IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 308 OF 2007 (UR 211/07)

SAMSON GETANGITA NKWEGE

JULIUS RANGE NKWEGE

JOSEPH MWITA NKWEGE…….. APPLICANTS

AND

ANISON NYAHIRI MUHINDI ……..…..….. RESPONDENT

(Application for stay of execution pending the filing, hearing and determination of an intended appeal from an order of the High Court of Kenya

Kisii (Gacheche, J) dated 10th July, 2007

in

H.C.C.C No. 24 of 2006)

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RULING OF THE COURT

The respondent in this notice of motion dated 3rd December 2007 and filed on 6th December 2007, Anison Nyahiri Muhindi, claims that he bought a parcel of land measuring seven acres or thereabout comprised in title No. BUKIRA/BWISABOKA/165 measuring in total 17.2 hectares from Nkwege Mwita Mongori (deceased) who was the father of all the applicants herein, Samson Getangita Nkwege, Julius Range Nkwege and Joseph Mwita Nkwege in the year 1966. That sale was by oral agreement. He paid Ksh.7,000/= as consideration and took possession of the same parcel of land in that year but the necessary legal transactions to confer title onto him did not take place. The vendor died soon thereafter. On 27th February 2006, the respondent took out Originating Summons in the superior court against the three applicants herein in their capacity as administrators of the estate of the deceased.

The main issue the respondent wanted the superior court to determine was whether he could be registered as the rightful owner of the seven acres of land out of land parcel BUKIRA/BWISABOKA/165 measuring 17.2 hectares having acquired the same by adverse possession. Together with the same Originating Summons, the respondent also filed on the same day, chamber summons dated 27th February 2006 seeking in the main:

"That a temporary injunction to issue restraining the respondents by themselves, their servants and/or agents from trespassing on, invading, entering, encroaching on or in any other manner howsoever interfering with the parcel of land occupied by the plaintiff measuring 7 acres or thereabout comprised in title No. BUKIRA/BWISABOKA/165 pending the hearing and determination of the suit."

That chamber summons was opposed. The record shows that it came up for hearing on 5th July 2006 before the Deputy Registrar S.M.S Soita who entered consent order as follows:

"By consent:

1. Application dated 27.02.06 be allowed but status quo as per the date of filing the suit be maintained.

2. Application dated 26.06.06 be allowed as prayed.

3. The application dated 12.04.06 be allowed and the case be heard viva voce before one Judge at Kisii Court."

The applications dated 26.06.06 and 12.04.06 are not relevant to the matter before us. The consent order above in respect of the application dated 27.02.06 is the genesis of the application before us. The consent order entered by the Deputy Registrar on 5th July 2006 was extracted. However, we have our doubts as to whether it was properly extracted as indeed, the extracted order does not, in our view, appear to reflect what is in the record. Be that as it may, there is a penal notice attached to the same order but there is no evidence of its having been served upon each of the applicants.

On 15th May 2007, the respondent was back in court. This time his complaint filed vide chamber summons dated that day was that the applicants had disobeyed and/or disregarded the lawful court orders issued on 5th July 2006 and served upon them on 18th September 2006. He sought in that chamber summons warrants of arrest to issue against the applicants and to have them brought before court and punished for disobedience of lawful court orders dated 5th July 2006 and that the applicants be cited for disobedience and be committed to jail for a duration not exceeding six (6) months and/or such shorter term as the court may deem fit and expedient. That application was opposed. The applicants through Mr. Okoth, their learned counsel, maintained that the orders that were given by consent of parties were *status quo* orders and thus they were allowed to cultivate the land as they had been doing before the matter went to court. To them, all they were restrained from doing was to build on the land. They also denied having been served with a penal notice. After full hearing, the superior court (Gacheche J.) on 10th July 2007 allowed the application and ordered that warrants of arrest do issue against the three applicants for disobedience of lawful court orders. They were each committed to serve four months imprisonment and ordered to pay costs of the application. The applicants naturally felt aggrieved by that order. They intend to appeal against it. They do not want to serve the jail term and hence this application before us brought pursuant to **rule 5(2) (b)** of this Court's Rules in which the applicants are seeking orders that:

"1. The Honourable Court be pleased to order a stay of execution of the committal order made on the 10th day of July 2007 pending the hearing and determination of the intended appeal.

2. Alternatively, the Honourable Court be pleased to stay this application awaiting the filing of a notice of appeal under rule 74 of the Court of Appeal Rules."

The application is brought on grounds among others, that the intended appeal is arguable and that the success of the appeal, were it to succeed, would be rendered nugatory were we to refuse this application. The application and the hearing notice were served upon the respondent's counsel but when the matter came up for hearing the same counsel for the respondent was absent. The respondent was also absent. Mr. Okoth has urged us to allow the application.

We have considered the notice of motion, the record before us, the ruling of the learned Judge of the superior court and the law. In our considered view, the question as to whether the applicants were properly served with the penal notice as is required by law and the effect of non- service of the penal notice, if it was not served as claimed by the applicants, is an arguable point. Further, the proper interpretation of the order recorded by the Deputy Registrar but extracted as having been recorded by Bauni J. and the effect of that interpretation on the applicants is another arguable point and, of course; the severity of the term of committal to civil jail i.e. four months without any mitigating factors being taken into account, is also another matter that this Court may need to go into when the intended appeal comes up for hearing before it.

We do not need to emphasise that the success of the intended appeal, if it at all succeeds, will be rendered nugatory should we reject this application as the effect of our rejecting the same is that the applicants will start their jail term, and by the time the appeal is filed and comes up for hearing, they will have completed the three months and nine days remaining (for we were told they had served 21 days in prison before they were placed on Ksh.1,000/= cash bail by this Court on 30th July 2007). The success of the appeal will certainly be rendered nugatory should we refuse this application. We however note that the applicants are facing jail terms and they may be tempted to avoid the punishment should the appeal fail. In the circumstances, we must consider an order such as will ensure that the applicants, while not in jail, will attend court on the hearing of their appeal and will face the sentence or any sentence ordered should their appeal fail or partially succeed. Conditional stay is therefore called for.

There shall be stay of the order of the committal of each applicant to serve four months imprisonment made on 10th July 2007 till the intended appeal is heard and determined. Each applicant is released on cash bail Ksh.1,000/= to appear in Court on each date fixed for the hearing of their appeal till the final determination of the appeal. Order accordingly.

Dated and delivered at Nairobi this 15th day of February, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

……..…

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR