



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GATEMBU, MURGOR & SICHALE, JJ.A)

CIVIL APPLICATION NO. 49 OF 2015

BETWEEN

JANE JEPTOO SAWE APPLICANT

VERSUS

ESTATE OF SYLVESTER KIMAGUT SANG

Represented by

JENNIFER CHEBET SANG RESPONDENT

(An application for stay of execution of the Judgment of the High Court of Kenya at Kitale, (Hon. E. Obaga. J.) dated 5th May, 2015

in

ELC NO. 122 OF 2012)

RULING OF THE COURT

1. The applicant seeks, under Rule 5(2)(b) of the Rules of the Court, for an order to stay execution of a decree passed on 5th May 2015 in Kitale Environment and Land Case No. 122 of 2012 by which that court ordered her to vacate the property known as Title Number Kaplamai/Kachibora Block 2/Mateket/95 having declared the same to be the registered property of the late Sylvester Kimagut Sang.

Background

2. In a plaint presented to the Environment and Land Court at Kitale on 28th September 2012 in Land Case Number 122 of 2012, Jennifer Chebet Sang as a representative of the estate of Sylvester Kimagut Sang sued the applicant seeking a declaration that the late Sylvester Kimagut Sang is the sole registered owner of the property known as Title Number Kaplamai/Kachibora Block 2/Mateket/95; that the applicant has no proprietary interest in that property; and that the applicant be ordered to move out from the property failing which she should be forcefully evicted. There was also a vague prayer for “a permanent injunction” that did not specify the nature of injunction that was being sought.

3. In her defence, the applicant contended that her late husband, Gideon Bore, purchased 6 acres of the property from the late Sylvester Kimagut Sang under three separate agreements dated 28th April 1983, 1st April 1985 and 29th April 1985; that she was legally occupying the 6 acres and was not a trespasser; that having been in continuous occupation since 1983, she is entitled to the property by way of adverse possession.

4. Having heard the suit, the court (E. Obaga, J) delivered judgment on 5th May 2015 and held that the applicant could not claim the 6 acres of the property on the basis of agreements dated 28th April 1983, 1st April 1985 and 29th April 1985 as the same became void for want of land control board consent; that neither the applicant nor her late husband had been in possession of the 6 acres peacefully for 12 years; that the filing of an action by Jennifer Sang, the wife of the late Sylvester Kimagut Sang, against Gideon Bore, the husband of the applicant seeking to stop him from selling the property “effectively stopped time from running.” The learned Judge said that, “it is clear that time stopped running in favour of the [applicant] and or her husband when the [respondent] filed a case seeking to have back the land her husband had sold to Gideon Bore.” The court proceeded to allow the suit and to dismiss the plea for adverse possession.

5. Dissatisfied with the judgment, the applicant filed a notice of appeal on 11th May 2015. On 24th September 2015, the applicant filed the present application before this Court.

The application and submissions by counsel

6. During the hearing of the application before us, learned counsel for the applicant Miss. Khaoya, M. I. referred us to the application and to the affidavits and urged us to grant a stay of execution of the judgment and decree considering the applicant has been in possession of the property since 1983; that although the respondent commenced execution and demolished the applicant’s houses on the property, the applicant has invested heavily on the property and has maize and trees that she should be allowed to harvest; that the status quo should be maintained as there are weighty issues for consideration during the hearing of the substantive appeal; that the intended appeal will be rendered nugatory if we do not allow the application.

7. Opposing the application, learned counsel for the respondent Mr. P. N. Kiarie referred us to the replying affidavits and submitted that the intended appeal is not arguable; that the title to the property was not issued until 1995; that the applicant’s husband Gideon Bore died in 2005 by which time 12 years on the basis of which a claim for adverse possession could be asserted had not expired; that time could not run in favour of the applicant before the death of her husband before which she could not independently and of her own right sustain a claim for adverse possession. Mr. Kiarie further submitted that an earlier application for stay of execution by the applicant before the ELC court was dismissed; that there is nothing to stay as the applicant was evicted from the property on 29th April 2015; that in the circumstances the applicant’s application is overtaken by events and should be dismissed with costs.

Determination

8. We have considered the application, the supporting and further affidavits, the replying and further affidavits and the submissions by counsel. In an application of this nature, 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. As this Court stated in **Ishmael Kagunyi Thande v HFCK Civil Application No. Nai 157 of 2006**:

“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.”

9. Based on the draft memorandum of appeal attached to the application, we do not think that the intended appeal is frivolous. There is for instance the question whether the action commenced by Jennifer Sang, the wife of the late Sylvester Kimagut Sang, against Gideon Bore, the husband of the applicant seeking to stop him from selling the property stopped time from running for purposes of the claim for adverse possession. We bear in mind that an arguable appeal is not one that must necessarily succeed, but is simply one that is deserving of the Court's consideration. [See **Dennis Mogambi Mong'are vs. Attorney General & others [2012] eKLR**].

10. Although we do not think the intended appeal is frivolous, the difficulty is that the judgment intended to be appealed from has already been executed and the applicant evicted from the property. The applicant deposes in her further affidavit sworn on 9th May 2016 that the eviction order issued by the court was given effect on 29th April 2016 with the assistance of the police. This occurred after the court delivered its ruling rejecting the applicant's application for stay of execution in the lower court. Considering that the object of Rule 5(2)(b) is the "***preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals***" [per Githinji JA, in **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011**], the order for stay of execution that the applicant seeks, has been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose.

11. The result is that the application fails and is hereby dismissed. As regards costs of the application, we think each party should bear their own costs of the application.

Orders accordingly.

Dated and delivered at Eldoret this 29th day of July, 2016.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR