



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: KARANJA, AZANGALALA & GATEMBU, JJ.A)**

**CIVIL APPLICATION NO. 71 OF 2016**

**BETWEEN**

**ELIPHAS COSMAS NYAMBAKA.....APPLICANT**

**AND**

**CHARLES ANGUCHO SUCHIA.....RESPONDENT**

***(Being an application for stay of execution of decree from a judgment of the High Court of Kenya at Bungoma (Mukunya, J) dated 27<sup>th</sup> July, 2016***

***in***

**H.C.C.C. NO. 123 OF 2010**

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

**RULING OF THE COURT**

1. The applicant seeks a stay of execution of a judgment delivered on 27<sup>th</sup> July 2016 in which the High Court at Bungoma (S. Mukunya, J) in High Court Civil Case No. 123 of 2010 decreed that the respondent is entitled to be registered as the owner of a land parcel known as Title Number Bungoma/Naitiri/506 comprising of 2.02 hectares having acquired it by adverse possession.
2. In the application and in his supporting affidavit, the applicant says that he filed a notice of appeal and that his intended appeal from that judgment has “*overwhelming chances of success.*” The alleged notice of appeal is however not part of the record of his application. He does not say, either on the face of the application or in the affidavit in support where he considers the learned judge of the High Court went wrong in his judgment.
3. However, during the hearing of the application, learned counsel for the applicant Mr. J. S. Khakula urged us to allow the application saying that adverse possession was not proved and that some witnesses were not heard and that the applicant’s appeal will be rendered nugatory unless this application is allowed.
4. On the respondent’s part, learned counsel Mrs. Mmbaka referred us to a replying affidavit sworn by the respondent on 9<sup>th</sup> December 2016 and submitted that the intended appeal is frivolous considering, for instance, that the applicant admitted before the High Court that he sold the suit property to the respondent.

She submitted that this matter has a long history, having started in 1991, and should be brought to an end.

5. To succeed in his bid to stay the judgment of the High Court, the applicant needs to demonstrate that the intended appeal is arguable and that if we decline to grant the order sought, the intended appeal will be rendered nugatory. In the case of **Ishmael Kagunyi Thande v HFCK Civil Application No Nai 157 of 2006** this Court stated that:

*“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] These principles are now well settled. For an application to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”*

6. Quite apart from the omission by the applicant to demonstrate to us that he has taken the first step towards challenging the decision of the High Court by lodging a notice of appeal, he has not shown us in what respect(s) he considers the learned Judge to have erred so as to demonstrate that the intended appeal is arguable. The claim by counsel for the applicant from the bar that some witnesses were not heard is not at all borne out by the material placed before us. Furthermore, the applicant has also not demonstrated how the intended appeal will be rendered nugatory if we decline this application.

7. Consequently, we do not consider that this application has merit. It is dismissed with costs to the respondent.

Orders accordingly.

**Dated and delivered at Kisumu this 10<sup>th</sup> day of February, 2017.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

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**DEPUTY REGISTRAR**