



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI & BOSIRE, JJ.A)

CIVIL APPLICATION NO. NAI. 122 OF 2010 (UR. 90/2010)

BETWEEN

AGNES WAMBUI KARUNGU.....APPLICANT

AND

JORETH LIMITED.....1ST APPLICANT

MILLICENT WANJIRU NGOTHO.....2ND APPLICANT

(Application for an injunction in an intended appeal from the ruling and order of the High Court of Kenya

at Nairobi (Muchelule, J.) dated 6th May, 2010

In

E. L. C. No. 671 of 2009 (O.S)

RULING OF THE COURT

By her notice of motion brought pursuant to the provisions of **Rule 5 (2) (b)** of the Court of Appeal Rules, Agnes Wambui Kurungu, the applicant, prays to the Court for two orders, namely:-

“(1) -----

(2) THAT a temporary injunction do issue restraining the Respondents whether by themselves, their servants, agents or employees from selling, alienating, transferring, demolishing the Applicants development, evicting the Applicant from premises known as L.R. NO. 13330/48 and also known as Plot NO. 296, Thome Farmers NO. 5 and/or in any way interfering with the Applicant’s quite possession thereof while pending the hearing and determination of this application.

(3) THAT a temporary injunction do issue restraining the Respondents whether by themselves, their servants, agents or employees from selling, alienating, transferring, demolishing the Applicant’s development, evicting the Applicant from premises known as L.R. NO. 13330/48 and also known as plot NO 296 Thome Farmers NO. 5 and/or in any manner interfering with the Applicant’s quite

possession thereof while pending the hearing and determination of the intended appeal.”

It is not quite clear to us if there is any difference between prayers No. 2 and No. 3. Be that as it may, “*the Respondents*” referred to in the two prayers are Joreth Limited (1st Respondent) and Millicent Wanjiru Ngotho (2nd Respondent).

The land, the subject matter of the dispute, i.e. L.R. NO. 13330/48 or Plot NO. 296, Thome Farmers NO. 5, is currently registered in the name of the 2nd Respondent. It was so registered in 2006. The land is in fact a portion of a bigger piece which was originally owned by the 1st Respondent; the 1st Respondent appears to have been a land-buying company, the shareholders of which would be entitled to own a portion of the entire land. The 1st Respondent sold the entire land to Thome Farmers NO. 5 Ltd., which sub-divided the land and distributed it to its shareholders.

The Applicant swore in its supporting affidavit that she had bought the disputed land from one Margaret Thitu Njenga on 11th April, 1986; she paid Kshs.50,000/- for it and took possession of it. In 2009 she realized that the 2nd Respondent had the title deed to the land and on 31st December, 2009 she (Applicant) instituted a suit by way of an originating summons claiming that she had become entitled to be registered as the owner of the land as she had acquired it by way of adverse possession. Since she had taken possession of the land in 1986, by the time she instituted her suit in 2009, she had been in occupation thereof for a period of 23 years. She, therefore, asked the superior court to declare that the title of the 1st and 2nd Respondent’s had been extinguished by her uninterrupted, peaceful and open occupation of the land for some twenty three years.

Muchelule, J rejected the Applicant’s claim principally on the ground that as the 1st Respondent had only acquired the land on 1st January, 1999 and the 2nd Respondent on 13th July, 2009, the minimum 12 years required to enable one to claim adverse possession had not expired and the Applicant could not, therefore, claim adverse possession against any of the respondents. The learned Judge was in effect saying that even if the Applicant had been in occupation since 1986 as she had claimed, that would be irrelevant because the two Respondents were not the registered owners in 1986. In grounds 1 and 2 of the “*Memorandum of Appeal*” annexed to the motion, the Applicant complains:-

“1. The learned Judge erred in failing to appreciate that the prescriptive rights are overriding interests which run with the land irrespective of change of proprietorship or any other dealing with land.

2. The learned Judge erred in failing to appreciate that the Intended Appellant claim was maintainable notwithstanding the registration of the 1st Respondent as the owner in 1999 and the subsequent transfer and registration of the 2nd Defendant (sic) as owner in 2009.”

We think these grounds of appeal are arguable; Mr. Mungai, learned counsel for the 2nd Respondent, admitted as much before us. We are satisfied the Applicant’s intended appeal is an arguable one; it must be remembered that an arguable appeal does not connote one that must or will succeed.

On the issue of whether the appeal will be rendered nugatory if we do not grant the order of injunction sought, we take into account that the Applicant’s structures on the land were demolished and the Applicant is no longer in possession of the land, if ever she had been in physical possession thereof. Mr. Wasuna, lead counsel for the Applicant told us that they only want an order restraining the 2nd Respondent from disposing of the land and preventing her from further developing the land which would have the effect of totally changing its status. The 2nd Respondent told us through her counsel that she has no intention of selling the land as she uses it as her matrimonial home. Taking into account all the circumstances of the case, we think that we ought to issue an order of injunction restraining the 2nd Respondent from disposing of the land and also restraining her from carrying out any further development of the same. In effect the injunction we grant shall maintain the status quo as at the date of this order until the hearing and determination of the appeal. The costs of the motion shall be in the proposed appeal. We

so order.

Dated and delivered at Nairobi this 13th day of April, 2011.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.