**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 352 OF 2009**

**BETH KAARI ……1ST APPLICANT**

**PRUDENCE MUKIRI ….……..2ND APPLICANT**

**AND**

**M'NYERI M'RIMUNYA ....……..RESPONDENT**

***(An application for injunction and stay of execution of the judgment and decree pending the lodging, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Meru (Mary Kasango) dated 25th September, 2009***

**in**

**H.C.C.C. NO. 80 OF 2004)**

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**RULING OF THE COURT**

The undisputed facts of this notice of motion dated 14th December, 2009 and filed on 15th December, 2009, as can be deciphered from the record before us are that the second applicant's husband was the registered proprietor of the suit parcel of land No. Karingani /Muiru/1749. His name was M'Ingetu M'Mwereria. He died on 3rd October 1998. Before he died he had filed Civil Suit No. 147 of 1987 at the High Court at Meru against three other people seeking that he be declared the sole proprietor by prescription or by limitation of Actions Act, of all that 6.916 Acres of land No. Karingain/Muiru/410. That suit was defended and was dismissed with costs on 14th April 1994. The defendants in that suit through their advocates sought to execute for costs awarded. The applicants claim this was fraudulent as the costs awarded was Ksh.15,050 only and one of the advocates for the defendants in that case had been paid much more than that amount to be precise Ksh.50,696/40. Be that as it may, the defendants moved and sold the suit land in this notice of motion by public auction to recover what they maintained were costs awarded them in that suit i.e. No. 147 of 1987. The respondent in this application, M'Nyeri M'Rimunya bought the land. The second applicant, Prudence Mukiri deponed in her affidavit and it is not challenged that even though the respondent bought the suit land before her husband, the then registered owner died, the respondent became the registered proprietor of the subject land after the demise of her husband who as we have stated above, passed on on 3rd October 1998. The second respondent and her

daughter Beth Kaari, the first respondent continued living on the suit land together with several members of their family. The second applicant depones that she was married in 1948 and have lived on the suit land together with her daughter and those other members of her family except other adult members who are now living on their own parcels of land elsewhere. Armed with the titles to the suit land, the respondent, having asked the applicant and her daughter to vacate the land without any success, filed Civil Suit No. 80 of 2004 at the High Court at Meru. In that suit it sought five orders namely:-

***"(a) An order of eviction directing the defendants, their servants, agents and/or employees to vacate land parcel No. Karingani/Muiru/1749 and an order to restrain the defendants from illegally occupying the plaintiff's said parcel of land.***

***(b) Civil damages and mesne profits.***

***(c) Costs of the suit.***

***(d) Interests thereof at court rates.***

***(e) Any other or better relief this Honourable Court may deem fit and just to grant."***

The applicants filed defence and counter-claim to that plaint. At paragraph 3 of their defence the applicants stated:-

***"The defendants state that the auction sale of LR No. Karingani/Muiru/1749 is subject of a pending dispute in High Court No. 147 of 1947 (sic)."***

At paragraph 4, they alleged that the sale of the suit property was illegal and gave five particulars of illegality and unlawfulness. In their counter-claim they sought possession of the suit land on account that the sale of the suit land by public auction was illegal. There was a reply to defence and defence to counter-claim. The record shows that that suit came up for hearing for the first time on 3rd June 2009. On that day Mr. Gituma, the learned counsel who was then representing the applicants applied for adjournment on grounds that the case arose out of another High Court case – HCCC 147 of 97 and he wanted to get the proceedings of that case as he needed them for defence. That application for adjournment was refused by the learned Judge of the superior court who ordered the hearing to proceed. We now add here that the record shows that after the learned Judge refused application for adjournment, Mr. Gituma walked out of court without permission of the court. Of course that was contempt of the court but that issue is not before us. The case proceeded and apparently Mr. Gituma returned and cross-examined the respondent. The respondent's case was thereafter closed and each of the applicants gave evidence in the defence but as the second applicant was giving her evidence in chief, it was apparent that some documents were necessary to the applicants' case and Mr. Gituma again applied for adjournment to be able to get the original death certificate. That application was objected to and the court again refused adjournment and the hearing of the case continued to the end. In her judgment, the learned Judge of the superior court (Kasango J.) delivered judgment in favour of the respondent in the following terms:-

***"1. That an order is hereby issued for the defendants to give vacant possession of parcel No. Karingani/Muiru/1749 within 30 days from this date hereof.***

***2. If within 30 days, the defendants fail to vacate the property as in number 1 above, the court does hereby order that an eviction order be issued against both defendants to be evicted from property Karingani/Muiru/1749 without further reference to this court.***

***3. The defendants' counter-claim is hereby dismissed with costs to the plaintiff. The plaintiff is also awarded costs of this suit."***

The applicants felt aggrieved by that judgment. They intend to appeal and filed notice of appeal dated 5th October, 2009 on the same date. On 13th October 2009, the applicants sought stay of execution in the

superior court that was sought by way of a notice of motion pursuant to ***section 3A*** of the Civil Procedure Act and ***Order 41 rule 4*** and ***Order 50 rule 1*** of the Civil Procedure Rules. In a ruling delivered on 3rd December, 2009, the learned Judge, considering that the suit land was applicants' family land granted stay of execution upon condition that the applicants deposit Ksh.800,000/= into a joint interest earning account held in the names of both advocates for respondent and for the applicants within 30 days from 3rd December, 2009, failure to which execution would proceed without any further reference to Court. The second applicant swore affidavit stating that she and her family found it impossible to comply with that condition despite several efforts by herself, the first applicant and the children of the second appellant. That assertion was not disputed. The applicants then moved to this Court twelve (12) days after that ruling and filed this notice of motion seeking two orders namely:-

***"1. That there be a stay of execution of the judgment and decree made on 25th September, 2009 in Meru High Court Civil Suit No. 80 of 2004, pending the lodging, hearing and determination of the intended appeal.***

***2. That there be an order of injunction restraining the respondent by himself, servants or agents from alienating, transferring, charging or otherwise dealing with LR No. Karingani/Muiru/1749 pending the lodging, hearing and determination of the intended appeal."***

The application is brought on grounds that the intended appeal is arguable mainly on two grounds which were also highlighted by Mr. Ng'ang'a, the learned counsel for the applicants. These were that the learned trial Judge erred in law in failing to exercise her discretionary powers properly when she refused adjournment application by the applicants who applied for adjournment for the first time the matter came up for hearing and needed adjournment to enable them access and produce to court important documentary evidence that would have helped the court in ensuring justice in the matter that was before her. With the refusal of the adjournments sought the applicants were disarmed in their defence and thus justice was not done to them as they could not produce vital documents in support of their defence and counter-claim. Secondly, the applicants contend that as the respondent was registered as proprietor of the suit land after the death of the second applicant's husband, the respondent's title was subject to the rights of the deceased's beneficiaries including the applicants under the Law of Succession Act Chapter 160 Laws of Kenya, but the learned trial Judge of the superior court did not give any consideration to that legal proposition. The applicants also maintained in support of that application, and her counsel argued before us that if this application is refused and eventually her appeal succeeds, that success will be rendered nugatory as the applicants, their children and grandchildren of the second applicant will have been evicted from the suit property which is their only family land and the suit property will have been put beyond their reach. All these were in the affidavit sworn by the second applicant in support of the notice of motion and as we had stated, were highlighted by Mr. Ng'ang'a in his submissions before us.

The respondent opposed the application and in his replying affidavit sworn on 22nd December, 2009, (possibly a mistake) filed on 22nd January, 2010, and highlighted by Mr. Kariuki, his learned counsel, the respondent's position was that the intended appeal is not arguable and has no chances of success as it was not in dispute that he was the registered proprietor of the suit land and that being so, the applicants' were residing therein unlawfully as was rightly found by the learned trial Judge. If there was any irregularity in the manner HCCC No. 147 of 1987 was handled, it would not have any effect on the matter at hand as the respondent was not a party in HCCC No. 147 of 1987. In any case, the events surrounding HCCC No. 147 of 1987 were neither here nor there as the parties in this case had passed on. And as to adjournment, Mr. Kariuki referred us to the record and was of the view that the learned Judge had given reasons for refusal of adjournment and in any case to grant it or not to grant adjournment was at the discretion of the Judge and Mr. Kariuki felt she exercised her discretion properly in the two applications for adjournment that came before her.

This Notice of Motion is brought pursuant to ***rule 5(2) (b)*** of this Court's Rules. For an applicant to benefit under this rule, he has in law, to demonstrate two matters. These are, first that the intended appeal or the appeal, if an appeal has been filed, is arguable, that is to say it is not frivolous. Secondly, he has to demonstrate that if the application is refused and eventually the appeal or intended appeal, as the case

may be succeeds, such success would be rendered nugatory. - See the third holding in the case of ***Madhupaper International Limited vs. Kerr (1985) KLR 840,*** and case of ***Harji Karsan Patel vs. Kunverji Naran Kerai and 2 others Civil Application No. NAI. 211 of 2009 (Ur).*** The introduction of an amendment to Appellate Jurisdiction Act by addition of ***section 3A*** and ***3B,*** now means that the court has to consider that the objective of the courts is to do justice to the parties before it.

We have considered the notice of motion with these legal principles in mind. We have perused the record. We have considered the judgment of the learned Judge of the superior court. We have considered the submissions of the learned counsel both for the applicants and for the respondents.

The first point raised in support of the arguability of the intended appeal is that the learned trial Judge did not exercise her discretion properly when she refused the applications for adjournment that were raised, one before the hearing started and the second one when the defence case was proceeding. We have perused and considered the authorities and the legal position as regards the guidelines to be considered by a court of law when faced with an application for adjournment. We have considered this Court's decision in the case of ***Openda vs. Ann (1984) KLR 208*** and that of ***Mrima vs. Atlantic Building & General Contractors and Another (1991) KLR 609.*** We are not hearing the appeal and so our jurisdiction is limited. That being so we cannot make any final decision here as in any case the whole record is as yet not before us. However, from what we have before us, we have no hesitation in stating that the issue as to whether the trial court was right or not in refusing the two applications for adjournment or one of the applications for adjournment is an arguable issue. We may add that if the husband of the second applicant had died before the time the respondent was registered proprietor of the suit land, which has been alleged by applicants but not denied by the respondent is true, then the question as to whether the suit land is subject of the Law of Succession Act Cap 160 Laws of Kenya is also an arguable point. One only needs to demonstrate the arguable point for the purpose of ***rule 5 (2) (b).*** The applicants have persuaded us on the first limb and we agree that the intended appeal is arguable.

On the nugatory aspect, we agree with the learned trial Judge in her ruling on the application for stay that this is a family land. The said applicant had lived there since 1948 when she was married. In her affidavit she deponed that she was living there with her daughter the first applicant. That is not disputed but rather is supported by the very fact that the respondent applied for their eviction from the suit land. We cannot turn our back to the fact that she must have developed sentimental attachment to the suit land. If evicted she would be out in the cold with her family. The respondent is already registered proprietor and may very well sell the land even if stay is granted but no injunction is granted. We have also considered the objective of the courts as stated above. In our view the success of that appeal after they are evicted from the land and the land is sold to a third person or even merely ordering stay which will still leave the respondent at liberty to sell the land to a third party and thus land the applicants to further problems which will not be justice. What we are saying is that if we refuse both prayers sought, the intended appeal will be rendered nugatory.

This application succeeds. The execution of the judgment and decree made on 25th September, 2009, in Meru High Court Civil Suit No. 80 of 2004 is hereby stayed pending the hearing and determination of the intended appeal. Further, the respondent, by himself, his servants, and/or agents are restrained by an order of injunction from alienating, transferring, charging or otherwise dealing with suit property LR No. Karingani/Muiru/1749 pending the lodging, hearing and determination of the intended appeal. Costs of this application to be in the intended appeal. These shall be the orders of the Court.

***Dated and delivered at Nairobi this 12th day of March, 2010.***

**E. O' O'KUBASU**

**…….**

**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**