



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & NYAMU, J.J.A)

CIVIL APPLICATION NO. NAI. 196 OF 2011 (UR. 128/2011)

BETWEEN

**MARY WAMBUI KAIGUA 1ST APPLICANT
STANLEY MUIGAI KAIGUA 2ND APPLICANT**

AND

**JAMES KURIA MAINA 1ST RESPONDENT
SAMUEL MBOGO KAIGUA 2ND RESPONDENT
GODFREY WAITHAKA MAINA 3RD RESPONDENT**

(Being an application for stay of execution, stay of further proceedings and injunction pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nyeri (Sergon, J) delivered on 17th June, 2011

In

H.C. C. C. No. 64 of 1986)

RULING OF THE COURT

By their notice of motion dated and lodged in this Court on the **27th July, 2011**, the two applicants herein, Mary Wambui Kaigua and Stanley Muigai Kaigua, ask the Court for orders:-

“1. THAT the orders issued by Justice Sergon on 21st October, 2010 and all other consequential orders arising there from be stayed pending the hearing of Applicants’ intended Appeal against the Ruling delivered on 17th June, 2011.

2. THAT there be a stay of execution as well as all other orders pursuant to the Ruling and order by the Honourable Justice Sergon delivered on 17th June, 2011 and 21st October, 2010 pending the filing, hearing and determination of the intended appeal.

3.”

As far as we understand the matter before us, the applicants have filed a notice of appeal against the orders made by Seron, J on the 17th June, 2011, which orders merely rejected an application for review of the orders made on 21st October, 2010. In his Ruling which the applicants propose to appeal against, the learned Judge stated as follows:-

“I have considered the rival submissions plus the material placed before me. Basically the orders sought are those of review. The principles applicable in such applications are well settled.”

The learned Judge then cites the case of NATIONAL BANK OF KENYA LTD. VS. NDUNGU NJAU, C.A. No. 211 of 1996 (unreported) which dealt with the principles of law applicable in an application for review and then concluded as follows:-

“----- After a careful consideration of the matter, I am of the view that there is no error apparent on record. It would appear the motion was filed to frustrate the smooth occupation by the plaintiffs of their parcel of land. The issue raised by the Applicants regarding the discrepancy of the acreage of the portions the (sic) 1st & 2nd houses cannot be said to be an error. -----.

The end result is that the motion dated 17th November, 2010 has no merit, it is dismissed with costs to the plaintiffs.”

So the order of 17th June, 2011 merely dismissed the application which had sought a review of the order made on 21st October, 2010. There is really nothing capable of being stayed with respect to the order of 17th June, 2011. The one of 21st October, 2010 had made several orders, namely:-

“1. THAT the Replying affidavit of JOHN KIHONGE KAIGUA be and is hereby struck out.

2. THAT Mary Wambui Kaigua and Stanley Muigai Kaigua do deliver up vacant possession of the property known as Title No. LOC 16/Mbugiti/1011 to James Kuria Maina (as trustee for Samuel Mbogo Kaigua and Godfrey Waithaka) being the registered owner thereof in accordance with the Decree issued by the Court on 18th November, 1991.

3. THAT the officer Commanding Police Station (OCS) Kirwara Police Station do supervise execution of these Orders of the Court.

4. THAT the Land Registrar, Thika District, do remove the inhibition placed on the title Nos. LOC 16/Mbugiti/1010 & 1011 on 7th July, 2003.

5. -----”

The lands, the subject of the dispute herein were subject to litigation as from 1991 and as a result of the litigation, they were sub-divided and registered in the names of various family members of the late Kaigua Mbogo of whom the applicants are members. The late Kaigua Mbogo had three wives and the court ordered way back in 1991 that Mbogo’s various lands be shared equally amongst the three houses. That appears to have been done and it is not quite correct to say, as the applicants appear to be doing, that if they were to be evicted from Title No. Loc 16/Mbugiti/1011 in accordance with the order of 21st October, 2010, they would be rendered landless. The lands in dispute were sub-divided a long time ago and registered in the names of various family members. The one in issue herein was in fact registered in the name of James Kuria Maina as trustee for Samuel Mbogo Kaigua and Godfrey Waithaka who all appear to be from the first wife (i.e. 1st house) of Kaigua Mbogo.

In these circumstances, we do not see any particular arguable point in the intended appeal of the two applicants. But even if it was to be contended as the applicants did in the High Court and also before us, that the orders of 21st October, 2010 altered the decree made in 1991 and that the alleged alteration constitutes an arguable point, we are not satisfied that our refusal to grant an order for stay in respect of the orders of 21st October, 2010 against which there was no appeal, will render the intended appeal

nugatory. These are family lands and they are registered in the respective names of the members constituting the three houses. There is no evidence that any of the houses proposes to sell or dispose of their portions and it would be wrong for us to continue to keep the respondents out of their portion which admittedly is registered in their names.

That being the view which we take of the matter, the notice of motion lodged by the applicants must fail. We order that the motion be and is hereby dismissed. The costs of the dismissed motion shall be in the intended appeal. Those shall be the Court's orders.

Dated and delivered at Nairobi this 27th day of January, 2012.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.