



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 51 OF 2018

BETWEEN

GODFREY WANJALA WAFULA.....1ST APPLICANT

KOLOLI WAFULA NASIOMBE.....2ND APPLICANT

AND

JAIRUS WAKHUNGU MULUNDA.....RESPONDENT

(Being an Application for injunction and stay of execution of the Decree of the

High Court of Kenya, Environment and Land Court at Bungoma,

(Mukunya, J.) dated 28th day of March, 2018

in

HCC ELC NO. 17 OF 2013)

RULING OF THE COURT

[1] This is an application under **Rule 5 (2) (b)** of the **Court of Appeal Rules (Rules)** for three main orders namely, stay of execution of the judgment and decree of the Environment and Land Court (*ELC*); an injunction to restrain the respondent from evicting the applicants or disposing of land **Title No. Kimilili/Kibingei/216** comprising of 2.8 Hectares (*suit land*) pending the hearing and determination of **Civil Appeal No 51 of 2018** and an inhibition inhibiting the Land Registrar Bungoma from registering any transfer, charges or any dealing in the suit land pending the hearing and determination of the appeal.

[2] The applicants have already filed Civil Appeal No. 51 of 2018 against the judgment and the decree of ELC dated 28th March, 2018 allowing the respondent's suit (*counter-claim*) for the eviction of the applicants from the suit land with costs.

[3] The documents filed in the appeal and application show briefly as follows:-

The applicants are the sons of **John Wafula Mulunda** who is the brother of the respondent. The said John Wafula Mulunda, the respondent and one **Richard Wekesa Mulunda** are sons of **Abraham Mulunda Kololi (Abraham)** who died in 1983. Abraham had other sons.

On 29th June, 1966, Abraham was registered as the proprietor of the suit land on first registration. On 11th November, 1980, the respondent herein was registered as the proprietor. Sometime in 1995, John Wafula Mulunda filed a dispute before the Land Disputes Tribunal Kimilili - **Tribunal Case No. 9 of 1995** claiming that the suit land was divided between the three sons of Abraham, namely himself, the respondent and Richard Wekesa and claimed a portion of the land. The Tribunal awarded him 2.3 acres on 18th May, 1995. The decision of the Tribunal was adopted as a judgment of the court in the Resident Magistrate's Court Kimilili Miscellaneous Application No. 4 of 1995. However in Bungoma High Court Misc. Application No. 53 of 1995 the decision of the Tribunal was quashed by the High Court on 8th September, 1999.

[4] John Wafula Mulunda died in about 2003 and a Limited Grant was given to the two applicants herein on 17th January, 2004. On 28th February, 2005, the applicants filed **High Court Suit No. 15 of 2005 (OS)** at Bungoma against the respondent claiming 2.3 acres from the suit land by adverse possession. The suit was filed on behalf of the applicants by the firm of **Wanyama Wanyonyi & Co. advocates**.

The respondents filed a counter-claim in the suit seeking an order of eviction. Apparently, the suit was registered in the Environment and Land Court as **Land Cause No. 17 of 2013 (OS)**. On 2nd October, 2015, the applicants' advocates filed a notice of withdrawal of the suit.

[5] In early 2016, one **Alex Sande Wafula** filed **Civil Case No. 5 of 2016** at the Environment and Land Court, Bungoma against the respondent herein. He avers in the suit that he is the legal representative of the estate of Wafula Mulunda John, that he is a nephew to the respondent and a grandson of Abraham. He claims a portion of 2.3 acres from the suit land on behalf of the estate.

[6] At the hearing of the respondent's counter-claim for eviction in ELC Case No. 17 of 2013, the applicants' advocates herein applied for the consolidation of the suit with ELC Case No. 5 of 2016. However the learned judge ruled that since the applicants had withdrawn the originating summons in suit No. 17 of 2013, that the suit did not exist for consolidation. Subsequently the applicants applied for setting aside of the order directing the respondent to proceed with formal proof and also for leave to file a counter-claim out of time.

That application was again dismissed by the trial judge. Ultimately the respondent gave evidence in support of the counter-claim and was cross-examined by the applicants' counsel.

[7] The learned judge reviewed the history of the dispute and the previous litigation including the evidence that the applicants have another land **Title No. Kimilili/Kibingei/699** which Abraham gave to the applicants' father and made a finding that the suit land was given to the respondent as a gift *inter vivos*, allowed the counter-claim and granted an order of eviction.

[8] The Rule 5 (2) (b) application is supported by the joint affidavit of the two applicants in which they state that they have an arguable appeal and that if they are evicted the appeal could be rendered academic and nugatory. The application is opposed on the grounds contained in the replying affidavit of the respondent. The respondent states, *inter alia*, that, after the withdrawal of the suit, the applicants have no claim to the suit land and the appeal is not arguable; that the applicants are not parties in ELC No. 5 of 2016; that Abraham registered land title No. Kimilili/Kibingei/699 in the name of the applicants' father and that the appeal would not be rendered nugatory if the applicants are evicted. He annexed a copy of official search indicating that the applicants' father was registered as proprietor of parcel No. Kimilili/Kibingei/699 comprising of 2.8 hectares on 12th May, 1973.

[9] Before the Court can exercise its discretion in favour of the applicants, they are required to demonstrate *inter alia* that the appeal already filed is arguable and that unless the orders sought are granted, the appeal would be rendered nugatory.

[10] The appeal is against the judgment allowing the respondent's claim for eviction. The applicants' suit claiming 2.3 acres of the suit land by adverse possession was withdrawn after the 1st applicant had already testified and had been cross-examined. The applicants not only filed a notice of withdrawal of the suit but also their advocate formally applied for leave to withdraw the suit which leave was granted by the trial court on 23rd February, 2016, thereby terminating the applicants' claim to the suit land. The pending suit No. 5 of 2016 was a distinct suit in which the applicants were not parties. That suit is in essence a relegation of the claim which the applicants' father had filed in the tribunal and in which the High Court had quashed the decision of the tribunal.

Having regard to the previous proceedings and the circumstances of the dispute, the applicants have not demonstrated that the pending appeal is capable of conferring title to a portion of the disputed land to the applicants which would justify a right to continued occupation of the land registered in the name of the respondent.

[11] Further, since there is no pending claim to the suit land by the applicants in their own right other than the appeal, and as the applicants have another piece of land, we are not satisfied that the intended appeal would, if successful, be rendered nugatory. In the event the appeal succeeds the applicants could regain possession.

[12] For the foregoing reasons and balancing the rights of the parties, it is not in the interest of justice to grant the orders sought. Accordingly, the application is dismissed with costs to the respondent.

DATED and Delivered at Kisumu this 25th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR