IN THE COURT OF APPEAL OF KENYA

AT NYERI

CIVIL APPLICATION 141 OF 2008 (UR. 88/2008

JECINTA WANJA KAMAU ……..……. APPLICANT

AND

ROSEMARY WANJIRU WANYOIKE ……..… 1ST RESPONDENT

JOHN MWANGI WANYOIKE ……..…….. 2ND RESPONDENT

(Application for stay of execution pending hearing and determination of an intended appeal from a judgment of the High Court of Kenya at Embu (Khaminwa, J.) dated 6th May, 2008

in

H.C.C.C. NO. 30 OF 2007)

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RULING OF THE COURT

Before us is an application by way of notice of motion brought under *Rule 5(2((b)* of the Court of Appeal Rules in which the applicant, *JECINTA WANJA KAMAU* seeks the orders:-

"1. That there be stay of execution or order/judgment/ruling in High Court Civil Appeal No. 30/07 – Embu and PM's Succ. No. 315/95 pending the hearing of the intended appeal.

2. That there be an order restraining the respondents or their agents from claiming or entering or whatsoever interfering with parcel No. LOC.6/GIKARANGU/2639 until intended appeal is heard and determined.

3. Costs and incidental of this application do abide the result of the intended appeal."

This application is brought on the grounds that:-

"(a) Notice of Appeal has been lodged and served.

(b) The applicant has applied for proceedings and judgment of the High Court Civil Appeal No. 30/07 Embu.

(c) The applicant has an arguable appeal with High chances of success."

The application is further supported by the affidavit of the applicant and as this affidavit sets out the background to the dispute, we think it is necessary to reproduce its contents. In the said affidavit, the applicant depones:

"*1. That I am the applicant herein conversant with the matter hence competent to swear this affidavit.*

2. That I bought 1.2 acres out of Land Parcel No. LOC.6/GIKARANGU/2639 from Beatrice Njeri Magondu and her son Samuel Wanyoike Magondu.

3. That I financed in filing succession cause No. 315/95 at Murang'a Law Court.

4. That during the confirmation of grant I was awarded 1.2 acres as a purchaser and her son 1.00 acre. Annexed is a copy of the confirmed grant marked "JWK 1".

5. That the shares were registered in the lands office on 14th December, 1998 as per annexed certificate of search marked "JWK 2".

6. That jointly with Wanyoike, we applied for consent to sub-divide the land so that we could get separate titles. Unfortunately Wanyoike died before the exercise was carried out.

7. That the respondents later applied for Review of the confirmation of grant which was allowed by the lower court and the High Court which judgment provoked the filing of present Notice of Appeal and the intended appeal.

8. That the intended appeal has very high chances of success as I obtained the ownership legally and is still in occupation and the respondents were not parties to the Succession Cause No. 315/95 – Murang'a and they only came in on a review application which we are contesting.

9. That if the order sought is not granted I will lose my 1.2 acres.

10. That what is deponed to hereinabove is true to the best of my knowledge information and belief."

When the application came up for hearing before us on *15th May, 2009*, Mr. J. Gacheru appeared for the applicant while *Mr. D.K. Musyoka* appeared for the respondent. In his submissions, *Mr. Gacheru* more or less gave the background to the dispute as stated in the affidavit of *Jecinta Wanja Kamau*. He took issue with the judgment of the superior court in which the learned Judge while supporting and accepting the submissions of the applicant's counsel went on to dismiss the appeal in that court. He emphasized the fact that the land in dispute is still registered in joint names of *Samuel Wanyoike Magondu* and her client *Jecinta Wanja Kamau*. For that reason, Mr. Gacheru asked us to maintain status quo until the appeal is finally determined.

In opposing the application, Mr. Musyoka submitted that there was nothing to stay as there were no orders capable of being executed since the superior court merely dismissed the appeal while the subordinate court reviewed the grant. As regards a prayer for injunction Mr. Musyoka was of the view that the applicant had not demonstrated that the intended appeal was arguable. It was further submitted that the applicant was not in possession of the land in dispute. Mr. Musyoka then referred to the contention that the applicant was a purchaser, in which case, so argued Mr. Musyoka, there was no evidence of a written sale agreement. He, however, conceded that the title is still in joint names of the applicant and *Samuel Wanyoike,* the late husband of 1st respondent.

In an application under *rule 5(2)(b)* an applicant must establish that he not only has an arguable appeal, that is, one which is not frivolous, but also that unless the application is granted as prayed his proposed appeal, were it to succeed would be rendered nugatory. A solitary arguable issue would avail an applicant - In *JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDERNBERG AFFAIRS & 3 OTHERS V. KILACH [2003] KLR 249 at p. 260* this Court said:-

"*We think this even (sic) if it were the only point is an arguable one and the length of time counsel spent before us was itself sufficient proof that the point is worth investigating an appeal and is not a frivolous one.*

There may or may not be other arguable points but as we have said before even one arguable point is sufficient for the purposes of rule 5(2); there need not be a chain of arguable points to sustain an application."

In this application, it is possible to conclude that the applicant had purchased 1.2 acres out of *parcel No. LOC 6/GIKARANGU/2639* and that according to the Certificate of Official Search of *14th December, 1998* this parcel of land was registered in the names of one, *Samuel Wanyoike Magondu* (now deceased) and *Jecinta Wanja Kamau,* (*the applicant herein*). In concluding her judgment the learned Judged of the superior court said:-

"*I have considered the appellant's case and I find no merit in her appeal. She did not establish her right to inherit the deceased land. The rules of procedure the Civil Procedure Act are only applicable so long as they are relevant to proceedings under Succession Act. I find strict application of order 44(1) Civil Procedure Rules is not applicable in this case. The appeal is dismissed with costs to the Respondents."*

On the face of it, there appears to be a contradiction in the foregoing expression of the learned Judge. That may well be an arguable point. Again according to the certificate of official search the title is in joint names of the applicant and the deceased.

While we agree with the submission of Mr. Musyoka that there is nothing to be stayed, we are however of the view that this is a proper case in which an injunction as prayed for in the second prayer of the application should be granted so as to maintain the status quo until the intended appeal is heard and determined.

In view of the foregoing, this application is allowed in terms of *prayer (2)* to the effect that there will be an order restraining the respondents or their agents from claiming or entering or whatsoever interfering with *parcel No. LOC.6/GIKARANGU/2639* until the intended appeal is heard and determined. The costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Nyeri this 12th day of June, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

……..……...

JUDGE OF APPEAL

D.K.S. AGANYANYA

…….……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR