



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 322 OF 2012

BETWEEN

FLORENCE ATIENO ONGORE (*suing as the*

Legal Administratrix of

SAMWEL ONGORE OBUYA – DECEASED).....APPLICANT/APPELLANT

AND

- 1. MIGORI LAND DISPUTES TRIBUNAL (AWENDO DIVISION)**
- 2. NYANZA LAND DISPUTES APPEALS COMMITTEE**
- 3. THE ATTORNEY GENERAL**
- 4. PETER OTIENO OKELLO.....RESPONDENTS**

(An application for injunction and stay of execution from the judgment and decree of the High Court of Kenya at Kisii (Makhandia, J.) dated 15th July, 2011

in

H.C. PETITION NO. 5 OF 2011)

RULING OF THE COURT

The application dated 20th December, 2012 and expressed to be brought under **Rule 5 (2) (b)** of this Court's Rules, **Sections 3A** and **3B** of the Appellate Jurisdiction Act and all enabling provisions of the law, seeks the following substantive orders: -

"2. That a temporary injunction to issue restraining the 4th respondent, his agents, servants and/or workers from selling, disposing, charging, sub-dividing and/or interfering with land parcel No. North Sakwa/Kamresi/15 (hereinafter "the subject title") pending the hearing and determination of Civil Appeal No. 10 of 2012 at Kisumu and that the status quo be maintained.

3. That in the alternative, there be a stay of execution in Rongo Principal Magistrate's Court Miscellaneous Civil Application No. 20 of 2010 pending the hearing and determination of the

The application is based on the following grounds that: -

- “(a) Land Parcel No. North Sakwa/Kamresi/15 is the sole property of Samwel Ongore Obuya (now deceased) and the applicant is the Administratrix of the deceased estate.*
- (b) The registration of the deceased as the sole proprietor of the said and is a first registration and therefore indefeasible.*
- (c) The 4th Respondent has no known legal rights over the said land.*
- (d) The 4th Respondent’s claim over the said land is time barred.*
- (e) The Respondents can execute the judgment in Rongo Principal Magistrate’s Court Miscellaneous Civil Application No. 20 of 2010 any time.*
- (f) The Applicant stands to suffer irreparable loss and damage if execution is carried out as it will render the appeal nugatory.*
- (g) The Applicant’s appeal has overwhelming chances of success.*
- (h) The subject matter being land, the Applicant should be allowed to pursue the appeal and have it determined before execution or further proceedings are made in Rongo Magistrate’s Court, Miscellaneous Civil Application No. 20 of 2010.*
- (i) The Respondents stand to suffer no prejudice or loss at all.”*

The facts giving rise to the matter before us were as follows: On 17th March, 2010, the 4th respondent filed a land dispute before the 1st respondent claiming the subject title on the ground that the same was improperly registered in the name of the deceased husband of the applicant to whom the land had been leased by the 4th respondent’s father also deceased. The 1st respondent after hearing the dispute, resolved that the two families share the subject titles in the following proportions: The applicant’s family: 2 hectares and the 4th respondent’s family 1.2 hectares.

The applicant was not satisfied with that decision of the 1st respondent and therefore lodged an appeal to the 2nd respondent which appeal was dismissed on the grounds that the applicant failed to produce documents to prove ownership of the subject title and that the official search and the “*physical observation did not tally.*”

Under the **Land Disputes Tribunal Act No. 18 of 1990** (repealed) the applicant, if he felt aggrieved by the dismissal of her appeal, could still have appealed to the High Court on matters of law. She could also have applied for orders of judicial review before the High Court. She did not do so. Instead she lodged a Constitutional Petition pursuant to **Articles 20, 22, 23 (3) and 40** of the **Constitution, 2010** seeking the following reliefs: -

- a. A declaration that she was entitled to protection under the Constitution.*
- b. A declaration that the 1st respondent had no right and/or jurisdiction to entertain and adjudicate upon proceedings touching and/or concerning ownership of and/or title to the subject title.*
- c. A declaration that the proceedings and decisions of the 1st and 2nd respondents touching and/or concerning the subject title were annulity ab initio and hence unconstitutional.*

- d. *A declaration that the applicant had been arbitrarily deprived of her rights and/or interests over the subject title. Consequently, the applicant's constitutional rights have been infringed upon and or violated.*
- e. *A declaration that the subject title belongs to the estate of Samwel Ongore Obuya (deceased) and restoration of the same to the applicant.*
- f. *An order of judicial review, bringing forth and quashing the proceedings and decisions of the 1st and 2nd respondents vide an order of certiorari.*
- g. *An order of permanent injunction restraining the 4th respondent either by himself, agents, servants and/or anyone claiming under him from entering upon, taking possession and/or in any other way whatsoever, interfering with the applicant's rights over the subject title.*
- h. *An order for damages.*
- i. *Costs.*
- j. *Such orders and/or writs as the court may deem fit and/or expedient to grant.*

The petition was heard by the High Court (Makhandia J.) (as he then was) and was dismissed. In dismissing the petition the learned judge stated as follows: -

"It cannot be unconstitutional conduct merely because a party has lost a case to the other party. In this case, the entire proceedings and subsequent orders issued were lawful. They were neither set aside, varied, reviewed nor rescinded as provided for under the statute creating (sic) the legal regime. How then can enforcement of such orders amount to or cause violation of the applicant's constitutional rights as alleged or at all."

The learned judge then subsequently continued: -

"The 1st and 2nd respondents were lawful tribunals established by an Act of Parliament. They acted within their mandate. There was a procedure provided by the Land Disputes Act as to how to challenge those decisions. Indeed, the petitioner did invoke the procedure and challenged the award through an appeal. She lost. Still the same act (sic) provided for a further appeal to this court. The petitioner has chosen not to take that route. Instead she has chosen to commence fresh proceedings by way of this petition."

The learned judge in the end dismissed the applicant's petition with costs to the 4th respondent and thereby triggered **Civil Appeal Number 10 of 2012**. In the interim the applicant seeks the two reliefs already referred to above.

The application was canvassed before us on 8th May, 2013 by Mr. Athung'a, advocate, who appeared for the applicant and Mr. Nyamori, advocate, who appeared for the 4th respondent.

In brief the applicant contended that her aim was to preserve the subject title pending the disposal of her appeal which, in her view as expressed by counsel, is arguable and unless an injunction as sought is granted, the appeal, if successful, would be rendered nugatory. The applicant further contended that unless the orders sought are granted, she would suffer irreparable loss as the subject title could be subdivided and could be disposed of. Reliance was placed on the case of **Dhiman v. Shah [2008] KLR 165** for the proposition that an order preserving the subject title could be made notwithstanding that the order appealed from was a negative order.

Mr. Nyamori, on his part, submitted that the order of the High Court was not a positive one and could therefore not be stayed and further that the applicant was not claiming land at the High Court and there was therefore no basis for an injunction. Counsel further was of the view that the applicant's appeal did

not raise *bona fide* triable issues but is an attempt to re-open a concluded matter.

We have considered the rival submissions and the background of this matter. Having done so, we take the following view of the matter. The application, as already stated, was brought mainly under **Rule 5 (2) (b)** of this Court's Rules. The jurisdiction exercisable by this Court under that sub-rule is now well settled. The jurisdiction is original and of course discretionary. For an applicant or applicants to succeed he or they must satisfy the twin guiding principles that the intended appeal is arguable, in other words, that it is not frivolous and that unless the injunction or stay is granted the appeal, if it eventually succeeds, will be rendered nugatory. (See **J.K. Industries Ltd v. Kenya Commercial Bank Ltd [1982 – 88] 1 KAR 1688**, **Githunguri v. Jimba Credit Corporation Ltd (No.2) 1988 KLR 38**, **Reliance Bank Limited v. Norlake Investment Limited [2002] 1 EA 128**, **Exclusive Estates v. Kenya Posts & Telecommunications Corporation and others [2005] 1 EA 53**, among others).

So, has the applicant in view of the background we have given and the guiding principles, satisfied the twin principles governing an application of this nature? We keep in mind that the applicant's appeal is yet to be determined and we should be careful not to encroach into the area which will be the domain of the appeal proper. The main issue in the appeal is whether the learned judge of the High Court was right in dismissing the applicant's petition for various declarations on the basis that the applicant's alleged deprivation of her right to land arose from the exercise of statutory duties by the 1st and 2nd respondents.

In the exercise of those duties, the 1st and 2nd respondents could have arrived at decisions amenable to challenge. The applicant indeed challenged the decision of the 1st respondent when he filed an appeal from its decision to the 2nd respondent. But it would not, in our view, be argued that a challengeable decision of the 1st and 2nd respondent would deprive the applicant of his fundamental right to property.

The petition, which the High Court dismissed is regrettably not exhibited by the applicant. The learned judge in his judgment, which has been annexed to the application before us, stated that the applicant had filed the petition pursuant to **Articles 20, 22, 23 (3) and 40** of the Constitution. The first three Articles are respectively on the application, implementation, enforcement and the authority of the courts with respect to the Bill of rights. **Article 40** protects the right to property. The applicant therefore asked the High Court to enforce alleged infringement of his property rights under **Article 40** of the **Constitution of Kenya 2010**. Under **Article 263** of that Constitution, the effective date was the date the Constitution 2010 was promulgated which was 27th August, 2010. We doubt whether proceedings which occurred before that date would be subject to the said Constitution as the Bill of Rights allegedly infringed was not retrospective.

In the premises we have our doubts as to whether the applicant's appeal is arguable. That being so it is not necessary to deal with the second limb of the principle.

The applicant has also sought an alternative order staying execution in Rongo Principal Magistrate's Court Miscellaneous Civil Application No. 20 of 2010, pending the hearing and determination of her appeal. The applicant's appeal is however, not against the decision in the Rongo case. The applicant's appeal is against the decision of the High Court dismissing her petition aforesaid. By that dismissal the learned judge did not order the parties to do anything or to refrain from doing anything. It was not a positive order which can be stayed.

Even if we were to go beyond the scope of the dismissal order and look at the Rongo decision, we note that the decree therein was given on 14th February, 2011 and has not been executed to date yet there is no order of stay in place. This case is therefore distinguishable from the case of **Dhiman v Shah** (supra) where the applicant faced an eviction if an order ensuring he remained on the subject title was not issued.

In the result we must decline to grant the injunction sought or the stay of execution of the decree in the Rongo case. The application is accordingly dismissed. Costs of the application shall be in the appeal.

Dated and delivered at Kisumu this 21st day of June, 2013.

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