IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & A. K. MURGOR, JJ.A)

CIVIL APPLICATION NO. NAI. 55 OF 2017

BETWEEN

HELIDA ASIKO…….…..……. APPLICANT

AND

MARACELIN A ODAWA …..……..…….... 1ST RESPONDENT

THE COMMISSIONER OF

LANDS…….……..…..……2ND RESPONDENT

THE ATTORNEY GENERAL……..…..……..……3RD RESPONDENT

(*Being an application for injunction and stay of proceedings from the judgment of the High Court at Kisumu (Kaniaru, J.) delivered on 8th September, 2016*

in

Environment and Land Court No. 80 of 2015)

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RULING OF THE COURT

[1] ***The applicant, Helida Asiko*** has brought this Notice of Motion lodged on 19th June 2017, seeking an order of injunction to restrain the respondents either by themselves or their servants, agents or anyone whomsoever claiming title or acting on their behalf from remaining in occupation, continuing to occupy or doing any act on land parcel known as Kisumu/ Muhoroni/1630 alias Kisumu/ Muhoroni/1040 *(the suit property)* pending the hearing and determination of this application, and a further interim order of injunction to restrain the respondents either by themselves or their servants, agents or anyone whomsoever claiming title or acting on their behalf from remaining in occupation, continuing to occupy or doing any act on the suit property pending the hearing and determination of the appeal. Further orders sought are, an order staying any and all proceedings further to the order of Kibunja, J dated 31st May 2017 pending the hearing and determination of this application as well as the appeal.

[2] A brief background to this application is that, the applicant claims at all times that she was allocated

the suit property in 1974, and that sometime on 22nd February 1993, she realized that the Lands Office had fraudulently changed the parcel number from Kisumu/Muhoroni/1630 to Kisumu/Muhoroni/1040 without her knowledge, and had transferred it to the respondent. The respondent had then trespassed on the suit property, and had cleared and destroyed the applicant's bananas and sugar cane. The applicant sought a declaration that the purported allotment was unlawful and against public policy, and further sought the cancellation or recession of the title, and prayed for a permanent injunction restraining the 1st respondent from trespassing or occupying or interfering with the suit property.

[3] In its determination, the High Court dismissed the applicant's suit in its entirety. It is this decision that has provoked this application and an intended appeal to this Court.

[4] The motion herein was brought on the grounds that the applicant had appealed against the decision of the High Court, and that the appeal would be rendered nugatory if the appeal was allowed; that the appeal had a high chance of success; that the applicant risked losing the land upon which she had been farming for the past 43 years; that the 1st respondent was in the process of evicting her yet, he was a trespasser who was assisted by local administrators to grab the applicant's land without the due process of land allocation being followed.

[5] The application was supported by the applicant's affidavit sworn on 14th June 2017 where it was deponed that she is the owner of the suit property, and that the 1st respondent had fraudulently obtained it and had registered it as land parcel Kisumu/ Muhoroni/1040, forcing her to file suit for its recovery; that the High Court had found in favour of the 1st respondent; and she had since appealed against the decision.

[6] On 6th June 2017 or there about, the applicant further deponed that her advocate has received a threatening letter demanding that she vacates the suit property; that she had since filed for a stay of the proceedings and all the consequential orders of the High Court, which application was dismissed by the lower court.

[7] The applicant further deponed that she is living in constant fear of forceful eviction following the 1st respondent's threats, and that unless the Court comes to her aid, she will suffer irreparable damage for which compensation would not be sufficient.

[8] In a replying affidavit sworn on 10th July 2017 by Serfina Aoko Ouma, the administratrix of the estate of the Marcelin Odawa, it was averred that the appeal had no chance of success, and that there was nothing to show that the applicant would suffer any damage or harm.

[9] ***Mr. Mwamu,*** learned counsel for the applicant submitted that the appeal is arguable as this was a suit where it was alleged that the suit property had been fraudulently changed from land parcel Kisumu/ Muhoroni/1630 to Kisumu/ Muhoroni/1040, and for which the Land Registrar was unable to provide an explanation during the proceedings in the lower court; that the suit property had not at anytime been adjudicated, and had this happened, it would have been apparent that the applicant was in occupation of the land. Counsel concluded that the learned judge failed to properly evaluate the evidence, and had he done so, would have reached a different conclusion.

[10] Learned counsel for the respondent, ***Mr. Yogo,*** opposed the application and submitted that the suit was hinged on fraud and adverse possession, and that the learned judge correctly found that land parcel Kisumu/ Muhoroni/1640 did not belong to any individual, but to the government; that the learned judge also found that adverse possession could not be claimed against the government, or a government entity and furthermore that, fraud was not proved.

[11] Counsel continued that the dispute concerned two parcels of land, and that Kisumu/Muhoroni/1040 had not been allocated to any person; that the applicant and the respondent are claiming two separate portions within the scheme and; that there was no discretion for the court to exercise in this case.

[12] In the case of ***Malcom Bell vs Hon. Daniel Torotich Arap Moi and another Civil Application No.***

Nai 342 of 2005, this Court outlined the principles to be applied in a ***rule 5 (2) (b)*** application thus;

> ***"The jurisdiction of the court under rule 5 (2) (b) above, is not only original, but is discretionary; and as such must be exercised on the basis of sound principles. Two main principles guide the court in its exercise of that discretion, namely for the applicant to succeed, he must not only show he has an arguable appeal or that his intended appeal is not frivolous but also that unless granted an injunction, stay of decree or further proceedings, as the case may be, his appeal or intended appeal, if successful will be rendered nugatory. Several authorities were cited to us, among them,*** *National Irrigation Board vs Mwea Rice Growers Multi-Purpose Co-operative Society & Another, Civil Application No. NAI. 153 of 2001 (83/01 UR); Municipal Council of Kisumu vs Nella Bhanubhai Patel T/AChemhard Agencies, Civil Application No. NAI 29 of 2001 (16/2001 UR)* and the *Standard Limited vs G.N. Kagia & Co. Advocates, Civil Application No. NAI 193 of 2003*. ***We have read them all and we agree that they set out the correct principles to be applied."***

[13] As to whether the intended appeal is arguable, the applicant's case is that the learned judge failed to evaluate and analyse the evidence, and in so doing, failed to find that the suit property was fraudulently changed from parcel number Kisumu/Muhoroni/1630 to Kisumu/Muhoroni/1040. It was also the applicant's contention that the learned judge misapprehended the evidence in so doing arrived at the wrong conclusion that the suit property belonged to the government, and furthermore failed to appreciate that the provisions of the *Land Adjudication Act Cap 284* were not adhered to.

[14] We do not consider the issue of whether or not the learned judge evaluated and analysed the evidence to be frivolous. In our view this is an arguable matter, and only one arguable issue will suffice to satisfy the first principle. See ***Chris Bichage vs Richard Nyagaka Tongi & 2 others [2013] eKLR.***

[15] On the second principle, that is whether the appeal would be rendered nugatory in the event the appeal were to succeed, from the record it is apparent that the applicant is in occupation of the land, otherwise the respondent would not be seeking to evict her. The applicant has filed a Notice of Appeal to this Court evidencing her intention to appeal against the decision of the High Court. On the one hand, since she is in occupation, and was to be evicted before the appeal is heard and determined, then the appeal would be rendered nugatory in the event that her appeal were to succeed. We do not consider that the respondent will be unduly prejudiced, as if on the other hand the respondent were to succeed in the appeal, the suit property would still be in existence and she would be entitled to evict the applicant. We think it prudent for the current prevailing situation on the suit property to be maintained pending the hearing and determination of the intended appeal.

[16] Accordingly, we grant, an injunction and a stay of proceedings in the High Court in terms of the Notice of Motion lodged on 19th June 2017. We further order that the appeal be filed within 60 days from the date hereof and that costs be in the intended appeal.

It is so ordered

Dated and Delivered at Eldoret this 27th day of July, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.