



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, SICHALE & OTIENO-ODEK, J.J.A)**

**CIVIL APPLICATION NO. NAI. 129 of 2015**

**BETWEEN**

**CAROLINE AWINJA OCHIENG ..... 1<sup>st</sup> APPLICANT**

**DAVID ZACHARIA OYOLO ..... 2<sup>nd</sup> APPLICANT**

**AND**

**JANE ANNAN MBITHE GITAU ..... 1<sup>st</sup> RESPONDENT**

**PETRONILLA NJERI NGAARA ..... 2<sup>nd</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI ..... 3<sup>rd</sup> RESPONDENT**

***(An application for stay of execution of the judgment and decree of the Land and Environment Court at Nairobi (J. L. Ongoto J.) dated 7<sup>th</sup> May 2015***

**in**

**2012)**

**ELC Case No. 694 of**

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**RULING OF THE COURT**

1. By a Notice of Motion dated 15<sup>th</sup> May 2015 lodged pursuant to **Rules 5(2)(b), 41 and 47** of the Rules of this Court the applicants are seeking *inter alia* stay of execution of the judgment delivered by the Land and Environment Court at Nairobi on 7<sup>th</sup> May 2015 pending the hearing and determination of an intended appeal.
2. The suit property in dispute between the applicants and the 1<sup>st</sup> respondent is an unregistered land being **Plot No. C255** also known as Kayole Plot No. 242. Both parties claim ownership of the same plot of land.

3. The applicants claim is that they purchased the plot in November 2008 from one **Martin Kitambi Robert** for Kshs.180, 000/= and took possession of the property. The 1<sup>st</sup> respondent claims to be the owner of the disputed property since 2001 and that she had been allocated the plot by the 3<sup>rd</sup> respondent, the City Council of Nairobi. The 3<sup>rd</sup> respondent's case is that the applicant was allocated a plot already owned by the 1<sup>st</sup> respondent. The 3<sup>rd</sup> respondent's averment is that the suit property has always been owned by the 1<sup>st</sup> respondent as the bona fide legal owner.
4. Upon hearing the parties, the trial court in a judgment delivered on 7<sup>th</sup> May 2015 declared the 1<sup>st</sup> respondent to be owner of the suit property; the court ordered the applicants to deliver up and or cause to be delivered up vacant possession of the property to the 1<sup>st</sup> respondent and in default execution to issue; and that the applicants do remove or cause to be removed all their structures and goods on the property within 30 days.
5. Aggrieved by the judgment, the applicants have moved this Court seeking stay of execution of the judgment and decree pending the hearing and determination of the intended appeal. The grounds in support are that the intended appeal is arguable and this is discernible from the draft memorandum of appeal attached to the affidavit in support; that the applicants have been in possession of the suit property for the last eight (8) years; that the applicants bought the suit property for Kshs. 180,000/= and have effected developments thereon; that the applicants and their children have sentimental and emotional attachment to the property which is their matrimonial home; that if the applicants are evicted from the property, they stand to suffer irreparable emotional and sentimental loss; that eviction would result to the physical damage and destruction of structures and developments made by the applicants on the property; that this Court should opt for the lower rather than the higher risk of injustice that may affect the substratum of the appeal.
6. The 1<sup>st</sup> respondent by way of replying affidavit opposes the application for stay. It is deposed that the intended appeal is not arguable and has no merit because the applicants did not prove that Martin Kitambi Robert who allegedly sold the suit property to them had a title to the property; that no document was produced to prove the title of Martin Kitambi; that Martin Kitambi has never owned the property and he had no title to pass to the applicants. Counsel submitted that the applicants are seeking an equitable remedy before this Court yet they have not come to court with clean hands; that the applicants have not disclosed that they were convicted of a criminal offence of forcible detainer of the suit property contrary to Section 91 of the Penal Code at the Makadara Chief Magistrate Court in Criminal Case No. 2985 of 2009; that the applicants are in illegal occupation of the property; that no prejudice will be suffered by the applicants if they are evicted from the property because any loss or damage suffered can be quantified and given monetary compensation.
7. The 2<sup>nd</sup> respondent by her replying affidavit stated that she has no interest in the suit property and is not affected personally in any way in respect of the prayer touching on eviction from the property; that she is non-suited in the matter; that she lays no claim over the property; that the applicants were not innocent purchasers for value of the property; that the applicants application does not meet the threshold for granting of stay of execution; that the applicants have not demonstrated that they have an arguable appeal; that the 1<sup>st</sup> respondent has a superior title to the suit property and possess a superior document namely a formalization card from the 3<sup>rd</sup> respondent; that the applicants have engaged in deliberate non-disclosure of material facts and or misrepresentation of facts and this disentitles them to any equitable relief from this Court; that the Kayole Matopeni Squatters and Police Resettlement Scheme which was allocating parcels of land to squatters never sold any of its parcels of land to the applicants or any other party and the scheme land was never for sale.
8. At the hearing of this application, learned counsel Mr. K. O. Nyende appeared for the applicants while learned counsel Ms Lillian Njuguna appeared for the 1<sup>st</sup> respondent and learned counsel Mr.

Miyare appeared for the 2<sup>nd</sup> respondent.

9. Counsel for the applicants urged this Court to find that the twin principles for grant of stay orders had been established; it was emphasized that the intended appeal was arguable because the applicants who are in possession of the suit property are bona fide purchasers for value; that the trial court ignored the fact of possession which confer upon the applicants an equitable beneficial interest over the suit property; that the 1<sup>st</sup> respondent never produced title documents that became formally marked as exhibits before the trial judge to prove her ownership or title to the suit property; that if stay orders are not granted the intended appeal will be rendered nugatory as the applicants shall be evicted from the property; that if evicted, the applicants will suffer irreparable losses that are unquantifiable; that the order of the trial court requires that the buildings and structures developed and put up by the applicants on the property be demolished; that demolition will alter the nature and character of the property which is the substratum of the intended appeal rendering the said appeal nugatory.
10. Counsel for the 1<sup>st</sup> respondent urged us to find that the intended appeal was not arguable and that the nugatory aspect had not been established. It was submitted that the applicants have not come before this Court with clean hands as they did not disclose the existence of a criminal conviction for forcible detainer of the suit property; that a criminal appeal is pending before the High Court and this has not been disclosed to this Court; that a magistrate court of competent jurisdiction has found the applicants guilty of forcible detainer of the suit property; that the 1<sup>st</sup> respondents right to the suit property, ownership and possession of the suit property has been confirmed and established by the magistrate's court in the criminal case and the High Court in the civil case the subject of this appeal; that the applicants are not bona fide purchasers without notice; that the applicants must have had knowledge that **Martim Kitambi** who allegedly sold them the plot had no title to pass; that the 1<sup>st</sup> respondent has a superior right to ownership of the suit property; that during trial before the High Court, the applicants never produced any document to prove their title. On the nugatory aspects of the intended appeal, it was submitted that any damage or loss suffered by the applicants was quantifiable and could be given monetary compensation; that the developments on the suit property are simple temporary iron sheet structures that can be valued and compensated in monetary terms.
11. Counsel for the 2<sup>nd</sup> respondent associated with submissions made by the 1<sup>st</sup> respondent and urged us to consider the contents of the replying affidavit deposed by the 2<sup>nd</sup> respondent. It was submitted that the application for stay was opposed as the intended appeal was not arguable; that the applicants never purchased the suit plot; that the 1<sup>st</sup> respondent has a superior title to the applicants; that the applicants are guilty of deliberate non-disclosure of material facts and misrepresentation and this disentitles them to any equitable relief from this Court.
12. We have considered the application, the grounds in support thereof, the replying affidavits, submissions by counsels and the law. For the applicants to succeed, they must satisfy the principles that the intended appeal is arguable; is not frivolous and that unless stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory - see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838**; **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**.
13. A notice of appeal has been filed and a draft memorandum of appeal is attached to the supporting affidavit. In the draft memorandum, the intended grounds of appeal are that the learned judge erred in law and fact by failing to analyze and evaluate the evidence before him; the judge erred in allowing the 1<sup>st</sup> respondent's claim to possession of the suit property whereas no document from the 1<sup>st</sup> respondents was produced in evidence and marked as exhibit in the case; that the judge ignored a material fact that the applicants were in possession of the suit property and were innocent purchasers for value; that the judge erred in law and fact by referring to the testimony of

a witness in a criminal case as corroborating the 1<sup>st</sup> respondent's case whereas such witness did not testify before him; that the judge erred by requiring the applicant to prove payment of purchase price and title or ownership by the seller of the suit property beyond balance of probabilities.

14. Our consideration of the draft memo of appeal and submissions by both counsel convince us that an arguable point is disclosed in the intended appeal. How the applicants came to be into possession of the suit property and the legal consequences thereof is *prima facie* an arguable point that need consideration and determination; this aspect of possession is critical noting that the suit property is an unregistered plot of land with no title documents; the legal consequences of the allegation that the 1<sup>st</sup> respondent did not formally produce any document that was marked as an exhibit is a matter for re-evaluation of the evidence on record and whose legal consequences is an arguable point that needs consideration and determination.
15. On the nugatory aspect, the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their submissions conceded that if stay is not granted, the applicants shall be liable for eviction from the suit property. The respondents urged this Court to find that any loss or damage suffered by the applicants upon eviction is quantifiable and could be compensated in monetary terms. In contrast, the applicants urged us to find that if evicted, they stand to suffer unquantifiable sentimental and emotional loss and the substratum of the suit property shall be destroyed.
16. We have considered the applicant's submission; sentimental and emotional attachment to property *per se* is not a ground for grant of stay orders. (see **Joseph Gitahi Gachau & another -v- Pioneer Holdings (A) Limited & Others Nairobi Civil Appeal No. 124 of 2008**).
17. In this case, we are convinced that eviction and subsequent demolition of structures and re-developments of the suit property shall damage and alter the nature, character and substratum of the intended appeal. *Prima facie* in law and equity, in the absence of documents of legal title, possession is nine-tenths ownership and we are minded to preserve possession by the applicants until the arguable points disclosed are determined in the intended appeal. Preservation of the suit property will cause no prejudice to either party; the 1<sup>st</sup> respondent is not in possession and if the intended appeal is not successful, the 1<sup>st</sup> respondent will be at liberty to enter and take possession thereof.
18. We bear in mind that both counsel submitted that criminal proceedings relating to ownership of the suit plot were instituted in which the 1<sup>st</sup> respondent was the complainant and the applicants the accused persons; that in the criminal case, the applicants were convicted and there is an appeal whose judgment is pending before the High Court. This Court cannot be averse to the likelihood that the outcome of the criminal appeal shall have a bearing on the intended appeal. For the various reasons stated above, we are satisfied that if stay orders are not granted, the intended appeal shall be rendered nugatory as the substratum of the appeal may be altered, damaged or destroyed.
19. Accordingly, the Notice of Motion dated 15th May 2015 has merit. We hereby grant and order stay of execution of the judgment dated 7<sup>th</sup> May 2015 and the decree consequential thereto pending the hearing and determination of the intended appeal. Each party shall bear his/her costs in this application.

***Dated and delivered at Nairobi this 31<sup>st</sup> day of July, 2015***

**M. K. KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**