



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAI, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 302 OF 2019

BETWEEN

JOHNSTONE NYANYUKI MENGE.....APPLICANT

AND

RHODA MONGINA ONDORO.....1ST RESPONDENT

THOMAS ONDORO.....2ND RESPONDENT

MARGARET ONDORO.....3RD RESPONDENT

(Being an application for injunction/conservatory orders restraining the alienation, wastage and/or otherwise dealing with the suit properties, pending the hearing and determination of Court of Appeal Civil Appeal No. 302 of 2019 against the Judgment and Decree of the Environment and Land Court (J. M. Mutungi, J) dated 9th October 2019)

RULING OF THE COURT

1. In his application dated 31st July 2020 made under Rule (5)(2)(b) of the Court of Appeal Rules, among other provisions of the law, the applicant Johnstone Nyanyuki Menge, has sought an order of injunction to restrain the respondents from entering upon, alienating, selling, sub-dividing or otherwise dealing with the properties known as Title Numbers Gesima Settlement Scheme/337 and 343 pending the hearing and determination of his Civil Appeal No. 302 of 2019. That appeal arises from a judgment of the Environment and Land Court (**J.M. Mutungi, J.**) dated 9th October 2019 dismissing the applicant's claim to the said properties on the basis of adverse possession. In the same application, the applicant has also sought an order of inhibition, or alternatively conservatory order to prevent dealings with the said properties pending the hearing and determination of his appeal.

2. To succeed, the applicant has the burden to satisfy the Court that his appeal is arguable and that unless we grant the orders that he seeks, the appeal if successful, will be rendered nugatory. As stated by this Court in **Ishmael Kagunyi Thande vs. Housing Finance Company Limited Civil Application No. 156 of 2006 (UR)**:

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant 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.”

3. Based on the application and the supporting affidavit as amplified in the applicant's written submissions by Ms. Oguttu, Ochangi, Ochwal & Co Advocates, the applicant's case is that he purchased the suit properties under sale agreements dated 21st October 1998 and 16th April 2005; that the vendors failed to procure the requisite Land Control Board consent with the result that the transactions were nullified by operation of law; and that he thereafter became entitled to the properties by dint of the doctrine of adverse possession.

4. In dismissing his claim, the learned Judge of the ELC held that the applicant's suit was premature expressing that the applicant;

“...instituted the present suit by way of originating summons dated 28th April 2010 filed in court on the same date. By the date the plaintiff filed the suit the requisite period of 12 years necessary to found an action based on adverse possession had not lapsed. The suit is therefore premature and the plaintiff was non suited.”

5. It was submitted that the intended appeal is arguable as computation of time for purposes of commencing the adverse possession should be computed from the date the applicant was placed in occupation of the properties.

6. In opposition to the application, counsel for the respondents Zablon Mokuu Advocate in his written submissions reiterated the contents of the replying affidavit sworn by the 1st respondent on 15th September 2020 maintaining that the intended appeal has no merit whatsoever as the issue of adverse possession, “*is simply the calculation of the number of years which either adds up to 12 or not and no more*”.

7. Having considered the application, the affidavits and the rival submissions, and having regard to the parameters for the exercise of the court's discretion in an application of this nature, and also bearing in mind that an arguable appeal is not one that will necessarily succeed, and cognisant that we are not at this stage dealing with the substantive appeal, we are not satisfied, on the material before us, that the applicant has demonstrated that the intended appeal is arguable. Based on the uncontested facts as placed before ELC, we are not persuaded that the applicant has, at this stage, demonstrated that the learned Judge erred in concluding that the suit was premature.

8. Being of the persuasion that the applicant has failed to demonstrate that the intended appeal is arguable, we need not say more. Consequently, we are unable to grant the orders sought. Accordingly, the application fails and is hereby dismissed with costs to the respondents.

Orders accordingly.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR