



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KARANJA, OKWENGU & M'INOTI J.J.A.)

CIVIL APPLICATION NO. 106 OF 2019 (UR 72/19)

BETWEEN

GINSON KIRAGU MBERIA alias

GINSON KIRAGU NJAGI.....APPLICANT

AND

STANLEY BUNDI RIMBERIA.....1ST RESPONDENT

KARANI JOHN RIMBERIA.....2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Environment and Land Court at Chuka (Njoroge, J.) dated 29th May 2019 in ELCC No. 306 of 2017)

RULING OF THE COURT

The Motion on Notice determined by this ruling is taken out by the **applicant, Ginson Kiragu Mberia**, under **rule 5(2) (b)** of the **Court of Appeal Rules**, for an order of stay of execution of the judgment of the **Environment and Land Court at Chuka (Njoroge, J.)** pending the hearing and determination of **Nyeri Civil Appeal No. 204 of 2019** which the applicant has already filed. By the impugned judgment dated 29th May 2019, the learned judge dismissed the applicant's Originating Summons seeking an order for the registration of the applicant as proprietor, by adverse possession, of 3 acres of **LR No. Mwimbi/Murugi/180 (the suit property)**. The learned judge further ordered the applicant to vacate the suit premises within three months from the

date of judgment, failing which the **Officer Commanding Station, Chogoria Police Station**, was to supervise his eviction. Lastly the learned judge ordered the land registrar to remove all inhibitions placed by the applicant or any other person on the title to the suit property.

The applicant has not yet been evicted from the suit property and is still in possession. Although duly served with a hearing notice, neither the respondents, nor their advocate attended Court for the hearing of the Motion.

The relevant background to the application is that by an amended Originating Summons dated 18th December 2017, the applicant averred that at all material times the suit property was registered in the name of his grandfather, **Rimberia Kanya** and that pursuant to a decree issued in **Meru HCCC No. 30 of 1978**, it was decreed that the said Rimberia Kanya held the suit property in trust for the applicant's family. However, the suit property ended up being registered in the name of the respondents' father, and when he died, the respondents petitioned for grant of letters of administration and were registered as proprietors of the suit property. The applicant further pleaded that he was in adverse possession of the suit property for a period of more than 12 years and that over that period, he had substantially developed the part of the suit property that he occupied by planting over 4,000 tea bushes, 100 coffee trees, and mango, avocado and other indigenous trees. He averred that he was born on the suit property in 1948 and had lived in it all the time, together with his family.

The respondents opposed the summons pleading that the applicant had forcibly entered the suit premises after the death of their father. They denied that the applicant was born on the suit property, although the 1st respondent stated that the applicant was in occupation of 7 rather than 3 acres of the suit property and that he had built a church thereon. The respondents denied that the suit property was registered in their names, and averred that it was still registered in the name of their late father. They however confirmed having petitioned for grant of letters of administration to their father's estate.

In a 19-page judgment, 95 percent of which comprises verbatim reproduction of pleadings, witness statements, and the parties' written submissions, the learned judge found that the applicant had failed to prove his claim for adverse possession, dismissed the case and issued the orders we have already adverted to. Aggrieved by the decision, the applicant has already, as earlier stated, filed an appeal in this Court at Nyeri and now seeks an order of stay of execution pending the hearing and determination of that appeal.

Ms. Kiome, his learned counsel, relied on the applicant's memorandum of appeal and submitted that the appeal was arguable. She contended that the learned judge merely reproduced the pleadings, witness statements and submission without properly evaluating the evidence. She contended that even the respondents had conceded that the applicant was in occupation of 7 acres of the suit property and had constructed a church thereon. Counsel further submitted that the learned judge erred by issuing orders of eviction and removal of inhibitions on the suit property's title when none of the parties had sought such prayers. Lastly the applicant submitted that the learned judge erred by considering and being influenced by irrelevant matters such, as whether the decree in Meru HCCC No. 30 of 1978 was enforceable.

The respondents did not file any replying affidavit to oppose the application and although duly served, neither them nor their advocate appeared for the hearing of the application.

Having carefully considered the application, we reiterate that to be entitled to the orders of stay of execution, the applicant must satisfy us, first, that the appeal is arguable and second, that unless we issue an order of stay of execution, the intended appeal will be rendered nugatory if it succeeds. (See **Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd, CA No. 314 of 2007**)

We are satisfied that the applicant has demonstrated that his appeal is arguable. Among the issues he wishes the Court to consider is whether the learned judge properly evaluated the evidence and applied the law on adverse possession. He also faults the learned judge for issuing orders which none of the parties had sought. As this Court has stated time and again, even one *bona fide* arguable issue will suffice for purposes of the first consideration. (See **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001**). Further, an arguable appeal need not be one, which must succeed. It is merely one that is not frivolous and raises an issue that is worthy of full consideration by the Court.

(See **Kenya Railways Corporation v. Edermann Properties Ltd, CA. No. Nai. 176 of 2012**).

As for the second consideration of whether the pending appeal will be rendered nugatory if it succeeds after the applicant has been evicted from the suit property, we are satisfied that it will. The applicant's averments that he has been on the suit property since 1948 and that he has substantial developments thereon have not been controverted in this application, although the respondents have had all the opportunity to do so. We note too that the applicant has already filed his appeal, which is now only pending for hearing and determination.

In the circumstances, being persuaded that the applicant has satisfied the twin principles under rule 5(2)(b) of the Court of Appeal Rules, we allow this application and order stay of execution of the judgment of the Environment and Land Court at Chuka dated 29th May 2019. Costs of the application will abide the outcome of the appeal. It is so ordered.

Dated and delivered at Nairobi this 22nd day of November, 2019

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR