



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: O’KUBASU, GITHINJI & NYAMU, J.J.A.)
CIVIL APPEAL NO. 20 OF 2011

TABITHA WAMBUI GITAU1ST APPLICANT
PATRICK NGERE2ND APPLICANT
VERSUS
JULIUS WAGACHA KABUTHIA1ST RESPONDENT
PETER THAIRU KABUTHIA2ND RESPONDENT
JOHN KINYANJUI KABUTHIA3RD RESPONDENT

(An application for injunction from the Judgment and Decree of the High Court of Kenya at Nairobi (Muchelule, J.) delivered on 27th October 2010
in
H.C.ELC. NO. 537 OF 2007 (OS))

RULING OF THE COURT

This is an application for injunction under **Rule 5 (2) (b)** of the Court of Appeal Rules to restrain the respondents from cultivating, utilizing, selling, transferring, disposing, wasting or in any manner dealing with land Reference No. Kiambaa/Kihara/759 and the developments thereon pending hearing and determination of the intended appeal.

The applicants intend to appeal against the judgment and decree of the superior court dismissing their suit (originating summons) claiming title by adverse possession of land parcel No. Kiambaa/Kihara/759. (Parcel No. 759)

Although the applicants have not annexed the pleadings the material facts relating to the dispute have been captured in the impugned judgment of the superior court delivered on 27th October 2010.

The two applicants and the Church Commissioners of Kenya filed a suit against the three respondents claiming respective portions of land title No. Kiambaa/Kihara/760 (parcel 760) after they discovered in the year 2001 that although their respective titles related to original land title No. Kiambaa/Kihara/760 they were nevertheless physically occupying land title No. Kiambaa/Kihara/759.

The applicants did not annex a copy of the title for Kiambaa/Kihara/760 but the respondents did. According to the copy of the register Morris Kungu was the first registered proprietor in 1958; that the land measured 2.3 acres; that the land was transferred to Richard Marimbet in 1998; that in 1999 the land was transferred to two people – Patrick Ngere Waihumbu – holding 0.575 acres and Kamau Kariuki

holding 1.725 acres; that on 4th October 1999 the title was closed on partition into parcel nos. 2888 – 2891. The copies of title deeds annexed show that sub-divisions nos. Kiambaa/Kihara/2888 and Kiambaa/Kihara/2889 were registered in the names of Patrick Ngere Waihumbu and Tabitha Wambui Gitau respectively.

On the other hand, land title No. Kiambaa/Kihara/759 which measures 2.7 acres was first registered in 1958 in the name of Evanson Kamunyo who in turn transferred it to Evans Muhu Njoroge in 1965 who ultimately transferred it to Kabuthu Wagacha. The Judgment of the superior court shows that upon the death of the latter in 1980 his three sons, the three respondents herein, became his legal representatives. The applicants honestly believed that they were physically occupying sub-divisions of the original title no. 760 until the mistake was discovered. Similarly the respondents as legal representatives of Kabuthu Wagacha believed that they were physically occupying land title no. 759. Upon the discovery of the mistake the respondent shifted to land title no. 760 thereby precipitating the present dispute.

Upon hearing the parties the superior court (Muchelule J.) dismissed the originating summons stating that the applicants had failed to prove adverse possession of title no. 760 for 12 years.

The principles on which the court exercises jurisdiction under **rule 5 (2) (b)** of the Court of Appeal Rules do not need repetition having been stated over and over again. Suffice to say that it is a matter for the discretion of the court and that the purpose of an injunction is to maintain the *status quo* of the subject matter of the dispute pending appeal.

The applicants have annexed a draft memorandum of appeal raising eight proposed grounds of appeal. It raises both factual and legal grounds. In making a finding that the applicants had not proved adverse possession for 12 years, the trial judge took into account the period from 1999 when the applicants occupied respective portions to the time of filing the suit. It seems however that the applicants were also relying on the period that their predecessors in title had occupied the suit land. It was also apparent that the respondents' deceased father, Kabuthu Wangacha, has never occupied the land claimed by the applicants since 1968 when he was registered as proprietor. The applicants have developed the respective portions of land that they are physically occupying. In the above circumstances, we are satisfied that the intended appeal is arguable.

The supporting affidavit sworn by Patrick Ngere explains the present occupation and the respective developments made by the respective applicants. He deposes that the applicants had made considerable developments on the subdivision occupied by each including planting trees, erecting dwelling structures, and digging boreholes. He also explains that the respondents have similarly developed the land occupied by their deceased father; that members of respondents family have been buried on the parcel occupied by respondents (i.e. 760) and that the land is now leased to Kamau Gitura . He deposes that the respondents have attempted to take possession before and have damaged the applicants' properties. He believes that the applicants would suffer immense economic loss and irreparable damage if an order of injunction is not granted. We have also considered the facts deposed to by Peter Thairu Kabuthia in the replying affidavit. He denies some of the facts stated in the supporting affidavit. However he states in paragraph 5 thus:-

“That it is true that in taking possession, our late father took possession of L.R. No. Kiambaa/Kihara/760 out of genuine mistake but we rectified the same by moving to our correct land being L.R. No. Kiambaa/Kihara/759.”

This explicitly indicates that the respondents have attempted to forcibly take over the portions occupied by the applicants as claimed by the applicants. Further a copy of a charge sheet annexed to the application indicates that the 1st and 2nd respondents were at one time charged with the offence of maliciously damaging the applicants' houses.

From the foregoing we are satisfied that the applicants would suffer great economic loss if they are evicted from the portions of land that they are currently occupying and further that the intended appeal would be rendered nugatory.

Furthermore, the present occupation of the land is through a mutual mistake by the predecessors in title of the land parcels nos 759 and 760. In the circumstances of this case the applicants would suffer greater loss and more hardship than the respondents if an order of injunction is not granted. Lastly, it is just and equitable that the *status quo* regarding the physical occupation of the respective titles before the error was discovered should be maintained pending appeal.

In the result the application is allowed and an order of injunction in terms of the application is granted pending appeal. The costs of this application shall be costs in the intended appeal.

Dated and delivered at Nairobi this 14th day of October 2011

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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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