



IN THE COURT OF APPEAL

AT KISUMU

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

J. MOHAMMED, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 47 OF 2018

BETWEEN

CHRIS MUNGA BICHAGE

(Suing as the administrator of the

Estate of the late ROSEMARY BICHAGE).....**APPLICANT/APPELLANT**

AND

ZABLON ONGAGA MOGAKA.....1ST RESPONDENT

SIMON ONGAGA.....2ND RESPONDENT

MOGAKA ONGAGA3RD RESPONDENT

(Being an appeal arising from the proceedings and judgment of the High Court of Kenya at Kisii, (J. Onyango, J.) dated 23rd day of February, 2018

in

ELC NO. 1190 OF 2016)

RULING OF THE COURT

[1] This is an application brought under **Rule 5 (2) (b)** of the **Court of Appeal Rules, 2010**, for orders that:

- (i) the execution of the judgment of the High Court delivered on 23rd February, 2018 dismissing the applicant's suit be stayed pending the hearing and determination of the pending appeal.
- (ii) status quo pertaining to the suit premises be maintained and respondents be restrained from wanton destruction of the applicant's properties in the suit premises.

[2] The application is supported by the affidavit of the applicant and annexed documents. It is opposed on the grounds contained in the replying affidavit sworn by **Zablun Ongaga Mogaka** and the annexed documents.

[3] The applicant is the administrator of the estate of his late wife **Rosemary Wanjiru Bichage (deceased)**. The deceased was the registered proprietor of land **Title No. Nyaribari/Cache/Keumbu/1702** which she bought from one **Peter Ayako Beta** in 1997 and allegedly took possession in 1998 and thereafter developed the land.

However, sometime in 2006, the respondents herein filed a dispute at Keumbu Land Disputes Tribunal claiming that their late father **Oganga**

Okioga had bought the same portion of land from the original owner. The tribunal awarded the land to the respondents. The decision of the tribunal was filed in the Magistrates Court and adopted as a judgment of the Court. That resulted in the cancellation of the title of the deceased.

[4] In 2006, the applicant filed **Civil Case No. 1190 of 2016** at the **Environment and Land Court, Kisii** seeking a declaration that the award of the land by the tribunal to the respondents, the subsequent adoption of the award by the Magistrates Court and consequential transfer of the land to the respondents was a nullity; an order cancelling the title of the respondents; and a permanent injunction to restrain the respondents from interfering with the suit land.

In the suit, the respondents maintained that their deceased father had bought the disputed portion from the original owner in 1964, took possession of the land and planted tea bushes.

[5] The trial court received substantial evidence relating to the history of the dispute between the respondents' father and the original owner, the subsequent sub-division of the original land, the previous civil proceedings and the evidence of the purchase of the suit land by the applicant's deceased wife. Ultimately, the court made a finding that the applicant's wife was a *bona fide* purchaser of the suit land and had acquired a good title.

Further the court made a finding thus:

“to the extent that the Tribunal purported to adjudicate a matter touching on title to land more so, one that had conclusively been determined by a court of competent jurisdiction, their decision was unlawful.”

However, the court made a finding that the Tribunal's decision could not be set aside by way of a declaration. The court said in part:

“From the foregoing, it is clear that even though the Tribunal's decision was unlawful, it cannot be set aside by way of a declaration.”

On the basis of that finding, the court dismissed the applicant's suit with costs.

[6] The applicant has already filed **Civil Appeal No 48 of 2018** against the decision and has annexed a copy of the memorandum of appeal filed in that appeal.

The applicant depones in the supporting affidavit, amongst other things, that, the appeal has high chances of success; that subsequent to the court determination, the respondents have been raiding the farm, cutting down crops and are threatening forcible entry, that he and the deceased made substantial investments on the land and that the execution of the decree should be stayed pending the hearing of the appeal.

The 1st respondent states in the replying affidavit that the respondents were registered proprietors of the suit land on 12th November, 2009; that the respondents have already taken possession; that the applicant put up temporary structures on the suit land and planted trees; that the structures are dilapidated and that the applicant is not in possession of the suit land.

[7] The applicant seeks a discretionary order. Before the Court can exercise its discretion in his favour, he is required to demonstrate that the appeal is arguable and that unless the orders sought are granted the appeal already filed would be rendered nugatory.

We have studied the judgment of the High Court and the grounds of appeal contained in the memorandum of appeal. The trial court made a finding that the applicant's wife lawfully bought the land and had a good title. The High Court further made a finding that the decision of the Tribunal cancelling the title of the applicant's wife was unlawful. The only reason why the applicant's suit was dismissed was because the court was of the view that the decision of the Tribunal could not be set aside through a declaratory judgment.

[8] A decision of the court may be impeached on grounds of jurisdiction or fraud (*see section 47 of the Evidence Act*) and **Jonesco v. Beard [1930] AC 298**. The applicant states that the appeal has high chances of success as the court did not interpret the law correctly. The issue of what is the correct procedure for impeaching the impugned judgment is a point of law.

Having studied the grounds in the memorandum of appeal we are satisfied that the grounds of appeal are arguable.

[9] As regards the prayer for stay of execution of the judgment, it is evident that the trial court merely dismissed the suit without granting any positive orders save the order for payment of the costs. The judgment of the Court is not capable of being executed. However, it is clear from the second prayer that the applicant in essence seeks an order to preserve the status quo pertaining to the suit premises. From the applicant's affidavit, it is clear that by status quo, he means that he should remain in possession of the suit land pending the determination of the appeal. The respondents dispute that the applicant is in possession although they admit that he had previously constructed temporary buildings which are still standing on the land. The applicant has filed a valuation report dated 29th November, 2017 which shows that the applicant was in possession and the developments that he has made.

On our consideration of the totality of the circumstances, it is our view that it is not just to interfere with the rights of the registered proprietor pending the determination of the appeal.

[10] However, balancing the rights of the parties, it is just to preserve the status quo in respect of the Register of the suit land. Unless the status quo in respect of the Register is maintained, the respondents may dispose of the property thus rendering the appeal nugatory.

[11] For the foregoing reasons, the application is allowed only to the extent, and we order that, the **County Land Registrar** do register an inhibition against **Land Title No. Nyaribari/Chache/Keumbu/1702** inhibiting registration of any dealing until the determination in Civil Appeal No. 48 of 2018.

Further the respondents are also restrained from demolishing or removing the applicant's developments on the land pending the determination of the appeal.

The costs of the application shall be costs in the appeal.

DATED and Delivered at Kisumu this 22nd day of October, 2018.

E.M. GITHINJI

.....

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