



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)**

**CIVIL APPLICATION NO. 4 OF 2014 (UR 2/2014)**

**BETWEEN**

**WILLIAM LERIKAN KONCHELLAH .....1ST APPLICANT**

**NICHOLAS LEKIRERE NTURU ..... 2ND APPLICANT**

**AND**

**JULIUS TABARAI OLE MAITO TAMPUSHI ..... RESPONDENT**

*(An Application for stay of execution and injunction pending the hearing and determination of Civil Appeal No. 29 of 2013 from the Judgment and Decree of the High Court of Kenya at Kisii (Sitati, J.) dated 21st February, 2013*

**in**

**H.C.C. NO. 315 OF 2010)**

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

**RULING OF THE COURT**

This is an application brought by way of Notice of Motion dated 5th February, 2014 and filed on 7th February 2014. It is brought pursuant to Rule 5 (2) (b) of this Court's Rules and is seeking only two Orders which are:

*“1. That pending the hearing and determination of the Applicants' Civil Appeal No. 29 of 2013, there be a stay of execution and/or further execution process in Kisii High Court Civil Case Number 315 of 2010.*

*2. That the costs of this application be provided for.”*

The grounds in support of the application are in a summary that if the application is not granted, the respondent will proceed to erect new fences and to draw new map reflecting the new fences before the appeal already filed is heard and hence the success of the appeal should it succeed will be rendered

nugatory notwithstanding that the applicants' appeal already filed is arguable with good prospects of success in that it was clear from the evidence on record that one parcel of the two parcels of land in dispute was not in dispute at all; that the court failed to appreciate that what was in issue was not a boundary dispute but a claim for title disguised as a boundary dispute; that the trial court erred in relying on the surveyor's report which was not a complete document per se and which had no evidential value as surveyor did not fix the boundary on the ground and that the boundary as appreciated by the trial court left no room for any claim based on trespass. There was an affidavit in support of the application sworn by the first applicant which on the main resonated the grounds in support of the application.

In response, the respondent in a replying affidavit sworn on 7th July, 2014 deponed that the application is an abuse of the court process in that the orders sought in the Notice of Motion have been overtaken by events as the execution sought to be stayed had taken place and did take place nine days after the Civil Appeal had been filed; that on 20th August, 2013 the applicants moved the High Court seeking stay of orders but failed to disclose to that court that execution was actually taking place as on the same date; that the auctioneer who conducted the eviction exercise pursuant to the trial court's judgment delivered on 21st February, 2013 filed report in court on 22nd August, 2013 and that application for stay in the High Court was subsequently dismissed in a ruling delivered on 18th October 2013; that subsequently this application was filed, and thereafter another application was again filed in the superior court for injunction but that was also dismissed on 27th June 2014 and that the application has been made nearly one year after the judgment complained about and as the execution has already taken place, granting the order could amount to returning the applicant to where he had been evicted from.

Before us Mr Gichaba, the learned counsel for the applicants has referred us to the Memorandum of Appeal in *Civil Appeal No. 29 of 2013* and submitted that the learned Judge erred in law in treating the entire matter that was before her as a boundary dispute whereas it was in fact a dispute over a claim of land. He further submitted that it was an arguable point as to whether the court had jurisdiction to entertain the matter that was before it and that as judgment was issued as prayed for in the plaint, it meant that the second appellant whose land was not shown in evidence to have been in dispute, was also adversely affected by the judgment. He thus in a summary submitted that the Civil Appeal already filed was arguable. That being so, Mr. Gichaba further argued that execution, part of which he contended was still proceeding should be stayed for if the appeal succeeds, such success would be rendered nugatory as the respondent will have erected new fences and will have drawn new maps that will permanently deface the disputed parcels. A copy of Memorandum of Appeal in *Civil Appeal No. 29 of 2013*, is annexed to the record before us.

Mr. Marintat, the learned counsel for the respondent, in his response submitted that the application and the orders sought have been overtaken by events as execution has taken place, and the applicants have been evicted as per the decree from the judgment delivered by the High Court. Mr. Marintat said it was not true that only fences were removed as alleged by the applicants. He referred us to the respondent's affidavit and to a copy of eviction report dated 20th August, 2013 duly signed by one **Joseph Bartore (SP)** Sub County Commander Transmara West as proof that full eviction had taken place. Finally, he submitted that the eviction was complete and appropriate title issued.

We have considered the above, but first, brief facts. In a plaint in *HCCC No. 315 of 2010*, the respondent herein, **Julius Tabasai ole Maito Tampushi**, sued the appellants, **William Lerikan Konchellah** and **Nicholas Lekirere Nturu**, praying for judgment against the two for:-

“(a) A declaration that the defendants have encroached onto the plaintiff's parcel No. TRANSMARA/OSINONI/234 to the extent of 12 acres and as per the District Land Registrar's report dated 19th October, 2010.

(b) An order of eviction to evict the defendants from the plaintiff's parcel No. TRANSMARA/OSINONI/234.

c. An order of permanent injunction to restrain the defendants jointly and severally from encroaching into the plaintiff's parcel No. TRANSMARA/OSINONI/234 or any other portion

thereof.

d. *General damages for trespass.*

*(e) An order that the District Land Registrar, Transmara District do fix the boundaries between the plaintiff's parcel No. Transmara/Osinoni/234 and the defendant's parcels Nos. Transmara/Osinoni/213, 2 and 217 as per his report dated 19th October 2010.*

*(f) Costs of this suit and interest thereon.”*

The applicants opposed that plaint and denied the allegations therein in a joint defence filed on 15th November, 2010. They in particular challenged the District Land Registrar's report, the basis of the respondent's prayers, contending that that report dated 19th October, 2010 was irregular, fraudulent and was otherwise void. They sought striking out of the respondent's plaint or its dismissal. That suit was fully heard by the High Court sitting at Kisii. In a judgment delivered on 21st February 2013, the learned trial Judge (*R. Sitati, J.*) entered judgment for the respondent who was the plaintiff as prayed in the plaint. In particular the decree went further and stated as follows

***“(i) The Defendants are hereby restrained from interfering and from encroaching onto the plaintiff's parcel No. TRANS- MARA/OSINONI/234 or any portion thereof.***

***(ii) The 1st Defendant shall vacate the encroached portions of the plaintiff's suit property WITHIN NINETY (90) DAYS from the date of delivery of this judgment failing which he shall be evicted therefrom.***

***(iii) No damages are granted as the plaintiff failed to adduce evidence on the claim.”***

The above is what prompted the applicants to file Notice of Appeal which was dated 26th February 2013 and thereafter they filed Record of Appeal in *Civil Appeal No. 29 of 2013*. For some unexplained reasons, it was only after they had filed the Notice of Appeal and Record of Appeal that the applicants found it appropriate to file this Notice of Motion.

The above are the salient aspects of this Notice of Motion before us. We have considered the record before us, the Notice of Motion together with the grounds appended to it and the affidavit in support of it. We have considered the replying affidavit together with all annexures to it. We have considered the able submissions by the two learned counsel before us, and the judgment. Finally, we have considered the law as regards the principles that guide this Court when considering an application such as this one before us, brought under rule 5 (2) (b) of the Court of Appeal Rules.

The law as regards the guidelines the court will consider when considering an application brought pursuant to Rule 5 (2) (b) of this Court's rules is now well settled. The applicant has to demonstrate two matters to the satisfaction of the court. Both must be proved and proof of one only will not be enough to secure the orders of stay as sought here. First, the applicant has to demonstrate that the appeal he has filed as is the case here or which he intends to file is not a frivolous one, that is to say, that the appeal is arguable and second, that if the application is not granted and eventually the appeal or the intended appeal succeeds, such success will be rendered nugatory. See the court's decision in the case **Reliance Bank Ltd vs Norlake Investments Ltd (2002) I EA 227**. As we have state these two limbs must both be satisfied before such orders can be granted.

We have perused and considered the Memorandum of Appeal annexed to the Record before us which is the Memorandum of Appeal in *Civil No. 29 of 2013*. The first ground challenges the jurisdiction of the trial court and cites the provisions of **Section 21** of the Registered Land Act Chapter 300 laws of Kenya (*now repealed*). We have no doubt in our minds that that is indeed an arguable issue and which would require this Court to ventilate. It is also in our view, an arguable point as to whether the matter that was before the trial court was a boundary dispute or a claim for title. When one is considering a dispute in respect of twelve acres of land, that issue becomes clearly an arguable issue. We do not need to add

any more. In law even one arguable dispute suffices and we are persuaded that the *Civil Appeal No. 29 of 2013* already filed raises arguable points. We need to make haste and add here that an arguable point is not necessarily a point that will succeed on appeal. Far from it. An arguable point is a point that needs to be ventilated by the court and may after both sides are heard be decided either way.

The second limb causes us some difficulties. This is the issue as to whether the success of the appeal, if it succeeds, will be rendered nugatory by our refusal to grant this application. The order sought in the Notice of Motion is that pending the hearing and determination of the appeal, there be a stay of execution and/or further execution process of the orders issued by the High Court. We are not being asked to issue any injunction orders to stop the respondent from selling or in any way dealing with the suit premises. We are not being asked to issue orders of inhibition against Registrar from making any entries in the Register against the land. We are being asked to issue stay of execution orders. Yet the respondent says and it is not disputed that the execution has already taken place and we are shown the auctioneer's report on the same. That being the case what are we to stay? Mr. Gichaba says there are some other matters that could be stopped, Mr. Morintat says no part of execution remains and the auctioneer's report supports him. In our view, the law is clear, courts do not act in vain. As Mr. Gichaba has not shown us substantive part of execution that is still pending, and as we see now, we cannot make orders of stay of execution for the same will be orders in vain.

In our view, as we have stated, both limbs must be satisfied before the orders of stay of execution, or injunction or stay of proceedings can issue. Here though satisfied that the appeal is arguable, we see no proof that the success of the appeal, if it succeeds will be rendered nugatory if we refuse the application, for that order has been overtaken by events. The applicants can only blame themselves for delay in filing this application.

In conclusion, the application cannot succeed. It is dismissed with costs to the respondent.

**Dated and Delivered at Kisumu this 19th day of September, 2014.**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**