



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: KIAGE, SICHALE & KANTAI, J.J.A.)**

**CIVIL APPLICATION NO. 53 OF 2018**

**BETWEEN**

**MARY NJERI GICHEHA.....APPELLANT/APPLICANT**

**AND**

**BENEDICT OBONYO OMOLLO.....1<sup>ST</sup> RESPONDENT**

**PATRICK MURAGURI.....2<sup>ND</sup> RESPONDENT**

**ONESMUS KAGEMA.....3<sup>RD</sup> RESPONDENT**

*(An application for stay of execution pending appeal on striking out of plaintiff's suit with costs by the Ruling and Orders of the Environment and Land Court at Nyeri (Waithaka, J.) dated 28<sup>th</sup> February, 2018*

**in**

**ELC No. 3 of 2014)**

**\*\*\*\*\***

**RULING OF THE COURT**

The applicant **Mary Njeri Gicheha** has by Notice of Motion brought under **rule 5 (2) (b)** and **42** of the rules of **this Court** applied that we issue an injunction restraining the respondents whether by themselves their servants or agents from evicting her from a suit property which is not described in the application pending the hearing and determination (of the application and) of an intended appeal.

In the grounds in support of the motion the applicant states that she has lodged a notice of appeal and has requested for proceedings to enable her to appeal. She also says that she has an arguable appeal with good chances of success and that she stands to suffer substantial loss and irreparable damage which would render the intended appeal nugatory if the application is not granted. The applicant swore an affidavit at Nyeri on 14<sup>th</sup> March, 2018 where she states amongst other things that the respondents; **Benedict Obonyo Omolo, Patrick Muraguri** and **Onesmus Kagema** are in the process of obtaining orders to evict her; that she is appealing the ruling of the **Environment & Land Court at Nyeri No. 3 of 2014** delivered on 28<sup>th</sup> February, 2018 where her suit was struck out; that she is in occupation of the suit property with her family; that she will be gravely prejudiced if she was evicted from the suit property that she says she has occupied for a long time, that parcels of land **Nyeri/Waraza/635 and 636** were combined with parcels No. **Nyeri/Waraza/633 and 634** to form **Nyeri/Waraza 1362** and that she has an arguable appeal.

There is a replying affidavit sworn at Nyeri by one **Purity Nyamu** who says that she is the **National Director** of **Kids Alive Kenya** which she says is the beneficial owner of the parcel of land known as **L.R. No. Nyeri/Waraza/1362** which is held in trust for that organization by the respondents; that the said organization is a charitable non-profit making organization which takes care of children in need of care and protection; that the said organization purchased the said parcel No. **Nyeri/Waraza/1362** in the year 2006; that the said organization has since set up a boys' home and school, special needs school, dormitories and other school facilities, staff quarters and animal crop farm and borehole on the suit property all constructed at a cost of over Kshs.100,000,000/=; that the applicant had attempted to restrain the respondents in a previous suit which suit had been dismissed; that there was no appeal against those orders; that the applicant is in possession of her own portion of land namely **L.R. No. Nyeri/Waraza/622** measuring 3 acres which was granted to her deceased husband through a judgment of the court; that the applicant is not in possession or occupation of the parcel known as **Nyeri/Waraza/1362** and that any injunction granted by this Court would disrupt the ongoing activities on the suit property which will be prejudicial to the children who are on the land.

The applicaiton came before us for hearing on 6<sup>th</sup> June, 2018 when **Mr. Mshila** learned counsel for the applicant submitted that the trial court was wrong to strike out a suit as according to him adverse possession cannot be defeated by a change in title to land. He conceded that there was a suit number **HCCC No. 240 of 2013** involving the applicant which had been dismissed for being *res judicata* and to which there had not been an appeal. He asked us to allow the application.

**Mr. Walter Akwabi** learned counsel for the respondents in opposing the application referred to the replying affidavit which we have already adverted to. Counsel submitted that the respondents were in occupation of the land; that the applicant occupied a 3 acre parcel which was outside of the suit property. According to counsel the intended appeal is not arguable because the applicant has not shown proof of ownership of the land.

We have perused the whole record and the ruling intended to be appealed. For an applicant to be entitled to orders of stay by this Court he must show that there is an arguable point in the appeal or intended appeal. If he shows arguability he must in addition show that the intended appeal or the appeal, as the case may be, would be rendered nugatory absent stay – see **Stanley Kangethe Kinyanjui v Tony Ketter & 2 Others [2013] eKLR** where principles in applications for stay of execution pending appeal to this Court were stated to be the following:

**“(i) In dealing with rule 5 (2) (b) (applications) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court. See RUBEN & 9 OTHERS v NDERITU & ANOTHER [1989] KLR 365.**

**(ii) The discretion of this Court under rule 5(2) (b) to grant stay or injunction is wide and unfettered, provided it is just to do so.**

**(iii) The Court becomes seized of the matter only after the notice of appeal has been filed under rule 75. HALAI & ANOTHER v THORNTON & TURPIN (1963) LTD [1990] KLR 365.**

**(iv) In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. DAVID MORTON SILVERSTEIN v ATSANGO CHESONI, Civil Application No. NAI 189 of 2001.**

**(v) An applicant must satisfy the Court on both the twin principles.**

**(vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. DAMJI PRAGJI MANDAVIA v SARA LEE HOUSEHOLD & BODYCARE (K) LTD, Civil Application No. NAI 345 of 2004.**

**(vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. JOSEPH GITAHU GACHAU & ANOTHER v PIONEER HOLDINGS (A) LTD & 2 OTHERS, Civil Application No. 124 of 2008.**

**(viii) In considering an application brought under rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. DAMJI PRAGJI (supra).**

**(ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. RELIANCE BANK LTD v NORFLAKE INVESTMENTS LTD [2002] 1 E.A. 27 at page 232.**

**(x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.**

**(xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. INTERNATIONAL LABORATORY FOR RESEARCH ON ANIMAL DISEASES v KINYUA, [1990] KLR 403.”**

As we have already pointed out the applicant has not even identified which suit property she is referring to when she asks us to stay the orders of the High Court.

In the ruling intended to be appealed it was found that the suit was *res judicata*. The respondents have through the replying affidavit demonstrated that propety known as Nyeri/Waraza/1362 is occupied by the respondents who hold the same in trust for an organization that takes care of children. It has also been shown that the applicant is in possession of a different parcel of land. In the circumstances, we are not persuaded that there is an arguable appeal in this matter. Having so found we do not need to go into the nugatory aspect of the principles we have set out. The motion fails and is dismissed with costs to the respondents.

**Dated and delivered at Nyeri this 11<sup>th</sup> day of October, 2018.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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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.

**DEPUTY REGISTRAR**