* and dismissed the suit on the grounds that the suit before the Chief Magistrate's Court was over the same suit land, by the same parties where that the applicants had sought a declaration of trust and should therefore not litigate in instalments.

2. This is what the Judge concluded in her own words: -

“36. The overarching principle is that parties cannot be allowed to litigate in instalments. Public policy demands that litigation has to come to an end.

37. In answer to issue No. a) the Court has found the suit is resjudicata.

38. In view of the finding in Para 37 above the orders issued on 11/3/19 lapse automatically upon the determination of the suit to be resjudicata.

39. In the end this suit is resjudicata and it is dismissed with costs to the Applicants.”

3. Aggrieved by that outcome, the applicants filed a notice of appeal on 16th December, 2019 indicating their intention to appeal against the aforesaid orders. This was followed by the instant Notice of Motion dated 28th February, 2020 brought under **Rule 5 (2) (b)** of the Court of Appeal Rules seeking a stay of the orders issued on 11th February, 2019 until the appeal is heard and determined and an order maintaining the status quo. The prevailing status quo is not clear as the applicants claimed that they relied on the suit land for their subsistence and the respondent in his replying affidavit contended that it was after the suit was dismissed that the applicants trespassed upon the suit premises

and started picking his tea bushes.

4. The application is supported by the grounds enumerated thereunder and further amplified in the supporting affidavit sworn by **George Mwicigi Githengi** of 28th February, 2020. In a nutshell it is stated that the appeal is arguable as the applicant's claim was based on adverse possession and it was dismissed after a preliminary objection thereby denying the applicants a chance of being heard. On the nugatory aspect, it was indicated that the applicants may be evicted from the suit land from where they derive a livelihood and which may be alienated, sold or disposed off by the respondent before the appeal is heard and determined.

5. The motion was opposed by the respondent vide his replying affidavit and written submissions. The respondent contends that the applicants' intended appeal has no merit and he recites the prayers that the applicants had sought in **Muranga ELC No. 5 of 2019** the subject of the intended appeal which was *inter alia*:-

“A declaration that the defendant (respondent herein) holds 1.44 hectares out of 5.77 hectares of land LOC 16/KIARUTARA/43 in trust of the plaintiffs (the applicants herein) and the said trust be dissolved and plaintiff be registered as proprietors of 1.44 hectares of land LOC.16/KIARUTARA/43 in particular the part the plaintiffs occupy alternatively the plaintiffs have acquired the said land by adverse possession.”

The respondent further avers in the supporting affidavit that after the applicants' suit was dismissed, they forcefully trespassed the suit land and started picking his tea which has caused him irreparable damage.

6. We have considered this application within the established principles under **Rule 5 (2) (b)** of this Court's Rules. It is trite law that for an applicant to succeed in an application such as the one before us, he/she needs to demonstrate that the appeal or intended appeal is arguable; and secondly that the same will be rendered nugatory in the event the appeal succeeds. See **Stanley Kengethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR**.

“That in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

7. We also remind ourselves that such an applicant only needs to demonstrate one ground of appeal to establish that the appeal is not frivolous. Going by the matters raised by both parties, it is common ground that they have been litigating over the same suit property. The issue which the applicants now wish to pursue in the intended appeal is whether their suit that was dismissed on a preliminary objection as being *res judicata* was erroneously done because the learned Judge found it was based on the law of trust when in their view, the claim was based on adverse possession. Whereas it is for the trial Bench to go into the merits and extrapolate the thin issues of whether the learned Judge erred in entertaining the preliminary objection on the grounds stated therein, on our part, and on the face of those grounds whether the claim was one based on “trust” or “adverse possession” we are not persuaded of their arguability.

8. Having found the grounds not arguable, and as the final order granted which is sought to be appealed against was a negative one dismissing the suit and not requiring any party to do or refrain from doing anything, it is needless to go into the nugatory aspect of this matter. See the case of **Western College of Arts and Applied Sciences vs. Oranga & Others [1976] KLR 63**, where this Court stated:-

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs...”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction”

The applicants having failed to meet the twin principles, this application fails, and it is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR