



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 64 OF 2018 (UR NO. 40/2018)

BETWEEN

PERIS SHANYASI ALLUYA.....1<sup>ST</sup> APPLICANT

JOYCE KABURANI.....2<sup>ND</sup> APPLICANT

JAPHETH LUGAFA SHIKONYORE.....3<sup>RD</sup> APPLICANT

LEAH MUSIMBI.....4<sup>TH</sup> APPLICANT

LENA SOKONI.....5<sup>TH</sup> APPLICANT

VERSUS

KIBUTUK ARAP TOO.....RESPONDENT

*(Being an application for stay of execution of the judgment of the Environment and Land Court of Kenya at Eldoret delivered by Justice M. A. Odeny on 31<sup>st</sup> October, 2017*

*in*

ENVIRONMENT AND LAND CASE NO. 41 OF 2016)

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RULING OF THE COURT

[1] Before us is a Notice of Motion dated 27<sup>th</sup> June, 2018 expressed to be brought under **Rule 5(2) (b)** of the Court of Appeal Rules. **Peris Shinyasi Alluya**, (the 1<sup>st</sup> applicant), **Joyce Kaburani**, (the 2<sup>nd</sup> applicant), **Japheth Lugafa Shikonyore**, (the 3<sup>rd</sup> applicant), **Leah Musimbi** (the 4<sup>th</sup> applicant) and **Lena Sokoni** (the 5<sup>th</sup> applicant (collectively referred to as applicants) seek an order of stay of execution pending the hearing and determination of the intended appeal against the judgment and Decree made by the Environment and Land Court, (**Odeny, J**) on 31<sup>st</sup> October, 2017 in favour of **Kibutuk Arap Too** (the respondent) herein.

[2] The application is founded on the grounds set out on the face of the motion and also on the averments deponed in the supporting affidavit of **Leah Musimbi** (the 4<sup>th</sup> applicant herein).

[3] A brief background of the suit in the ELC is that by a Plaint dated 23<sup>rd</sup> February, 2016 the respondent herein filed a suit against the applicants. In the said Plaint, the respondent stated *inter alia* that at all material time before the commencement of the suit, he had been and still is the legal registered owner of land parcels **No. NANDI/KAPKANGAI/1339** and **2211** (the suit properties); that the applicants have refused to vacate the suit properties despite various notices served upon them; that the continued stay by the applicants on the suit properties is illegal and unlawful and that they should therefore be evicted to enable the respondent to enjoy the benefit of his property.

[4] On 17<sup>th</sup> March, 2016, the applicants filed a joint statement of defence and counter claim together with witness statements. It was the applicants' claim in the joint statement of defence that the applicants are legally and properly in occupation of a portion of the suit properties as follows:-

- “i) PERIS ALLUYA 0.50 Acres out of Nandi/Kapakangani/1439
- ii) JOYCE KABURANI 0.45 Acres out of Nandi/Kapakangani/1439
- iii) JAPHETH LUGAFA 1.10 Acres out of Nandi/Kapakangani/1439
- iv) LEAH MUSIMBI KEVEDI 0.20 Acres out of Nandi/Kapakangani/2211
- v) HELENA SOKONI 0.20 Acres out of Nandi/Kapakangani/2211
- together with the following other Occupants and possessors not in Court:-*
- vi) MOHAMED KEGONYERE ALI 0.60 Acres in Nandi/Kapakangani/1439
- vii) ANDREA SHIDOLWA 1.10 Acres in Nandi/Kapakangani/1439
- viii) JOSHUA VWONYE 0.50 Acres in Nandi/Kapakangani/2211”

[5] In the counter claim, the applicants admitted that the respondent is registered as proprietor of the suit properties. It is their claim that the registration in favour of the respondent is not absolute; that their occupation and user has been long, uninterrupted, continuous and to the exclusion of the respondent or his agents, servants or whoever may have been acting or claiming on his instructions; that the respondent does not enjoy or has ever enjoyed peaceful, uninterrupted and/or occupation of the suit properties and he cannot therefore claim any colour of right to the suit properties.

[6] The applicants jointly and severally prayed for orders dismissing the respondent’s case and urged that the counter claim be allowed with costs. In particular the applicants sought the following orders:-

**“1. A declaration that land comprised in land parcels No. NANDI/KAPKANGANI/1439 and 2211 solely belong to the plaintiff and the defendants have no proprietary interest in the said Parcels.**

**2. An eviction order do issue against the defendants herein, their agents, servants and/or anybody acting on their behalf from land parcels No. NANDI/KAPKANGANI/1439 AND 2211.**

**3. Costs and interest.**

**4. Any other relief that this Honourable court may deem fit and just to grant.”**

[7] In her ruling delivered on 31<sup>st</sup> October, 2017, the learned Judge found that the respondent had proved his case on a balance of probabilities and entered judgment in his favour; and that the applicants had failed to prove their counter claim and dismissed it with costs. Consequently the learned Judge made the following orders:-

**“1. That a declaration is hereby made that land comprised in land parcels No. NANDI/KAPKANGANI/1439 and 2211 (the suit properties) solely belongs to the plaintiff and the defendant have no proprietary interest in the said Parcels.**

**2. That the defendants herein, their agents, servants and/or anybody acting on their behalf do vacate land parcels No. NANDI/KAPKANGANI/1439 and 2211 within the next 60 days from the date of this judgement or decree failure of which an eviction order to issue.**

**3. The defendants to pay the costs of this suit.”**

[8] Aggrieved by that decision, the applicants filed this application on the grounds that they have an arguable appeal with good prospects of success; that they have been in possession of the suit properties since 1972; that they have constructed permanent structures on the suit properties; that they are apprehensive that the respondent will commence execution proceedings; that the respondent has filed an application seeking an eviction order; that the applicants will suffer irreparable loss and damage should the court decree be executed; and the intended appeal will be rendered nugatory.

[9] The respondent opposed the application and filed a Replying Affidavit on 21<sup>st</sup> August, 2018 in which he swore that the intended appeal is not arguable; and has no chances of success; that the instant application is fatally and incurably defective, bad in law, an abuse of the court process; and that the application should be struck out with costs to the respondent.

### **Submissions**

[10] When the application came up for hearing, **Mr Kipkosgei Choge** represented the applicants’ while there was no appearance by counsel for the respondent though served with the hearing notice.

**Mr. Kipkosgei Choge** submitted that the applicants have proved that they have an arguable appeal; that the applicants are in possession of

the suit properties and have been in occupation since 1972; that the result of the impugned judgment is to dispossess the applicants of their homes where they have lived since 1972; that if the judgment is executed the applicants will lose their property and the appeal will be rendered nugatory.

**Determination**

[11] We have considered the application, the Affidavits, the submissions by counsel and the law. The jurisdiction of this Court in applications of the nature as the one before us is donated by **Rule 5(2)(b)** of the Court of Appeal Rules. The jurisdiction is original and discretionary. In the case of **Stanley Kang’ethe Kinyanjui Vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012**, this Court stated inter alia;

*“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”*

[12] In considering the application, we shall bear in mind these principles. On the issue of arguability, the applicant has in its Draft Memorandum of Appeal set out several grounds including; whether the applicants or the respondent is the rightful owner of the suit properties. From the record the respondent is the registered owner thereof while the applicants claim to be entitled to exclusive and unimpeded right of possession and occupation of the suit properties.

[13] The court is minded to avoid going into the merits of the intended appeal, as this will be the preserve of the bench that will hear and determine the main appeal. We are satisfied that the applicant has an arguable appeal. For instance there is an issue regarding ownership of the suit properties as both parties claim proprietary rights in respect of the suit properties.

[14] On the nugatory aspect, as this Court said in **Reliance Bank Ltd Vs. Norlake Investments Ltd [2002] I EA 227**, the factors which could render an appeal nugatory are to be considered within the circumstances of each particular case and that in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated as follows:-

*“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”*

[15] In the instant case, the applicants’ counsel **Mr Stanley N. Kagunza** depones in paragraph 4 of the affidavit verifying the urgency that the applicants are exposed to imminent execution proceedings which will render the intended appeal nugatory. **Leah Musimbi**, (the 4<sup>th</sup> applicant) herein in her supporting affidavit dated 27<sup>th</sup> June, 2018 averred at paragraph 9 thereof that the respondent filed an application dated 7<sup>th</sup> March, 2018 seeking an eviction order in execution of the Decree. The applicants are therefore exposed to imminent danger of eviction from the suit premises which will render the intended appeal nugatory.

[16] As the applicants have satisfied the twin requirements for granting orders under **Rule 5(2) (b)** of the Court Rules, we allow the application and order as follows:-

*1) That there shall be an order of stay of execution of the judgment and orders of 31<sup>st</sup> October, 2017 requiring the applicants, their agents, servants and/or anybody acting on their behalf to vacate the suit properties pending the hearing and determination of the intended appeal is stayed.*

*2) That costs of this application shall abide the outcome of the appeal.*

Dated and delivered at Eldoret this 8<sup>th</sup> day of November, 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**