



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CIVIL APPLICATION NO. 56 OF 2017 (UR 38/2017)**

**BETWEEN**

**LAWRENCE MUSANGO OKETCH ..... FIRST APPLICANT**

**PETER OPIYO ..... SECOND APPLICANT**

**JOYCE WANJAWA ..... THIRD APPLICANT**

**AND**

**KAREN ENTERPRISES LIMITED ..... RESPONDENT**

***(Application for injunction and stay of proceedings in the High Court of Kenya at Kisumu, (Majanja, J.) dated the 23<sup>rd</sup> day of May, 2017***

**in**

**CIVIL SUIT NO. 59 OF 2005**

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

**RULING OF THE COURT**

**[1]** The applicants **Lawrence Musango Oketch, Peter Opiyo** and **Joyce Wanjawa** herein referred to as the applicants have moved this Court by way of a notice of motion dated 15<sup>th</sup> June 2017, in which the applicants seek inter alia an order of interim injunction restraining Karen Enterprises Limited (*the respondent herein*), or anyone acting on their behalf from encroaching, trespassing, disposing off, selling, occupying or evicting the applicant from land parcel known as IR 67384 LR. NO.16345/Kisumu Municipality (*herein the suit property*), pending the hearing of an intended appeal against the judgment of the High Court sitting in Kisumu HCC No. 59 of 2005. The applicant also seeks to have the proceedings in the Kisumu High Court case stayed pending the hearing and determination of the appeal.

**[2]** The applicants are aggrieved by the judgment of the High Court in which they were ordered to vacate the suit property within 30 days, and also restrained from any further interference with the respondent's possession of the suit property.

**[3]** The applicants maintain that the suit property has been in the possession of their families through themselves and their fore fathers for the last 150 years; that the grant of lease to the respondents in regard

to the suit property was irregular, illegal and unconstitutional and fraudulent. The applicants fear that unless the orders sought are granted, the respondents may evict them from the suit property which would rendered them homeless and vagabonds hence their plea to the Court to come to their assistance by restraining the respondents from evicting them from the suit property; and that it is in the interest of justice to give them an opportunity to pursue their intended appeal.

[4] Learned counsel, **Mr. Mwamu, J. A.** who argued the application on behalf of the applicant, informed the Court that the applicant has already filed an appeal challenging the judgment of the High Court. Counsel explained that the appeal raises the issue of jurisdiction, as the High Court did not have the jurisdiction to hear land matters. Counsel further submits that the respondent obtained a certificate of lease for the suit property irregularly as the government compulsorily acquired the suit property for public purposes.

[5] The application is opposed through a replying affidavit sworn by the respondents advocate, **Issac E. N. Okero.** Counsel reiterates that the High Court gave judgment in favour of the respondents and ordered the applicants to vacate the suit property, and that the appeal is frivolous as it is predicated on a belated challenge to the Courts jurisdiction. In arguing the application, Mr. Okero submitted that there were no arguable issues arising from the appeal upon which the application was anchored, and therefore the applicant had not met the conditions provided under **rule 5 (2) (b)** of the **Court Rules.** He dismissed the challenge against the jurisdiction of the High Court in hearing the dispute between the applicant and the respondents over the suit property contending that the High Court had jurisdiction pursuant to the transition provisions of the Constitution. Counsel argued that the applicants had failed to discharge the burden of proof in establishing an indefeasible title, and that they had come before the Court with unclean hands.

[6] Relying on **Charles Kirathe Kiarie and 2 Others v the Administrators of the Estate of John Wallace Mathare (deceased) and 3 Others (2015)eKLR** Supreme Court application No. 1/2014; and **King Motors Limited v Shell & BP (Malindi) Kenya Limited (2005) eKLR.** Counsel urged the Court to dismiss the appeal.

[7] The applicants ' motion having been brought under Rule 5(2)(b) of the Court Rules, the principles upon which such an application will be granted has been restated by this Court severally. For instance in **Civil Application No. 94 of 2014 (Ur 77 Of 2014) Harshmukrlal Virchand Shah & 2 Others v Investments and Morgages Bank in which** the general principles on which the Court would base its unfettered discretion in an application under **rule 5(2)(b)** were identified as, first, that the appeal should not be frivolous or the applicant must show that he has an arguable appeal; and secondly, that the Court should ensure that the appeal, if successful, should not be rendered nugatory. Thus the applicants must satisfy this court first that their appeal raises arguable issues; and secondly, that if the order of stay of execution or interim injunction that is sought is not granted the intended appeal will be rendered nugatory.

[8] With regard to whether the applicants appeal raises arguable issues, the applicant availed a draft memorandum of appeal wherein six grounds of appeal have been raised. A perusal of the memorandum of appeal shows that grounds 1 and 2 raise the issue whether the High Court had jurisdiction to hear and determine the dispute over the suit property. Although it would appear that this issue was not raised in the High Court, it is evident to us that jurisdiction is an issue of law that can be raised at any stage. Both counsel submitted at length on this issue, and this is a clear indication that this is an arguable issue that will have to be canvassed and ruled on in the appeal. Another arguable issue is the issue of compulsory acquisition of the suit property and whether the respondents irregularly acquired the suit property.

[9] On the second condition regarding the nugatory aspect, the subject matter of the appeal is the suit property. The learned Judge issued an order for the eviction of the applicants. If the order of stay and interim injunction is not issued the applicants stand the risk of losing occupation and further, a danger of the suit property being disposed off and this will obviously render their appeal nugatory.

[10] In our considered view, the applicant has satisfied the requirement of **Rule 5(2)(b)** of the **Court Rules.** Accordingly, we allow the applicants motion and issue order of interim injunction and stay of the

judgment of the high Court as prayed in prayer 3 and 5 of the motion respectively, subject to the applicant filing and serving the record of appeal within 60 days from the date hereof, and the appeal being listed for hearing within twelve months from the date of filing of the record of appeal. Costs of this application shall be costs in the appeal.

Those shall be the orders of the court.

**DATED and Delivered at Eldoret this 27<sup>th</sup> day of July, 2017.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**