IN THE COURT OF APPEAL OF KENYA
AT NYERI
CIVIL APPLICATION 128 OF 2010

BETWEEN

PRISCILLA MUTHONI KIRUGI
ESTHER KORI KIRUGI
PETERSON MURIMI KIRUGI
SAMUEL GICHOBI KIRUGI
MWANIKI KIRUGI
EUNICE NJERI KIRUGI
DAN MUCHIRA KIRUGI
JAMES NYAGA KIRUGI
DICKSON MWAI KIRUGI
JACINTA NJOKI KIRUGI
MUCHIRI KIRUGI
JOSEPH KINYUA KIRUGI
MUGO KIRUGI
DAVID BUNDI KIRUGI
JAMLICK KIMOTHO KIRUGI
EPHRAIM THIAKA KIRUGI
AMOS KATHIGO KIRUGI
WAWIRA KIRUGI
MITHAMO KIRUGI
MARY MUTHONI KIRUGI ……..…….....….....APPLICANTS

AND

ELGON INSURANCE CONSULTANTS LTD …….....….RESPONDENTS

(Application for an order of stay of execution of the decree pending appeal from judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 10th March, 2010

in

H.C.C.C. NO. 73 OF 2002)
****
RULING OF THE COURT

The Notice of motion dated 19th May 2010 and filed on 25th May 2010 is seeking one main order and that is an order:-

> ***"That this Honourable Court be pleased to order stay of execution of the decree issued on 31/3/2010 pending the hearing and determination of the intended appeal."***

Five grounds are cited in support of the application and these are:-

> ***"(a) That the applicants have lodged an appeal against the judgment of this Court.***
>
> ***(b) That the said appeal has overwhelming chances of success.***
>
> ***(c) That the applicant are (sic) threatened with eviction on the basis of the judgment of the High Court.***
>
> ***(d) That the applicant have (sic) been on the suit land since 1976.***
>
> ***(e) That the said appeal will be rendered nugatory if the orders are not granted."***

There is an affidavit in support of the application sworn by one of the 20 applicants who is Priscilla Muthoni Kirugi, the first applicant.

The application is brought pursuant to the provisions of ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act – Act No. 6 of 2009 and under ***rule 5 (2) (b)*** of this Court's Rules. In law, the principles that guide this Court in deciding such an application are well settled. The applicant has to demonstrate first that the appeal or the intended appeal, as the case may be, is arguable and second, that were the appeal or the intended appeal to succeed, such success would be rendered nugatory by our refusal to grant the application. These two requirements must be met before the application can be granted – see ***Relliance Bank Ltd*** *(in liquidation)* ***vs. Norlake Investments Ltd CA NAI. 98/02 (ur).***

The applicants in this application are members of the family of the late Wilson Kirugi Mburia who was brother to Ephantus Mugo Mburia, the Managing Director of the respondent company. It is not in dispute that between 1962 and 1964, Ephantus purchased land parcel Inoi/Kamondo/583 from one Njeru Kiraruga. At that time, Ephantus was proceeding to England and so he had that piece of land registered in the name of his brother Mburia. He returned from England in 1970. In 1976, he asked Mburia to transfer the same land to him, and his brother Mburia readily did so with the consent of the relevant Land Control Board having been obtained. Having got back his land, he subdivided it into four portions which are ***INOI/KAMONDO/1829,INOI/KAMONDO/1830,INOI/KAMONDO/1831*** and ***INOI/KAMONDO/1832***. He incorporated the respondent company and had them registered in the name of the respondent company – Elgon Insurance Consultants Ltd. At that time, Ephantus's evidence in court was that the deceased Mburia and his family were staying on ½ acre piece of land within the entire land although they had their land ***MWEA/MAKIMA/373*** elsewhere. Mburia died in 1992 without claiming the suit land. In the year 2000, the applicants, according to Ephantus, invaded the entire suit land, cut down the trees and subdivided it amongst themselves. Ephantus went to court at Kerugoya. They were convicted and suspended sentences were imposed on them. The respondent then sought eviction orders, damages and permanent injunction orders by way of ***Civil Case No. 73 of 2002*** in the superior court at Nyeri. The respondent's defence in that suit was that as they had been in continuous uninterrupted occupation of the suit land since the time of land demarcation, they had gained prescriptive rights over the suit land.

The learned Judge of the superior court (Sergon J.) after hearing the case, entered judgment for the respondent as against the applicants, ordering the applicants to vacate the suit premises within a period of

30 days from the date of the judgment, in default, the respondent to be at liberty to forcefully evict them. He also issued a permanent injunction to restrain the applicants from entering, staying on the suit land or in any way interfering with the land after the lapse of the 30 days from the date of that judgment.
The applicants are not satisfied with that judgment. They want to appeal against it and have filed notice of appeal which, we note, was only filed by two applicants and not by all applicants. In the meantime, they have brought this application seeking the order cited above. It was opposed by the respondent, which filed replying affidavit sworn by Ephantus who stated, inter alia, that he is the one who had allowed the applicants to be on his land and denied that the applicants acquired the land by way of adverse possession.
We have anxiously considered the application, the affidavits in the record, the record, and the submissions by Mr. Githinji, the learned counsel for the applicants who urged us to grant the application, and the submission by Mr. Muchira, the learned counsel for the respondent who opposed the application. In our view, even if we were to accept that the issue as to whether the applicants had gained prescription rights over the suit land is an arguable issue, there are still certain aspects that make it difficult for us to grant this application. As we have stated above, the two requirements i.e. that the appeal or intended appeal is arguable and that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory must both be demonstrated before the application can succeed. In this matter, if this application is refused, the eviction orders would be executed. If that is done, the respondent says at paragraph 9 of its affidavit as follows:-

> ***"9. That the applicants have their own parcel of land MWEA/MAKINA/373 where they should relocate to."***

This allegation is not new. In his evidence in chief, Ephantus stated that the applicants have land elsewhere to which they could relocate and the learned Judge did consider that in his judgment. The applicants did not refute that. Thus, should they be evicted, they would have somewhere to relocate to and as they have not alleged that the respondent intends to dispose of the suit property, if they succeed, in their intended appeal, the suit land will revert to them or they will be at liberty to seek damages for any loss suffered as a result
of execution of the superior court's order. In short, the results of the success of the intended appeal, were it to succeed, would not be rendered nugatory.

The above would have sufficed to dispose of this application. There are however, two other matters that would have made us slow to grant this application as brought. These are first, that, we note the record before us is complete with Certificate of Delay attached. In our view, and on inquiry the learned counsel for the applicants confirmed that there was no reason as to why the appeal had not been filed as all documents required to mount a successful appeal were availed by 5th May 2010 and were used to prepare the record before us. There is Certificate of Delay in the record confirming the same. Under those circumstances, we note that whatever appeal will be filed, will clearly be so filed out of time. Whereas that is not a matter before us, we think the orders sought in this application may if granted be so granted in vain. Courts do not act in vain. Secondly, we note that the notice of appeal is not properly drawn. It cites only two applicants as the ones intending to appeal, but the learned counsel says from the

bar that all 20 applicants intend to appeal. If that is so, then their appeal cannot be buttressed on the notice of appeal in this record.

All in all, this application cannot succeed. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 24th day of September, 2010.

R. S. C. OMOLO
……..
JUDGE OF APPEAL

M. OLE KEIWUA
……
JUDGE OF APPEAL

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

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

DEPUTY REGISTRAR