



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

CIVIL APPLICATION NO. 50 OF 2016 (UR 35 OF 2016)

BETWEEN

LOISE NJERI & 9 OTHERS.....APPLICANTS

VERSUS

JOSEPH MAINA KAMAU.....RESPONDENT

(Being an application for injunction restraining the respondent either by himself or through his agents, servants employees and/or any one acting on his behalf from evicting or threatening to evict the applicants from all those parcels known as Maragua/Ridge 259, Maragua/Ridge/260 Maragua/Ridge 261, Maragua/Ridge/263, Maragua/Ridge 264, Maragua/Ridge/265 Maragua/Ridge 266, Maragua/Ridge/267 Maragua/Ridge 268, Maragua/Ridge/269 pending lodging, hearing and determination of an intended appeal from ruling and orders of the High Court of Kenya at Nyeri (Honourable Lady Justice L.N. Waithaka) dated 26th May, 2016)

In

Environment & Land Court Case

No. 423 of 2014

RULING OF THE COURT

The applicants **Loise Njeri; Peter Kariuki; James Irungu Macharia; Mwangi Gatheyu; Peter Ndungu; David Maina Gichingiri, Eunice Nyokabi Muiruri, Mbuthia Kahiga and John Ngugi Muiruri** filed a Notice of Motion dated the 26th day of July, 2016 against the respondent. They seek orders to stay further proceedings in Nyeri High Court Environment and Land Case No. 423 of 2015; and an order of injunction to restrain the respondent either by himself or through his agents, servants and or any one acting on his behalf from selling, offering for sale, advertising, disposing, transferring, alienating evicting the appellants from or in any other way dealing and interfering with all those parcels of land known as Maragua/Ridge/259-269, pending hearing and determination of their intended appeal. The application is predicated on **rule 5(2)(b)** and **42** of the Court of Appeal Rules, 2010. It is anchored on the grounds on its body and a supporting affidavit together with annexures thereto. It has been opposed by a replying affidavit deposed by **Joseph Maina Kamau** on the 21st day of November, 2016.

Learned counsel, **Miss Grace Mutindi** instructed by the firm of **B.M. Musyoki** advocates, submitted that the applicants have all along lived on parcel Number Maragua/Ridge/39A (the suit parcel) since 1950; that one **Kamau Ngure** the deceased father of the respondent (the deceased) threatened them with eviction prompting the filing of Nyeri HCCC No. 222/2012 subsequently numbered ELC 423 of 2014 (the suit). In the said suit, the applicants claimed entitlement to the suit property subsequently subdivided into parcel numbers Maragua/Ridge/259-269 (the suit parcels). During the pendency of the suit, the respondent successfully moved the High Court seeking an order to strike out the suit on account of its being *res-judicata*, prompting the intended appeal. It is the applicants' contention that they have an arguable appeal as their main argument has all along been that the suit property which has now been parceled resulting in the suit parcels was totally distinct from the respondents parcel number Maragua/Ridge/50; that they are apprehensive that the respondent's major reason for parceling the suit property is to have it disposed off to 3rd parties and if such alienation is carried through the intended appeal will be rendered nugatory.

To buttress their submissions, the applicants cited the cases of **Agnes Wambui Karingu versus Joreth Limited and Another [2011] eKLR; Duncan Nduracha versus Fuad M. Muhammed and 2 Others [2011] eKLR and John Gachie Gichimu and twenty others versus Mukua Tutuma & another [2010] eKLR** all on the principles that guide the Court on the exercise of its mandate under **rule 5(2)(b)**

with regard to the granting or withholding of an injunctive relief.

In response, the respondent through learned counsel **Kibuka Wachira** submitted that it is true that he successfully took out a Notice of Motion dated the 13th day of July, 2015 seeking to strike out the suit on the grounds that it was *res-judicata*. According to him, the deceased was allocated land parcel number Maragua/ Ridge/50 measuring forty four (44) acres, while **Mwangi Katheyu**; the 5th applicant; **Muiruri Njoroje**, the late husband of the 8th applicant **Eunice Nyokabi Muiruri**, **Mbuthia Kahiga** the 9th applicant, **Gichigiri Njima** the late father of **David Maina Gichingiri** the 7th applicant; **Macharia Mugo** the late father of **James Irungu Macharia**, the 4th applicant and **Peter Kariuki Kuria** the 2nd applicant were variously allocated land parcels numbers Maragua/Ridge/27-30, on which they settled. It was not until 1968 when the applicants or persons through whom they claim invaded the deceased's land and with the connivance of settlement officers purported to excise 11.6 acres from the deceased's land, which action prompted the deceased to successfully file Nyeri HCCC No. 252 of 1983 against **Mwangi Gatheyu** the 1st applicant; the husband of the 8th applicant **Eunice Nyokabi Muiruri** and the 9th applicant **John Ngugi Muiruri**. The deceased obtained orders of eviction against the three intending to evict them from land parcel number Maragua/Ridge/39A which had allegedly been excised from the deceased's land but which did not exist on the ground.

The three pleaded with the deceased to allow them to peacefully vacate the land on their own, to which the deceased acceded. Instead of vacating peacefully, they brought in the other applicants or persons through whom they claim and put up more structures on the disputed portion and also moved to file a flurry of suits in Murang'a, Thika and Nairobi. ELC Case number 423 of 2014 which was struck out at the instance of the respondent was one such suit.

On the basis of the above background, the respondent submits that the applicants' intended appeal is not arguable. Neither will it be rendered nugatory as parcel number Maragua/Ridge 39A to which they purport to lay a claim does not exist on the ground; and the earlier suit pursuant to which eviction orders were issued though involving only three leaders of the current applicants, the subject matter is the same and parties are re-litigating in the same position.

In reply, **Miss Mutindi** reiterated the earlier submissions that the intended appeal is arguable as the parcel of land the applicants claim is distinct from the respondents' land and that the respondent is trying to forcefully evict the applicants from the portion of land they are rightfully entitled to.

We have given due consideration to the rival pleadings and submissions set out above. The principles that guide the exercise of our jurisdiction under the above provisions with regard to the granting or otherwise of a relief of stay or an injunctive relief have now been crystallized by a long line of decisions of this Court. We take it from **Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR** wherein this Court while considering an application under **Rule 5 (2) (b)** expressed itself as follows:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5 (2) (b) the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR as follows:

In dealing with Rule 5 (2) (b) the Court exercised original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court.

v. The discretion of this Court under Rule 5 (2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii. 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.

viii. An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.

x. 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.

xi. 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.

xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

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

We have perused the draft memorandum of appeal annexed to the application. In our view, issues as to whether the disputed parcel of land namely Maragua/Ridge/39A exists on the ground, distinctly from Maragua/Ridge/50; and whether the doctrine of *res judicata* operates to

bind the six of the nine applicants who were not initially party to the earlier proceedings are arguable. As observed by the Court in **Agnes Wambui Karingu versus Joreth Ltd and another** (supra), an arguable point does not connote one that must or will succeed, but one that will invite a response from the opposite party.

As for the second ingredient, the applicants' apprehension that the disputed parcel has now been parceled into parcel numbers Maragua/Ridge/259-269; and that there is a likelihood of these being disposed off to 3rd parties during the pendency of the intended appeal, when considered in the light of the respondents insistence on his right to carry through the execution of the High Court judgment, cannot be wished away as unfounded.

The upshot of the above is that we find merit in this application. It is allowed in terms of prayer 2 & 4 thereof, on condition that the intended appeal shall be filed within sixty (60) days of today's date failing which the injunctive orders shall automatically lapse.

Costs shall be in the intended appeal.

DATED AND DELIVERED AT NYERI THIS 5TH DAY MARCH 2017.

P. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR