



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MARAGA, MWERA & G.B.M. KARIUKI, JJ.A.

CIVIL APPLICATION NO. NAI. 10 OF 2014 (UR.5/2014)

BETWEEN

- 1. JEDIDAH WAMBUI KARANJA**
- 2. MARTIN THIRIMBU KARANJA** (*legal representative of*
- 3. MARY NJOKI KARANJA.....****APPLICANTS**

AND

PETER NDIRANGU KINUTHIA.....**RESPONDENT**

(Application for stay of execution from the judgment and decree of the High Court of Kenya at Nairobi (Waweru, J) dated 18th December, 2013

in

H.C.S.C. NO. 1678 OF 2002)

RULING OF THE COURT

1. Though the applicants have not stated the legal provisions under which their notice of motion dated 28th January, 2014 is brought, it is clear to us that it is brought under **Rule 5(2)(b)** of the **Court of Appeal Rules**. It seeks a stay of execution of the decree arising from the judgment of Waweru, J delivered on 18th January, 2014 in Nairobi HCSC No. 1678 OF 2002.
2. Basing herself on the averment in the affidavit in support of the application, **Jedidah Wambui Karanja**, the 1st applicant submitted that together with the 2nd applicant and their families, she lives on the piece land known as **Title No. Muguga/Gitaru/805** (Plot No. 805) on which there are three buildings and the graves of their parents and siblings. If the stay they have sought is not granted, they will be evicted there from and thus suffer irreparable loss. She contends that **Title No. Muguga/Gitaru/1705** (Plot No. 1705) does not exist on the ground and that the plot in dispute is Plot No. 805.
3. In opposition to the application, Peter Ndirangu Kinuthia, the respondent, swore a replying affidavit in which he rubbished the application as frivolous as the applicants have no arguable appeal. Relying on the averments in the replying affidavit, Ms Mate, learned counsel for the respondent, argued that in execution of the decree arising from Waweru, J's judgment dated 18th

- January, 2013, the applicants were evicted from Plot No. 1705. The respondent immediately took possession of the same and fenced it. In the circumstances the application has been overtaken by events.
4. Ms Mate dismissed the applicant's assertion that Plot No. 1705 does not exist on the ground. She said that piece of land is vacant and is different from the applicant's piece of land which is Plot No. 805. The applicants' houses and the graves of their loved ones are on Plot No. 805 in which the respondent has no interest. In the circumstances, she concluded, the applicants' intended appeal is not arguable and even it was, the same will not be rendered nugatory. She therefore urged us to dismiss this application with costs.
 5. We have considered the matter. As is usual, for an application under Rule 5(2)(b) of the Court of Appeal Rules to succeed, the applicant has to satisfy the Court that he has an arguable appeal and that if stay is denied, his appeal, if successful, will be rendered nugatory. These principles have been stated in numerous decisions of this Court on applications brought under the above provision.
 6. A perusal of the record in this application shows that parcel **Title No. Muguga/Gitaru/265** that belonged to the late Amos Kinuthia, was subdivided into three equal portions which were given **Title Nos. Muguga/Gitaru/803,804 and 805**. Plot No. 803 was transferred to the deceased's son known as Geoffrey Ndungu Kinuthia, Plot No. 804 to the respondent while Plot No. 805 was transferred to the original defendant/applicant.
 7. Sometimes later several pieces of land in Muguga location were compulsorily acquired by the Government for the construction of Nairobi/Nakuru Highway and the respective owners were accordingly compensated.
 8. The dispute in the case giving rise to this application relates to the compulsory acquisition of Plot Nos. 804 and 805 which border each other. According to the applicants, the respondent's entire Plot No. 804 was compulsorily acquired and the respondent was duly compensated for it. After that, the respondent colluded with surveyors and the Kiambu District Land Registry officials and curved a portion out of the applicant's Plot No. 805 which they registered as Plot No. 1705 in the respondent's name.
 9. The respondent on the other hand contended that only one third of his Plot No. 804 was compulsorily acquired after which the remainder was registered as Plot No.1705 in his name.
 10. After considering the evidence on record, Waweru, J agreed with the respondent and found that contrary to the applicant's contention, Plot No. 1705 is not a fictitious piece of land fraudulently curved out of Plot No. 805. The two are distinct and separate and that Plot No. 805 belongs to the applicants while Plot No. 1705 belongs to the respondent.
 11. As the applicants intend to challenge that finding, we find that they have an arguable appeal. We however, wish to point out that as this Court has in previous decisions, many without number, held, an arguable appeal is not one that will necessarily succeed. So the applicants should not misunderstand us and start celebrating that their appeal will necessarily succeed. It may or may not succeed.
 12. On the second criterion of whether or not the applicant's intended appeal, if successful, will be rendered nugatory, we have no hesitation in holding that it will not. The applicants have not disputed the allegation that they were evicted from Plot No.1705 and that the respondent has taken possession of the same. Their contention is that Plot No. 1705 does not exist on the ground and that even if it does, it was excised from Plot No. 805 and it is therefore part of their parcel No.805. Whatever finding the bench that will hear the intended appeal will make, it is clear to us that the parties are at the moment occupying separate and distinct portions. Whether those portions are part of one piece of land as the applicants contend or two separate pieces of land as the respondent contends, we cannot say. As we have pointed out, that issue will be determined by

the bench that will hear the appeal.

13.Whichever way the matter is ultimately determined, the applicants' intended appeal willnot be rendered nugatory. If the applicants' intended appeal succeeds, the land will still be there and the respondent will be evicted from Plot No. 1705 that he is now occupying and the same will be given to the applicants. Granting a stay will mean evicting the respondent from that piece of landwhich he is already in possession of.

14.The applicants having failed to satisfy us that if stay is not granted their intended appeal will be rendered nugatory, we hereby dismiss their notice of motion dated 28thJanuary, 2014. Costs of this application shall be in the intended appeal.

DATED and delivered at Nairobi this 30th day of May 2014.

D.K. MARAGA

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true

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DEPUTY REGISTRAR