IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPLICATION NO. NAI 50 OF 2013 (UR 30/2013)

BETWEEN

FRANCIS SIRMA KIOS ……..……...……...……. APPLICANT AND

KIBORE SIGILAI …….…….…….…….…..... RESPONDENT

(Application for stay of execution pending the lodgement, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nakuru (Emukule, J) dated 18th May, 2012

in

HCCC NO. 151 OF 2004)

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RULING OF THE COURT

This application arises from the disputed ownership of a parcel of land known as *WASEGES/NYAMAMITHI BLOCK 4/57* (the suit property). The parcel is situated in Subukia, Nakuru County and is said to measure approximately 4.46 hectares. The present litigants are administrators of the estates of their respective deceased fathers, who started off this dispute which their sons inherited and are now actively continuing.

The short background to the application is that *Kipkios arap Sijo* (deceased), the father of the applicant herein and *Kibore Sigilai* (deceased), the father of James Kipkoros arap Murgor, the substituted respondent herein, were both shareholders of Ogilgei Farm Company Limited. By virtue of their shareholding, each was entitled to 10 acres of the farm. The actual parcel of land to be allocated to a member was to be determined by a balloting system. That system entailed preparation of a subdivision map in which the farm was parceled into numbered 10 acre plots. Ballots bearing numbers equivalent to those in the subdivision map were prepared and each member was allocated the parcel of land corresponding to the ballot number he had picked. Balloting took place in 1987. The applicant's father declined to participate in the ballot, while the respondent's father did and took plot number 57, which he occupied thereafter and is the current suit property.

In 1989, the applicant's father filed Nakuru Resident Magistrate's Court Civil Suit No. 1039 of 1989 against Ogilgei Farm Company Limited. Pleadings in that suit have not been availed; all there is, is a decree issued on 18th March, 1991 which *inter alia* reads:

"1. That eight acres out of plot number 57 Subukia farm be amalgamated with two acres on which the posho-mill stands, making a total of ten acres to be registered in the name of Kipkios arap Sijo

……

4. That the current allottee of plot number 57 be allocated another plot by the Defendant."

The respondent's father, having been allotted plot number 57 following the balloting, and therefore being a party directly affected by the suit was never made a party of that suit or otherwise involved in it. It is also noteworthy that

by the date of that decree, the suit property had been allotted to the respondent's father who had taken possession and was in occupation, and the same was no longer held by Ogilgei Farm Company Limited. The evidence on record indicates that after the balloting in 1987, the entire Ogilgei farm was distributed to members, save plot No. 100 which was not balloted for. It was left for the applicant's father.

In 1993, the applicant's father moved into plot number 57 and took possession of six and a half acres thereof. On 8th August, 1997, he procured his registration as proprietor of the suit property under the *Registered Land Act, Cap 300 Laws of Kenya, (now repealed)*. The applicant's father next filed Nakuru High Court Civil Suit No. 151 of 2004 seeking a declaration that he was the rightful owner of the suit property, an order for eviction of the respondent's father therefrom, and mesne profits. The respondent's father filed a defence which was later amended to include a counterclaim for cancellation of the registration of the applicant's father as proprietor of the suit property on the ground of fraud, particulars of which were pleaded.

The dispute was heard by Emukule, J. The applicant testified and did not call any witnesses. The respondent also testified and called 2 witnesses who included the officials of Ogilgei Farm Company Limited at the time of the ballot. On 18th May, 2012, the learned judge held that the registration of the applicant's father was fraudulent and dismissed the suit and allowed the counterclaim. He directed the Land Registrar, Nakuru to rectify the register by cancelling the name of the applicant's father and substituting therefor the name of the respondent's father. An application for stay of execution of that judgment was unsuccessful.

On 1st March, 2013, the applicant filed the current Notice of Motion under *Rule 5 (2) (b) of the Court of Appeal rules* seeking an order for stay of execution of the judgement and decree of the High Court of Kenya at Nakuru pending the filing, hearing and determination of an intended appeal. The applicant also prayed for an order that the costs of the application do abide the result of the intended appeal. The grounds upon which the motion is based are that applicant has an arguable appeal raising weighty issues of law and with good chances of success and that if the order sought is not granted, the applicant risks being evicted from the suit property and the intended appeal will be rendered nugatory and a mere academic exercise.

The respondent opposed the motion through a replying affidavit sworn on 3rd June, 2013. He supported the finding and holding of the learned judge and contended that no arguable appeal was disclosed by the applicant. He deponed further that the applicant had other parcels of land namely WASEGES/NYAMAMITHI BLOCK 4/146 AND 147 where he has built his residential houses and that he was merely letting the suit property to third parties. Finally, the respondent contended that in the event of the intended appeal succeeding all that would be required is a mere rectification of the register.

In determining this application, we are required to satisfy ourselves that the applicants have an arguable appeal or an appeal that is not frivolous and that if an order of stay of execution is not granted, the intended appeal will be

rendered nugatory. See *TRUST BANK LIMITED & ANOTHER V INVESTECHBANK LTD & 3 OTHERS, CIVIL APPLICATION NO. NAI 258 OF 1999* and *EAST AFRICAN POWER MANAGEMENT LTD V THE OWNERS OF THE VESSEL "VICTORIA EIGHT" , NBI CIVIL APPLICATION NO. 245 OF 2009.*

The applicant is obliged to satisfy both of these principles; it will not suffice to satisfy only one of them. See *PETER MBURU NDURURI V JAMES MACHARIA NJORE CA NO. 29 OF 2009 (UR 14/2009).*

On whether the intended appeal is arguable, Mr Richard Machage, learned counsel for the applicant did not present any draft memorandum of appeal from which the grounds the applicant intends to argue could be discerned. The only semblance of grounds of appeal presented and urged by Mr Machage are in paragraph 12 of the applicant's supporting affidavits where it is deponed as follows:

> *(i) The trial judge did not actually record all the evidence as tendered before him. He has omitted vital evidence as stated by me.*
>
> *(ii) That I have noted that he laid blame on me especially on the rectification of the member's register yet the alleged documents were never in my possession hence the judge arrived in the wrong decision (sic).*
>
> *(iii) The learned judge refused deliberately to receive my evidence touching on balloting. He refused to record that there were other plots that were never balloted for as it was agreed by members and*
>
> *the directors then that those members who had developed specific*
>
> *portions need not ballot."*

We remind ourselves that at this stage we are not dealing with the merits of the intended appeal. However, if the above are the grounds intended to be urged on appeal, it is very doubtful in our opinion, whether they disclose an arguable appeal with a probability of success because they are primarily an impeachment of the record of the proceedings in the High Court. The part of the record that the applicant presented before us is certified as true copy of the record kept by the Court. The central question is whether the applicant can present a record other than that kept by the court and even if he were able to do so, whether when this Court hears the intended appeal, it will be able to ignore the certified record of the High Court and consider a different record.

But more fatal to this application was the admission by Mr Machage at the hearing of the application that the decree of the High Court has effectively been executed and that the respondent has taken possession of all the arable portions of the suit property and is now cultivating the same. The only point of contention between Mr Machage and Mrs Wanderi, learned counsel for the respondent was whether or not the applicant was still living in a house on the

suit property. In *INTERNATIONAL CENTRE FOR POLICY AND CONFLICT V KAMLESH MANSUKHLAL DAMJI PATTNI & 5 OTHERS, (CIVIL APPLICATION NO. NAI. 87 OF 2013 (UR 57/2013),* this Court reiterated that an order for stay of execution cannot be countenanced where the decree or order sought to

be stayed has already been executed. The Court stated:

> *"There is no doubt that the criminal case facing the respondents was terminated in execution of Mutava J's judgement. The sureties have already been discharged by the court. We are not persuaded that there is anything to stay in this matter".*

See also *KIROP KANDA V GABRIEL BIWOT KANDA & 3 OTHERS, CIVIL APPLICATION NO NAI. 194 OF 2005.*

Accordingly, we are not satisfied that the applicant can, where execution has already taken place, properly invoke *rule 5 (2) (b) of the rules of this Court*. Nor are we, in any event, persuaded that the applicant has presented an arguable appeal with probability of success. Accordingly the Notice of Motion dated 28th February, 2013 is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 18th day of October, 2013.

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR