



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: O’KUBASU, AGANYANYA & NYAMU, J.J.A.)
CIVIL APPLICATION NO. NAI 92 OF 2010 (UR 67/2010)**

BETWEEN

KIURA KIGUNDUAPPLICANT

AND

- 1. DAVID MURIITHI**
- 2. NJAGI KIGUNDU**
- 3. NJERU KIGUNDU**
- 4. MUCHIRA KIGUNDU**
- 5. CHAIRMAN CENTRAL PROVINCE LAND**

DISPUTE TRIBUNAL

- 6. SENIOR RESIDENT MAGISTRATE COURT
OF KENYA AT KERUGOYA.....RESPONDENTS**

(Being an application for an injunction restraining any interference with ownership and possession with land parcel number Ngariama/Kabare/225 pending the hearing of an appeal lodged on 5th March, 2010

**in
H.C. Misc. C. Appl. No. 5 of 2010)**

RULING OF THE COURT

Kiura Kigundu, the appellant was the registered proprietor of a piece of land known as *Ngariama/Kabare/225*. He disputed over this land at Gichugu Land Disputes Tribunal Court with his brothers, namely, *David Muriithi Kigundu*, *Njeru Kigundu* and *Muchira Njogu*. In an award signed by *Stephen Muriithi* – Chairman of the Panel, *Ernest Kathuri* – member and *Patrick Wamutu* – Secretary, it was decided that each of the brothers as above do receive 1 acre of land each while the remainder, estimated to measure 3 acres was to be retained by the appellant. The award of the elders, No. 24 of 1999 was on 7th December, 2009 recorded as the judgment of the court. The appellant was not amused and he lodged a Judicial Review Application for leave to the superior court at Embu wherein the trial Judge (*Karanja, J.*) perused the file in her chambers on 10th February, 2009 and made an order thereon in the following terms:

“Court:

I have perused the application herein. The same is seeking leave to file for Judicial Review for

certiorari orders in respect of an award which was given by the LDT over 10 years ago. Order of certiorari would certainly not issue against such award. Even if the applicant were to argue that the award of the tribunal was entered as a judgment of the court on 2/6/2009, the application was filed on 10/2/2010 and that is beyond 6 months prescribed by law. This application is therefore bad in law for being time-barred. The same is therefore dismissed.

Aggrieved by the dismissal order the appellant lodged an appeal to this Court on 5th March, 2010 through a home-made memorandum of appeal in which he listed 4 grounds of appeal as hereunder:

“1. THAT the learned Judge erred in law and in fact failing to acknowledge that the appellant constitutional right in respect to his proprietorship right over his land parcel No. Ngariama/Kabare/225 had been breached by the tribunal by virtue of the said tribunal acting outside its statutory powers as conferred by section 3 of Land Dispute Tribunal Act No. 18 of 1990 and otherwise the learned Judge failed to apply her mind to the fact that the Court ought not to enforce an illegality as per the circumstances of this instance (sic) case.

2. THAT the learned Judge in arriving at her decision misdirected herself in law and applied wrong legal principles.

3. THAT the learned Judge in exercising her discretion did not do so in a judicious manner and completely failed to exercise equity in view of the nature of the appellants claim.

4. THAT the Honourable Judge erred in law and in fact by evidently failing to realize that by dismissing the appellant’s application dated 9/2/2010 the appellant was left without a remedy.

Soon after lodging this appeal the appellant also lodged into the Court an application under **rule 5(2)(b)** of the Court of Appeal Rules. It was dated 3rd March, 2010 and lodged in the Nyeri sub-registry of this Court on 9th April, 2010. It sought the following prayers; namely:

“(a) ...

(b) That pending the hearing of an appeal filed on 5/3/2010, this Honourable Court be pleased to grant a temporary injunction restraining the first, second, third and fourth respondents by themselves, servants or agents from selling, disposing, alienating and/or transferring or in any manner interfering with the applicant’s property known as Ngariama/Kabare/225 situated in Kirinyaga District and alternatively the court to restrain the respondent from interfering with the applicant’s quiet occupation, possession and cultivation with the aforesaid land accordingly.

(c) That this Honourable Court be pleased to issue any further orders as may deem fit to grant.

(d) That the cost of the application be provided for in any event.”

That application was based on the grounds set out on the face thereof and also on the affidavit in support thereof. The grounds were that Gichugu Land Disputes Appeals Tribunal had no jurisdiction to deal with the dispute, that the appellant had developed the suit land and his daily activities had been affected during this rainy season; and that there was a danger of the land being registered in the names of the respondents who had sought consent to sub-divide it thus rendering the otherwise merited appeal already filed nugatory. The supporting affidavit, other than the background information given therein had similar grounds as those in the application.

The application was heard by this Court on 19th May, 2011 wherein the applicant who appeared in person stated that since the ruling of the learned Judge was delivered, the respondents had caused the survey of the land but he did not know if they had obtained titles to their portions. **Mr. Wairomo**, learned counsel for the 5th, 6th and 7th respondents submitted that since the tribunal award had already been adopted as the judgment of the court and there was no prayer to quash that adoption in the application, this Court would

be acting in vain if it grants the order of injunction being sought. He submitted that there was no arguable appeal but that if there was, then its result would be rendered nugatory. There were no submissions for 1st to 4th respondents though they did not appear at the hearing of the application though they were served with a hearing notice.

We have perused the record and also heard submissions of the parties. We are not satisfied the record of this appeal is complete because although there is an indication that the dispute was heard by the Central Land Dispute Appeals Tribunal and Gichugu Land Disputes Tribunal (*see ground (1) on the face of the application*) proceedings of the former are not included in the record. But be that as it may, the principles which guide this Court in either granting or not an application under **rule 5(2)(b)** of the Court of Appeal Rules are well settled. An applicant is obliged to show that he has an arguable appeal or that his intended appeal is not frivolous. In addition he is obliged to show that the success of that appeal or intended appeal will be rendered nugatory unless the Court grants him the order of injunction or stay as the case may be; see ***Trust Bank Limited & Anor v Investech Bank Limited & 3 Others - Civil Application No. Nai. 258 of 1999 (UR)***.

In the case giving rise to this application, ***Civil Appeal No. 5 of 2010*** was lodged in Nyeri sub-registry of this Court on 5th March, 2010 and the grounds set out in the memorandum of appeal are substantially on points of law and not frivolous. This certainly makes the appeal arguable. And as Mr. Wairomo, learned counsel for the respondents conceded, in case the appeal is arguable then failure by this Court to exercise its discretion in the applicant's favour its result will be rendered nugatory as his land will be subdivided by the respondents to put the subdivided portions at the risk of being disposed off by the said respondents before the conclusion of the appeal. In the circumstances we consider this to be a fit and proper application where the Court would be inclined to exercise its discretion in favour of the applicant. We therefore allow prayer (b) of the application dated 3rd March, 2010 and direct that the costs thereof shall be in the appeal. It is so ordered.

Dated and delivered at Nyeri this 7th day of July, 2011

E. O. O'KUBASU

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR