



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, SICHALE & J. MOHAMMED, JJ.A)**

**CIVIL APPLICATION NO. NAI. 15 OF 2017 (UR 11/2017)**

**BETWEEN**

**CHRISTOPHER KIOI**

**NANCY WAMBUI WAWERU (Suing on behalf of the**

**estate of MWANGI KIOI (Deceased) .....APPLICANTS**

**AND**

**WINNIE MUKOLWE JULIA KIRIRA**

**HOPE MUTUA (Sued as the administrators of the estate**

**of DAVID NYAMBU JONATHAN KITURI (deceased).....1<sup>ST</sup> RESPONDENT**

**LUCY WANJIRU MUCHAI T/A**

**BELLAVINN INVESTMENTS..... 2<sup>ND</sup> RESPONDENT**

*(An application for injunction pending the hearing and determination*

*of an appeal from the Judgment of the High Court of Kenya at*

*Nairobi (N. Gacheru, J.) dated 27<sup>th</sup> January, 2017*

**in**

***ELC No. 544 of 2009)***

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**RULING OF THE COURT**

1. In an application anchored under **Rule 5 (2) (b)** of the Court of Appeal Rules (the Rules), the court's main concern was succinctly put by Githinji, J.A in **Equity Bank Limited -vs- West Link Mbo Limited [2013] eKLR** thus,

**“It is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.” Emphasis added.**

2. We are faced with such an application wherein the applicants seek *inter alia*,

***An order of injunction be issued restraining the respondents, their agents, servants and/or employees from alienating, disposing off or in any other manner whatsoever dealing with the title in the property known as L.R No. 10090/24 located in Juja (herein after referred as to as the suit property) or interfering with the applicants possession of the suit property pending the hearing and determination of the intended appeal.***

3. The gravamen of the application is that the applicants herein filed an originating summons in the High Court being ELC No. 544 of 2009 praying for several declarations against the 1<sup>st</sup> respondents. The applicants filed suit in their capacity as administrators of the estate of Mwangi Kioi (deceased) while the 1<sup>st</sup> respondents were sued in their capacity as administrators of the estate of David Nyambu Jonathan Kituri (deceased). Of relevance is that they sought a declaration that David’s title to the suit property had been extinguished by adverse possession; and a declaration that the applicants were entitled to be registered as legal and beneficial owners of the suit property in place of the respondents.

4. The applicants’ claim was that Mwangi had purchased the suit property from David in the year 1969. Despite paying the entire purchase price, David neglected to transfer the suit property in favour of Mwangi. Mwangi took possession of the suit property in the year 1970 and developed the same. He remained in exclusive possession of the suit property and upon his demise in the year 2008 his family continued possession of the same. In total, Mwangi and his family have been in possession of the suit property for over 39 years.

5. On the other hand, the 1<sup>st</sup> respondents disputed the applicants’ possession. They averred that even if the applicants were in possession, they had recently entered into possession in the year 2005 and had not accrued any prescriptive rights over the property. On her part, the 2<sup>nd</sup> respondent was enjoined as an interested party by virtue of a purchaser’s interest over the suit property. Apparently, she entered into a sale agreement with the 1<sup>st</sup> respondents for the sale of the suit property and paid the agreed deposit. According to her, the applicants were not in possession at the time the sale agreement was concluded. They only claimed the suit property when she begun subdividing the property.

6. It seems that after hearing the evidence of the parties, the trial Judge directed the Deputy Registrar to visit the suit property and prepare a report tabulating her findings. In her report she concluded that due to the presence of thick bushes the suit property had not been occupied in a long time. Furthermore, there were newly constructed structures on the property. Based on the said report and the evidence tendered, the trial Judge found that the applicants’ had not proved that there were in open, continuous and adverse possession of the suit property for a period of over 12 years. She found that the applicants’ possession was not open but was done secretly because the 1<sup>st</sup> respondents were unaware of the same. As a result, she dismissed the applicants’ suit by a judgment dated 27<sup>th</sup> January, 2017.

7. As expected the applicants’ filed a notice of appeal against the said decision. They subsequently filed the application before us praying for the aforementioned order. The grounds in support of the application are that the intended appeal is arguable. Expounding on the arguability, the applicants’ relied on the draft memorandum of appeal which was annexed to the application. They contended that the intended appeal would be rendered nugatory in the event the injunction sought is not granted. There was a real likelihood that the respondents’ would evict them from the suit property and dispose of the same. In their opinion, the respondents would not suffer any prejudice if the order sought was granted.

8. Mr. Muthui, learned counsel for the applicants, submitted that it was not in dispute that the applicants were in possession of the suit property. In his view, knowledge of the applicants’ possession by the 1<sup>st</sup> respondents could be direct or indirect. All that was required to be determined was whether the 1<sup>st</sup>

respondents had sufficient means of knowing about the applicants' possession. He took issue with the findings made by the Deputy Registrar whom he thought had no jurisdiction to do so. He argued that the sale between the respondents was illegal simply because the Land Control Board Consent had not been obtained. Mr. Muthui urged that the applicants intended to expeditiously dispose the intended appeal.

9. Mr. Mwangi, learned counsel for the 1<sup>st</sup> respondents, submitted that the trial Judge found as a fact that the applicants were not in possession, and therefore, adverse possession could not arise. He argued that the applicants had failed to demonstrate that the appeal was arguable and that the same would be rendered nugatory if the order sought was not granted.

10. Mr. Kinyanjui, learned counsel for the 2<sup>nd</sup> respondent, in opposing the application, claimed that damages would adequately compensate the applicant in the unlikely event that they suffered any loss.

11. We have considered the application, affidavits on record, submissions as well as authorities cited by counsel and the law. The jurisdiction of this Court under **Rule 5 (2) (b)** of the Rules follows a well beaten path. That jurisdiction is original and discretionary. There are twin principles that the applicants must satisfy before they can be granted an order thereunder. The first is that the applicants must demonstrate that they have a good and arguable appeal that is deserving consideration before this Court. The second is that they ought to satisfy the court that the appeal, if successful, would be rendered nugatory should the order of injunction not be granted. These principles are well settled and have been restated in several decisions of this Court. See **Patel -vs- Transworld Safaris Ltd [2004] eKLR & Patrick Mweu Musimba -vs- Richard N. Kalembe Ndile & 3 Others [2013] eKLR.**

12. Taking into account that we must not make definitive or final findings of either fact or law at this stage as doing so may embarrass the ultimate hearing of the intended appeal, we find that the intended appeal is arguable. Whether or not the learned Judge failed to appreciate what amounts to open, continuous and adverse occupation; whether or not the Deputy Registrar had jurisdiction to make the findings she did; and whether or not the learned Judge erred in relying on the findings made by the Deputy Registrar on the issue of possession, are some of the issues which in our view ought to be considered in the intended appeal.

13. This Court while discussing the nugatory aspect in **Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 Others [2013] eKLR** expressed itself as follows:-

***“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.”***

In addition to the foregoing, we remind ourselves that we must carefully weigh the competing claims of both parties and each case must be determined on its own peculiar facts. See **Reliance Bank Ltd -vs- Norlake Investments Limited (2000) 1 EA 227.**

14. The applicants claim to have been in possession of the suit property for over 39 years while the 1<sup>st</sup> respondents are the registered owners of the suit property. It is also not lost to us that the respondents have entered into a sale agreement over the suit property and the 2<sup>nd</sup> respondent has even paid the requisite deposit. It is more likely that unless the injunction is granted, the suit property, which is the substratum of the intended appeal, will be transferred to the detriment of the applicants, rendering the appeal nugatory. In our view, the circumstances of the case call for the preservation of the suit property.

15. Accordingly, we allow the application and grant the injunction sought for a period of six months, which period we consider as sufficient for the determination of the intended appeal. In the event, the appeal is not determined within the said time frame, the applicants are at liberty to apply for extension of the same. Costs of the application shall abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of March, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**