



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 20 OF 2018

BETWEEN

MILKA AKINYI OTIENO.....APPLICANT

AND

CHARLES ODONGO NGANI.....RESPONDENT

(An application from the Judgment and Decree of the Environment and Land Court of Kenya at Kisii (Mutungi, J.) dated 6th October, 2017

in

ELC No. 1151 of 2016

Formerly

HCCC No. 301 of 2011 (OS)

RULING OF THE COURT

Background

(1) In brief, the facts leading to this application are that the respondent **Charles Odongo Ngani** instituted proceedings before the High Court by way of originating summons (OS) dated 16th December 2011 claiming to have acquired title to 1 acre out of land parcel **Kamagambo/Koluoch/1000** (known as the suit property) by way of prescription and/or adverse possession from the applicant. The respondent averred that he has openly occupied and cultivated the suit property for an uninterrupted duration of more than twenty (20) years since 1984; that he had therefore acquired ownership thereof by way of prescription and/or adverse possession; that his entry onto the suit property was pursuant to an agreement of sale entered into between his father, one **Zakayo Ngani** (now deceased) and the late husband to **Milka Akinyi Otieno** (applicant), one **Ongoma Ochuka** in 1984; that the respondent and his late father took possession of the suit property and continued in uninterrupted possession until 2000 when his father died; that after his father's death, he continued to exclusively use and cultivate the suit property without any interruption from the applicant; that the applicant's husband, **Ongoma Ochuka** died in 2002; that the applicant is the legal administrator of the original owner of the suit property and that she holds title to the suit property in trust for the respondent as title in respect thereof was extinguished in favour of the respondent by virtue of the respondent having acquired title through adverse possession.

(2) On 16th January, 2012, the applicant filed a replying affidavit to the chamber summons and the notice of motion. The applicant asserted that the respondent had trespassed onto a portion of the suit property and illegally built structures; and that the respondent had not been in adverse possession of the suit property and was therefore not entitled to the orders sought.

(3) The learned Judge found that the respondent had proved that he had been in possession of the disputed portion of the suit property since 1990; that he had constructed a permanent home therein; and had been utilising the disputed portion of the suit property.

(4) The learned Judge stated as follows;

“23. Taking the totality of the evidence it is my finding and holding that the plaintiff has proved on a balance of probabilities that he was an adverse possessor of a portion of 1 acre of land out of land parcel Kamagambo/Koluoch/1000 and that he is entitled to be declared as the owner thereof. I so declare.”

(5) The learned Judge entered judgment in favour of the respondent in the following terms;

“(1) A declaration be and is hereby issued that the plaintiff, the said Charles Odongo Ngani has become entitled to be registered as owner of a portion of 1 acre out of land parcel Kamagambo/Koluoch/1000 by reason of being in adverse possession for a period exceeding 12 years.

(2) That it is ordered that the portion of 1 acre in occupation and possession by the plaintiff be hived off from land parcel Kamagambo/Koluoch/1000 and be transferred to the plaintiff, the said Charles Odongo Ngani.

(3)The defendant is hereby ordered to execute all the necessary and appropriate documents to facilitate the subdivision and transfer of the 1 acre portion aforesaid to the plaintiff failing which the Deputy Registrar of the court be and is hereby authorized to execute the necessary documents to give effect to the decree herein.”

(6) Aggrieved by that judgment, the applicant filed the current application under Rule 5(2)(b) of the **Court Rules** seeking to stay execution of the judgment.

Submissions by Counsel

(7) At the hearing of the application, **Mr. Herman Omiti** held brief for **Mr. Mainga**, learned counsel for the applicant while **Mr. Omotto** represented the respondent.

(8) **Mr. Omiti** submitted that the essence of the judgment of the E&LC is specific performance that will necessitate subdivision and transfer of the suit property; that the appeal has high chances of success and will be rendered nugatory; that the appeal is arguable; that from the evidence it was not clear which portion is occupied by the respondent or to be sub-divided; that the principles of adverse possession were not taken into account; that there was no peaceful occupation by the respondent with the knowledge of the applicant and that the applicant’s arguments and submissions were not properly considered.

(9) Counsel submitted that if the orders sought are not granted, the respondent may dispose of the disputed property and this may render the appeal nugatory if the appeal succeeds; that it is not true that the application was filed out of time as the **14 days** for filing the appeal fell on **Friday 20th October, 2017**, a public holiday (Mashujaa Day). The next working day was 23th October, 2017 which was the date when the application was filed. The application was therefore filed within time.

(10) **Mr. Omollo** opposed the application and relied on the respondent’s replying affidavit filed on 14th June, 2018. Counsel submitted that there is no valid appeal before the Court as the Notice of Appeal was filed out of time without leave of the court; that the Notice of Appeal on Record is fatally defective as it was not signed and sealed by a Judge or the Deputy Registrar and therefore offends the mandatory provisions of **Rule 10** and **Rule 37** of the **Court of Appeal Rules, 2010**; that in the absence of a valid Notice of appeal, this Court has no jurisdiction to entertain an application for stay of execution; that the application lacks merit and should be dismissed.

Determination

(11) We have considered the application, the affidavits, and the submissions by counsel, the authorities cited and the law. The principles governing the exercise of the court’s jurisdiction under **Rule 5(2)(b)** of this Court’s Rules are well settled. The applicant must satisfy the two limbs of **Rule 5(2)(b)** and show that the intended appeal is arguable and that the appeal, if successful, would be rendered nugatory if the orders sought are not granted. See **Stanley Kangethe vs. Tony Ketter & 5 Others**, [2013] eKLR.

(12) On the aspect of arguability, the applicant has set out in her draft memorandum of appeal filed on 19th December, 2017 several grounds of appeal including that the learned Judge erred in law and in fact in finding that the respondent was entitled to the suit property by way of adverse possession and that the learned Judge arbitrarily allocated the respondent the suit property without any prior survey to establish the exact position that would have been occupied by the respondent, if at all. We are satisfied that the intended appeal is indeed arguable.

(13) On the nugatory aspect, as stated by this Court in the case of **Reliance Bank vs. Norlake Investment Ltd [2002]1 EA 227** the factors which could render an appeal nugatory have to be considered in the circumstances of each particular case and the court has to carefully consider the conflicting claims of both parties.

(14) In the instant case, it is the applicant’s claim that the execution of the orders of the E&LC are in the nature of specific performance and are final in nature, the reversal of which will be long and costly and if the respondent executes against the applicant, the whole substratum of the intended appeal will be destroyed thereby rendering the intended appeal nugatory. Accordingly, we find that the applicant has satisfied this Court that her appeal if successful will be rendered nugatory.

(15) In the circumstances of this case, we are satisfied that the applicant has satisfied both limbs as required by **Rule 5(2)(b)** of this Court’s Rules.

(16) The respondent herein has challenged the competence of the intended appeal as he alleges that the notice of appeal was filed out of time and without leave of the court. The applicant asserts that the notice of appeal was filed within time and this Court therefore has jurisdiction

to hear and determine the instant application and the intended appeal. This Court is minded to avoid delving into the merits of the intended appeal as this will be the preserve of the bench that will hear and determine it.

(17) The upshot is that we allow the applicant's notice of motion dated 7th March, 2018 and order as follows;-

1) *That there shall be an order of stay of execution of the judgment and orders of the Environment and Land Court in Kisii ELC Cause No. 1151 of 2016 (formerly HCCC No. 301 of 2011 (OS) delivered on 6th October, 2017 requiring the suit property measuring 1 acre in occupation and possession by the respondent be hived off from land parcel **Kamagambo/Koluoch/1000** and be transferred to the respondent pending the hearing and determination of the intended appeal.*

2) *That there shall be an order of stay of execution of the order requiring the applicant to execute all the necessary and appropriate documents to facilitate the subdivision and transfer of the suit property to the respondent failing which the Deputy Registrar of the Court to execute the necessary documents to give effect to the decree pending the hearing and determination of the intended appeal.*

3) *The costs of this application shall abide by the outcome of the appeal.*

DATED and delivered at Kisumu this 7th day of December, 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