



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, WAKI & AGANYANYA, J.J.A.)**

**CIVIL APPLICATION NO. NAI. 83 OF 2010 (UR. 60/2010)**

**BETWEEN**

**MARGARET WANJIKU CHEGE .....APPLICANT**

**AND**

- 1. DANIEL KIPKEMBOI KIBET**
- 2. DAVID KIBITOK KEMBOI**
- 3. JULIUS RKIMELI**
- 4. JOSEPH RONO**
- 5. KIPKEMBOI KOGO**
- 6. KIPTOO BARGETUNY**
- 7. BERNARD KITARIA**
- 8. TAMARTA CHEBICHII.....RESPONDENTS**

*(In the matter of an application for an injunction and stay of any further proceedings while pending the hearing and determination of an appeal against the ruling of the High court at Kitale (Ombija, J.) dated 1<sup>st</sup> February, 2010*

in

H.C.C.C. No. 55 of 2009)

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**RULING OF THE COURT**

This application by notice of motion dated and filed in this Court on 12<sup>th</sup> April, 2010 is made under **rules 5(2)(b)** and **42** of this Court’s Rules. It seeks the following prayers:

**“1. THAT there be a stay of any further proceedings in Kitale HCCC No. 55 of 2009 while (sic) pending the hearing and determination of the appeal filed on 23/3/2010 as Court of Appeal at Eldoret No. 5 of 2010.**

**2. THAT the respondents be enjoined from interfering with the applicants user of the suit property and which measures 132.5 acres and the same being part of L.R. No. 1800/3 while (sic) pending the hearing and determination of the appeal filed on 23/3/2010 at Court of Appeal at Eldoret No. 5 of 2010.**

The application is based on the grounds set out on the body thereof and also on the averments deponed to by the applicant in the supporting affidavit. The grounds on the face of the application state that in a ruling delivered by the superior court (**Ombija, J.**) on 1<sup>st</sup> February, 2010 the applicant’s application for extension of time within which to serve the memorandum of appearance and defence upon the respondents and which had been filed in Court was rejected. According to counsel for the applicant, it is only in the interest of justice that there should be a stay of further proceedings in the matter until the hearing and determination of the appeal. The grounds also show that after the application for extension of time was dismissed by the superior court it proceeded to enter judgment and what remains is the assessment of damages. The applicant further states that she has a good defence and should not be denied an opportunity to be heard in her defence due to mistakes not of her making. The applicant also stands to lose (sic) 132.5 acres part of **L.R. No. 1800/3** from which she stands to be evicted before the pending appeal is heard.

Ground 8 states that the respondent will not be prejudiced by the order of extension of time within which to serve the pleadings and hence facilitate the inter-partes hearing of the dispute on merits and that since the title L.R. No. 1800/3 is in the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents if the matter proceeds for assessment of damages by way of formal proof the suit land will be out of reach of the applicant. And in the event that the applicant is evicted from the suit land as a result of the formal proof and the said land is sold or even sub-divided the pending appeal, if successful, will be rendered nugatory. Ground 11 states that the applicant who had ploughed the land in readiness for planting had been prevented from re-ploughing and planting by the respondents.

The supporting affidavit by the applicant repeats the grounds as set out in the body of the application and gives the history of how the applicant’s husband and father-in-law purchased the suit land and annexes a document **MWC10(a)(b)** and **(c)** being an application for Land Control Board consent, letter of consent and transfer of land from the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the applicant’s late husband duly executed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. However, this transfer was not registered though she has been living on the suit land continuously from 1974 up to the time she swore the affidavit.

In a replying affidavit deponed to by the 2<sup>nd</sup> respondent on his own behalf and on behalf of the other respondents he states that the appeal filed by the applicant is not arguable and has no chances of success to warrant the issuance of an injunction and stay of proceedings of the superior court. Furthermore, since the applicant has no title to the land in dispute the appeal she has filed will not be rendered nugatory. The replying affidavit states further that the applicant is not entitled to an equitable remedy since she had failed to disclose material facts which are set out in paragraph 6 of the said replying affidavit; that the doctrine of *res judicata* is applicable; and that in any case the applicant had testified in an earlier case **No. 35 of 1997** that it was her father-in-law who was entitled to the suit land; hence she is estopped by the doctrine of estoppel from claiming the land in her own name; that the applicant was only entitled to 30 acres as per the will drawn by her father in-law which she has never disputed and not 132.5 acres; that the applicant has not given an undertaking to furnish security or compensate the respondents in costs in the event that she loses the appeal; and that the applicant owes the respondents **Kshs.3,900,000/=** in *mesne profits* which will escalate with her continued occupation of the said land.

When the application came before us for hearing **Mr. Kiarie**, learned counsel for the applicant submitted on the same and echoed the grounds set out on the face thereof and as supported by the averments in the affidavit and submitted that the appeal is not frivolous because what the applicant wanted was to get

extension of time to serve the memorandum of appearance and defence to the respondents so that the suit could be heard on its merits. He stated that the appeal (*No. 5 of 2010*) already filed in Eldoret raises issues of law and that the applicant was ready to pay costs. He pointed out that the memorandum of appearance and defence had been filed in Court in time and contended that the appeal is arguable. He repeated that if the stay order is refused and the appeal eventually succeeds, the same will be rendered nugatory because she will have been evicted from the land.

**Mr. Adere**, learned counsel for the respondents submitted that the learned judge exercised his discretion in dismissing the application for extension of time, which discretion cannot be interfered with by this Court. He repeated the averments in the replying affidavit that the applicant was given 30 acres in the Will made by her father-in-law which is all she is entitled to. According to counsel, the applicant's defence had no basis hence the intended appeal is not arguable. Finally, he submitted, if this application for stay and injunction is refused the applicant will lose nothing.

We have heard and recorded the submissions of counsel for the parties. The Ruling out of which appeal No. 5 of 2010 has arisen had nothing to do with the filing of the memorandum of appearance and defence because these documents had already been filed. It had to do with refusal to extend time within which to serve these documents to the respondents. With the memorandum of appearance and defence already on record, the appeal filed is questioning whether the exercise of discretion by the learned judge was judicious, given in particular that the dispute pertains to a piece of land measuring 132.5 acres. Our view of the matter is that the intended appeal is not frivolous and we reject the contention by the respondents' counsel that there is no arguable appeal. An arguable appeal is not that which will necessarily succeed.

The applicant has also disclosed that during this planting season she had been stopped from re-ploughing the land and planting her crops on it. This may well be a signal that if this application is refused, she risks being evicted from the land and that the possibility of the land being alienated is not remote. There has been no denial of these submissions by the respondents. In the event that this happens and the applicant eventually wins the appeal, that decision would be rendered nugatory. Thus the applicant has demonstrated both limbs which need to be satisfied before an order under **rule 5(2)(b)** of the Court of Appeal Rules can be granted.

We allow the application as prayed and order that all further proceedings in the superior court be stayed until the hearing and determination of the pending appeal. We also order that the respondents be and are hereby restrained from interfering with the applicant's user of the suit property pending the hearing and determination of **Civil Appeal No. 5 of 2010** filed at Eldoret Court on 23<sup>rd</sup> March, 2010. Costs of the application shall be in the appeal.

***Dated and delivered at Nairobi this 3<sup>rd</sup> day of June, 2010***

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**PRINCIPAL DEPUTY REGISTRAR**