IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, ONYANGO OTIENO & VISRAM, JJ.A.)

CIVIL APPLICATION NO. NAI. 310 OF 2010

BETWEEN

NJIRU KITHUA.....APPLICANT

AND

THE HONOURABLE MINISTER OF LANDS.....1ST RESPONDENT
EMBU COUNTY COUNCIL.....2ND RESPONDENT
MBEERE COUNTY COUNCIL.....3RD RESPONDENT
DISTRICT LAND ADJUDICATION OFFICER, MBEERE DISTRICT....4TH RESPONDENT
DISTRICT LAND REGISTRAR, MBEERE DISTRICT.....5TH RESPONDENT
DISTRICT SURVEYOR, MBEERE DISTRICT.....6TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....7TH RESPONDENT

(An application for an injunction from the ruling and orders in the High Court of Kenya at Embu (Karanja, J.) dated 28th September, 2010

in

HIGH COURT PETITION NO. 5 OF 2010)
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RULING OF THE COURT

The genesis of the whole saga that has ended up in this notice of motion before us dated 30th December 2010 and filed on 31st December 2010 is the declaration of Kirima as an adjudication area on 21st July 1972 by the Embu/Kirinyaga Land Adjudication Officer at the instance of the Minister for Lands. Before that land adjudication was originally carried out, the applicant in this notice of motion Njiru Kithua, states in his affidavit in the record that a portion of land measuring 7000 acres had been set aside for 17 clans and leased out to Meka Sisal Development Company which in any event used only 300 acres for cultivation of sisal and left the rest in the hands of the clansmen. The entire piece of land was registered as land parcel No. Mbeere/Kirima/2244. The applicant alleges that that piece for land (the subject piece of land) was thus held in trust for the indigenous residents making up the seventeen clans by Embu County Council, the second respondent in this notice of motion. Meka Sisal Development Company stopped cultivation in 1967 so that by the time Kirima area was declared adjudication area and subject land parcel given the parcel No. Mbeere/Kirima/2244, the entire piece of land had reverted to the seventeen clans. At one time the second respondent resisted adjudication and refused to recognize the alleged trust in favour of the clans and asserted ownership but upon objection by the clans, the District Land Adjudication Officer adjudicated the subject land and awarded the same to the clans jointly. The clans felt aggrieved by the decision of the adjudication officer to award them the piece of land to be owned by the clans jointly as

they wanted the land to be adjudicated in such a way that individual ownership was ensured. Each clan thereafter appealed separately to the Minister against that decision by the District Adjudication Officer. It should be noted, that several procedural stages such as adjudication committee stage etc. were apparently ignored if one is to go by what is in the record before us. Be that as it may, each clan filed an appeal to the Minister as we have stated. These appeals carried similar complaints and in all of them each appellant requested that the entire land be adjudicated in such a way that each individual would have his/her own parcel. That required that the Minister would, if satisfied that the appeals had merit, order that proper adjudication process would start with all the stages and institutions set out in the Land Adjudication Act being put in place. These would be Adjudication Committee, Adjudication Board, Objection Committee and finally the Minister to whom the last appeal would go. However, when the clans appealed to the Minister. The Minister instead of ordering proper adjudication to be done to ensure each individual got his piece of land in his name, decided to allocate the parcels himself. In doing so, he allegedly allocated parts of the land to people who had and could have no valid claims to the land. The applicant claims that in his case, as a result of the erroneous pronouncement by the Minister he was allocated 143 acres only while he was entitled to 477 acres thus 261 acres of his land were erroneously given to another person from another clan. He read ill motive and corruption in the actions of the Minister. He felt the Minister breached the provisions of the repealed Constitution. He moved to the superior court by way of Petition Number 490 of 2008 at the High Court at Nairobi. Later that case proceeded to hearing as Petition No. 5 of 2009 at Embu. The petition was filed pursuant to the provisions of ***section 1, 70(a)*** & ***(c), 71, 74, 75, 77 (a)*** and ***84*** of the Constitution of Kenya (now repealed) and ***rules 11,*** and ***12*** of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006. That petition went before W. Karanja J. who, in a fairly lengthy ruling found it lacking in merit and dismissed it with costs to the respondents and those interested parties who opposed the petition. The respondents were the Hon. Minister of Lands, Embu County Council, Mbeere County Council, District Land Adjudication Officer, Mbeere District, District Land Registrar, Mbeere District, District Surveyor, Mbeere District and the Hon. The Attorney General, being 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents respectively. In dismissing the petition, the learned Judge was of the view that the applicant (petitioner in that petition) had no *locus standi* as the subject land had never been in the name of the applicant; that there was no breach of ***section 117(4)*** of the repealed constitution; that adjudication process was fully carried out to the last level allowed in law and the process did not confer any rights over 334 acres the applicant was claiming and that in any case the matter should have been brought to court as a judicial review matter as it was questioning the jurisdiction of the Minister to act at that stage and in so acting to allocate the land to various individuals himself, an assignment outside the Minister's jurisdiction and not as a constitutional interpretation or constitutional breach matter. There were other matters raised by the learned Judge as additional grounds for rejecting the petition.

The applicant was aggrieved by that decision. He filed a notice of appeal and on 26th November 2010, he filed Civil Appeal No. 314 of 2010 challenging the ruling and as we have stated, on 31st December 2010, he filed this notice of motion in which he is seeking orders:-

"(a) That pending the hearing and determination of his appeal:-

(i) An order do issue restraining any person claiming by virtue of the Minister of Land's award from subdividing, transferring evicting and/or in any other manner interfering with the residents quiet enjoyment and occupation of original Mbeere/Kirima/2244 and all resultant subdivisions and;

(ii) The respondents either by themselves, their agents or servants be prohibited from surveying, demarcating, subdividing and registering any alienation transfer or in any other manner dealing or interfering with the status quo on original Mbeere/Kirima/2244 and its resultant subdivisions,

(iii) An order staying taxation of costs in the superior court.

(b) That costs of this application be provided for."

The application is grounded on two main reasons which are, first, that the applicant has an arguable appeal with good prospects of success in that the learned Judge erred in law in finding as she did, that the

appellant's constitutional rights had not been violated and in failing to consider evidence adduced by witnesses before her. The second ground is that the success of his appeal, were it to succeed will be rendered nugatory by the refusal of the court to grant this application in that the beneficiaries of the Minister's award are not entitled to the land parcels awarded to them; that the appellants livelihood would be severely affected if the award were to be implemented as the undeserving beneficiaries would enter the suit property and destroy the crops, houses and other infrastructure that have taken decades to develop. Mr. Wati, the learned counsel for the applicant submitted that the appeal already filed is arguable and cited many legal issues which he said required this court's ventilation such as whether the learned Judge was right in holding that the matter should have been commenced by way of Judicial Review and not by way of petition on Constitutional breach as was done in the petition before her and whether the Minister's decision was proper or not it being made before the full adjudication process was done in respect of the suit land and whether the appellant had *locus standi* to commence the proceedings. Ms Munyi, the learned counsel for the 1st, 4th, 5th, 6th and 7th respondents opposed the application contending that there was no arguable points in the appeal as indeed according to her, the learned Judge was plainly right that the matter should have been brought by way of Judicial Review and was not a constitutional matter requiring a petition. On the nugatory aspect, Ms Munyi's take was that as the applicant is not in occupation of the suit land, the issue of the success of the appeal being rendered nugatory does not arise. Mr. Okwaro, the learned counsel for the interested parties also opposed the appeal maintaining that the appeal already filed is not arguable as the appeal is seeking status quo of land parcel Mbeere/Kirima/2244 which land is non existent as it had long been subdivided even before the petition in the superior court was filed. According to Mr. Okwaro, the Minister's action came after all processes of adjudication had been carried out and all stages were duly followed. He also, was of the opinion that the matter raised no constitutional issues and if the appellant was offended by the Minister's action, he should have proceeded to challenge it by way of Judicial Review and not by way of petition pursuant to Constitutional Provisions. On nugatory aspect side, Mr. Okwaro submitted that the success would not be rendered nugatory as the land parcel Mbeere/Kirima/2244 is no longer in existence. Further he stated that the orders sought cannot be granted as the land had since been subdivided into over 300 titles and most of the proprietors are not parties to this suit and so the orders would affect them notwithstanding that they have not been heard. In any case, Mr. Okwaro submitted, the appellant has not filed the suit as a representative suit. He is only complaining against two people and he has his 143 acres which would not be affected in anyway by the orders he is seeking to upset.

We have anxiously considered the application, the submissions, the record and the law. The application is brought pursuant to ***rule 5(2) (b)*** of this Court's Rules. That being the case, it is upon the applicant to satisfy us, not only that the appeal already filed is arguable, and is not frivolous, but also that the appeal, if successful, will be rendered nugatory if the orders sought are not granted. In the case of ***Bob Morgan Systems Ltd and another vs. Jones (2004) 1 KLR 194 at page 195*** this Court stated:-

"The powers of the court under rule 5(2)(b), aforesaid are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory."

We are prepared to accept and do accept that the appeal raises arguable points such as whether the matter raised constitutional or judicial review issues or both and as such, whether it should have been brought to court by way of a Judicial Review application as the learned Judge held or by way of a petition pursuant to the provisions of the constitution and the rules made thereunder. The applicant needed to demonstrate only one arguable point and that has been demonstrated.

However, on the second requirement of whether if the appeal was to succeed, the success would be rendered nugatory, our view is that the applicant has not shown that to our satisfaction. First, he had not brought the suit as a representative of all the 17 clans affected. Indeed as Mr. Okwaro rightly pointed out, he is complaining in person only against two people to whom he says parts of his land have been awarded. He does not specifically state what threat has been made to the rest of the suit land. Further, it is stated in the replying affidavit sworn by one Jenard Josia Nyaga, that several hundreds of people are now registered as proprietors of the parcels of land that resulted from the subdivision of the original

Mbeere/Kirima/2244 and three people have developed their pieces of land extensively and thus it could not be proper to interfere with their development when they are not parties to these proceedings. This allegation has not been rebutted by the applicant. Lastly and in any event, land parcel No. Mbeere/Kirima/2244 might no longer be in existence. Any orders of stay or of injunction granted will be in vain. Courts do not act in vain. The invitation to grant orders staying activities on land parcel Mbeere/Kirima/2244 ***and its resultant subdivisions*** is not specific and if acted upon by this Court may end up affecting title holders who may not be parties to the suit and have not been heard. The law cannot allow that.

In the result, as the second requirement of demonstrating that the success of the appeal, if it succeeds will be rendered nugatory has not been met, this application has no merit. It is dismissed with costs to the respondents and to the interested parties represented before us.

Dated and delivered at Nyeri this 8th day July, 2011.

S. E. O. BOSIRE
.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR