



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), KOOME & KANTAL, J.J.A)

CIVIL APPLICATION NO. 149 OF 2019

KIMATHI M'RIRIA.....1ST APPLICANT
PAUL GITUMA.....2ND APPLICANT
MUTUMA M'RIRIA.....3RD APPLICANT
MURITHI M'RIRIA.....4TH APPLICANT
KINOTI M'RIRIA.....5TH APPLICANT
MWITI M'RIRIA.....6TH APPLICANT

AND

HARUN MUTHOMI.....RESPONDENT

(An application for stay of execution of the decree pending and determination of an

intended appeal against a judgment of the Environment & Land Court

at Meru (J.G. Kemei, J.) dated 8th April, 2019

in

E&LC No. 187 of 2011)

RULING OF THE COURT

The respondent's claim before the court below was that he is the registered owner of the suit land, NTIMA/IGOKI2004 and that he has always been in possession and occupation of the land. The applicants, who are brothers, live and own the parcel of land which borders the suit land. The respondent alleged that the applicants have encroached on and occupied a portion of the suit land measuring 0.3 acres without any right or consent of the respondent. The latter brought an action against the applicants for an order of permanent injunction to restrain them from trespassing, occupying, cultivation, building on or entering the suit land or in the alternative, an order of eviction of the applicants from the suit land.

The applicants in their defence denied the above allegations insisting that they have been in occupation of the suit land since 1968; that the remains of their parents were interred on the suit land; that their occupation of the suit land has been open, exclusive and uninterrupted since 1968; that they have made various developments on the suit land including constructing over 6 houses and planting more than 200 trees of coffee.

Their claim of ownership of the suit land was by adverse possession. According to the applicants, they only realized that they were occupying the respondent's land when they received a demand letter to vacate; and because they assumed all along that they were on their land, they could not even tell where exactly the 0.3 acres claimed by the respondent was.

Kimey, J. did not agree with them and found their claim to the land by adverse possession "shaky". Instead, he found they were trespassers on

the suit land and the respondent was the true registered owner who was entitled to protection of the law from trespassers.

In the result, he restrained the applicants by an order of permanent injunction as prayed and ordered them to vacate the suit land forthwith or be evicted if they fail to vacate.

The applicants intend to challenge this decision on appeal to this Court and in the meantime have brought the instant application for the Court to preserve the suit land by issuing an order of stay of execution under **Rule 5(2)(b)** of the Court of Appeal Rules, as they bring an appeal.

For them to succeed in the application, they have to prove, one, that the appeal is arguable and, two, that the appeal will be rendered nugatory if the order of stay is not granted and in the event the appeal was to succeed.

From the draft memorandum of appeal and the affidavit in support of this application as well as that sworn on behalf of the respondents, there is no doubt that the applicants are presently on the suit land. The learned Judge has ordered them to vacate it or be evicted. Should that happen, the appeal, if successful, will serve no purpose. That satisfies the second limb. On the first limb, we are of the view that the question of whether or not the applicants had established a case for adverse possession, is a triable issue. The two limbs, having been satisfied, we allow this application and grant stay of execution of the orders of the trial court made on 8th April, 2019 until the appeal is lodged, heard and determined.

We further direct the applicants to file and serve the record of appeal within 30 days of this ruling, failing which, the order of stay granted here will automatically lapse without further orders. Costs will be in the appeal.

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

W. OUKO, (P)

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JUDGE OF APPEAL

M.K. KOOME

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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