



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 23 OF 2013

BETWEEN

PETER CHEPKOCHOI MITEIAPPLICANT

AND

ESTHER JELAGAT NG'ENY1st RESPONDENT

BARABARA KIPRUGUT ARAP TANUI2nd RESPONDENT

ISAIAH KIMURGOR TANUI 3rd RESPONDENT

CHRISTOPHER KIPLAGAT YEGO 4th RESPONDENT

(Application for stay of execution from a Ruling of the High Court of Kenya at

Eldoret (S. Munyao, J) dated 19th June 2013

in

ELDOR ET H.C E & L No. 193 OF 2013)

RULING OF THE COURT

The dispute giving rise to the application before us has a long and winded history. We shall not set it out fully in this Ruling. Briefly it involves a parcel of land known as Uasin Gishu/Tapsagoi/93. The Applicant, Peter Chepkochoi Mitei averred in the Plaint before the High Court of Kenya at Eldoret that he was entitled to the said parcel of land registered in the name of the 4th respondent Christopher Kiplagat Yego.

The 1st respondent Esther Jelagat Ngeny is the widow and administratrix of the estate of her late husband Kimayo Arap Ngeny who was initially registered as the proprietor of the parcel of land. The 2nd respondent Barabara Kiprugut Arap Tanui purchased the parcel of land from the said Kimaiyo Arap Ngeny and later transferred the same to his son the 3rd respondent Isaiah Kimurgor Tanui. The parcel of land changed hands yet again when the 3rd respondent transferred it to the 4th respondent.

According to the applicant, in or about 1965 he with his brother Alfred Kiptogom Mitei contributed money and bought a parcel of land known as Nandi/Salient/226. Thereafter, in or about 1974 the two were joined by another brother the late Kimayo Arap Ngeny, contributed money and purchased another parcel of land known as Uasin Gishu/Tapsagoi/ 61. In 1975 the three brothers, in yet another enterprise, put money together and purchased the suit land Uasin Gishu/Tapsagoi/ 93. All the moneys were handled by the late Kimaiyo Arap Ngeny.

The appellant further pleaded that at a family meeting in 1985 it was agreed that the applicant would keep the suit land while Kimaiyo Arap Ngeny would have Nandi /Salient/226 and Kipsogom Mitei would have Uasin Gishu/Tapsagoi/ 61. According to the applicant each brother took possession of the respective parcels of land as agreed but the applicant was to later discover that Kimaiyo Arap Ngeny had registered all the parcels in his own name. Meetings were held which led to Kimayo Arap Ngeny giving up Uasin Gishu/Tapsagoi/ 61 to Kipsogom. The registration of Kimaiyo as proprietor of the suit land was fraudulent for failure to disclose the applicants interest, it was further averred. The applicant therefore filed a suit in the subordinate court at Eldoret being CMCC No. 31 of 1991 which had neither been heard nor determined at the hearing of the matter in the High Court intended to be appealed.

The applicant stated that on 29th March, 2013 the 4th respondent, in the company of police officer's, descended on the suit land destroying houses and crops. The applicant was in the process evicted provoking the suit in the High Court.

Contemporaneous with the Plaintiff was an application by Motion where it was prayed inter alia:

“THAT the 4th defendant/respondent his servants, agents and or any other person whatsoever be restrained by way of a temporary injunction from entering, interfering with, alienating, evicting the plaintiff, damaging or destroying the plaintiff's properties or houses, claiming the use of, ploughing, planting, felling trees, leasing, demarcating, selling, transferring or in any way doing any other thing on or over all that parcel of land known as Uasin Gishu/Tapsagoi/ 93 pending the hearing and determination of this application and the suit subsequently.....”

In the supporting affidavit of the applicant it was stated inter alia:

“29. THAT on 28/3/2013, the 4th defendant /respondent in company of police came to my land and demolished houses and felled trees with impunity and without a court order.

30. THAT on 29/3/2013, the 4th defendant/respondent brought a tractor and ploughed my land and now intends to plant without my consent and to my detriment and that of my family.

31.”

In a Ruling delivered on 19th June, 2013 by Justice Munyao Sila the learned judge dismissed the application directing that the 4th respondent retain possession of the suit land pending hearing and determination of the suit. It is those orders that provoked the applicant to come before us through the Notice of Motion dated 3rd July, 2013. The Motion is brought under Rule 5 (2) (b) of this Courts' Rules and all other enabling provisions of law and is supported by the grounds set out and by the affidavit of the applicant sworn on 3rd July, 2013.

In the Motion it is prayed in the main that there be a stay of execution of the orders of the High Court and that pending hearing and determination of the appeal orders of injunction issue against the 4th respondent restraining him and his agents from interfering with the suit land. It is also prayed that the proceedings in the High Court be stayed pending hearing and determination of the appeal.

The Motion came for hearing before us on 24th July, 2013 when the applicant was represented by learned counsel Mr. Miyienda E. O. The 1st and 4th respondents were represented by learned counsel Mr. N. Tororei while the 2nd and 3rd respondents were represented by learned counsel Mrs. Bor. Counsel for the applicant submitted that the applicant had been in possession of the parcel of land since 1975. Counsel faulted the learned judge for making what counsel thought were final orders in an interlocutory application and urged us to hold in favour of the applicant who would be rendered landless if the judges orders were not put on hold.

Counsel for the 1st and 4th respondents on the other hand submitted that no appeal had been filed and that there was no arguable appeal. In any event, according to counsel, the facts of the case were not agreed as the applicant had stated in an affidavit that he did not reside on the suit land.

Counsel for the 2nd and 3rd respondents submitted that the 2nd and 3rd respondents had been in possession of the suit land and had passed a good title to the 4th respondent. Counsel submitted further that damages would be an adequate remedy if the applicant succeeded in the suit.

We have considered the application, the affidavits and the rival submissions of the learned counsel and the law.

As stated no appeal has been filed.

The law as regards the principles to be applied by this Court when considering applications under Rule 5 (2) (b) of this courts' Rules is now fairly settled by the many decisions that have been rendered by this court. The court in deciding such an application exercises unfettered discretionary powers which cannot be exercised capriciously nor upon the whims of the judge. The court has to be satisfied that the intended appeal, or the appeal, if already filed, is arguable, which is the same as saying that it is not frivolous. The court must also be satisfied that should the intended appeal, or the appeal, as the case may be, succeed, the success would be rendered nugatory should the court refuse to grant the application. See **Republic v Kenya Anti-Corruption Commission & 2 others [2009] KLR 31** where it was held by this court differently constituted:

“ The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb.[emphasis added] [See also this Court's decisions in the cases of RELIANCE BANK LTD v NORLAKE INVESTMENTS LTD (2002) 1EA 227 & GITHUNGURI v JIMBA CREDIT CORPORATION LTD & OTHERS (NO. 2) 1988; KLR 828; WARDPA HOLDINGS LTD & OTHERS v EMMANUEL WAWERU MATHAI & HFCK (CIVIL APPEAL NO. 72 OF 2011[unreported].”

Githinji, J. A recently delivered himself thus in **Equity Bank Limited v West Link MBO Limited Civil Application No. NAI of 2011:**

“It is trite law in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instanceIt is clear that rule 5 (2) (b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

The innovation of the law on the Rule 5 (2) (b) principles has received additional expansion in enactment of Sections 3A and 3B of the Appellate Jurisdiction Act.

Section 3A (1) of the Act provides:

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act.”

Sub-Section 2 provides that in the interpretation of the provisions of the Act the court shall give effect to the overriding objectives of the Act.

Section 3B (1) of the Act provides:

“For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

- (a) the just determination of the proceedings;**
- (b) the efficient use of the available judicial and administrative resource;**
- (c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
- (d) the use of suitable technology. ”**

In considering this expanded jurisdiction this court differently constituted court had this to say in City Chemist (Nbi) & Anor v Oriental Commercial Bank Ltd Civil Application No. NAI 302 of 2008 (UR 199/2008):

“The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attribute's of the overriding objective.”

The said Sections 3A and 3B of the Appellate Jurisdiction Act of course derive their legitimacy from Article 159 of the Constitution which deals with judicial authority.

We must now apply all these principles to the matter at hand to determine whether the applicant has satisfied the said principles so as to be entitled to the orders prayed.

In the supporting affidavit of the applicant already referred to the applicant has averred to the following in addition to the averments we have cited in the affidavit at the High Court:

“13. THAT since then I have resided upon the land although I occasionally reside on the ancestral family land comprising if (sic) 4 acres at Nandi/Koyo /250 which the family agreed to register in my name but I hold it in trust for the entire family (see copy of marked P. C. M. 4).

14. THAT soon after the Honourable Judge vacated the orders of injunction on 19/6/2013, the 4th respondent immediately went to my land demolished all my houses and other erected structures occupied by my children and now my children have been forced to hire some rooms at a nearby centre.

15.

16.

17. That I now pray that the orders of 19/6/2013 issued by the Honourable Judge be stayed in order to stop the 4th respondent from evicting me from my land.

18. THAT I also pray for orders of injunction as prayed herein to restrain the 4th respondent from interfering with my quiet and peaceful possession of the disputed land..”

The applicant has therefore confirmed in the affidavit evidence that he has not only resided some times in his ancestral home but that he was evicted from the suit land after the Ruling of the High Court. We must guard against going into the merits of the suit at the High Court which has not been heard on the merits.

The High Court found that the 4th respondent had a good title to the suit land and that a prima face case had not been established to warrant a grant of an injunction in favour of the applicant. We too do not find it demonstrated that the intended appeal is arguable.

The applicant has in the event failed to demonstrate whether the intended appeal is arguable or whether the orders sought, if not granted, would be rendered nugatory.

In the instant case and without deciding the merits of the intended appeal and only going by what is before us so far, we are of the respectful opinion that the intended appeal is not arguable and would in any event not be rendered nugatory by our failure to grant the orders sought. The effect of our findings is that the application has no merit and we accordingly dismiss it with costs.

Dated and Delivered at Kisumu this 11th day of October 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