



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO 322 OF 2007**

**RACHEL WAIRIMU MUKOMA ..... APPLICANT**

**AND**

**1. HANNAH WAMBUI GITHERE**

**2. WANJIKU GITHERE**

**3. HARUN THIONG'O NJIRI**

**4. KAGUONGO NJIRI**

**5. JOSEPH NJIRI GITHERE**

**6. NJIRI GITHERE .....RESPONDENTS**

**(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa J) dated 13<sup>th</sup> March, 2007**

**in**

**H.C.C.C. NO. 141 OF 1988 90S)**

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**RULING OF THE COURT**

By this application brought under **Rule 5 (2) (b)** of the court of Appeal Rules, the applicant seeks two orders, namely, a stay of execution of the judgment and decree of the superior court made on 13<sup>th</sup> March, 2007 in *High Court Civil Case No. 141 of 1988 (O.S.)* and an injunction restraining the six respondents from interfering with the applicant's possession and enjoyment of a portion of land title No. Githunguri/ Gathangari/1057 pending the hearing and determination of the intended appeal.

The applicant is the wife and legal representative of Mukoma Njiri now deceased (Mukoma). Mukoma was the registered proprietor of land titles Nos. Githunguri/Gathangari/1057 comprising of 4.52 Hectares (11.2 acres) and Githunguri/Gathangari/T.105 comprising of 0.22 acres. The deceased was the brother to Githere Njiri who died in about 1954. The said Githere Njiri was survived by two widows – Hannah Wambui Githere (1<sup>st</sup> respondent), (Hannah) and Wanjiku Githere (2<sup>nd</sup> respondent) and two sons – Joseph Njiri Githere (5<sup>th</sup> respondent) and Njiriri Githere (6<sup>th</sup> respondent). Mukoma and Githere Njiri had two brothers viz: Harun Thiongo Njiri (3<sup>rd</sup> respondent) and Kaguongo Njiri (4<sup>th</sup> respondent). On 19<sup>th</sup> January, 1988, the six respondents filed a suit, *High Court Civil Case No. 141 of 1988 (O.S.)* against Mukoma for three declaratory orders: firstly, that the defendant (Mukoma) holds the land title No. Githunguri/ Gathangari/1057 and Githunguri/Gathangari/T.105 in trust for himself and the plaintiffs, secondly, further and/or in the alternative Hannah is entitled to be registered as proprietor of a portion of 1½ acres or thereabouts of land title Githunguri/Gathangari/1057 under section 38 of the Limitation of Actions Act, and thirdly, further and/or in the alternative, a declaration that the 5<sup>th</sup> plaintiff – (Joseph Githere) and the 6<sup>th</sup> plaintiff (Njiri Githere) had jointly acquired by adverse possession absolute title to land title No. Githunguri/Gathangari/T.105.

There is another piece of land – land title No. Githunguri/ Gathangari/ T.106 comprising of 0.25 acres which was not the subject matter of the suit. That land was, however, mentioned in the evidence and distributed by the superior court. Mukoma was registered as proprietor of the latter land on 23<sup>rd</sup> July, 1959 but on 11<sup>th</sup> March, 1971, he transferred the land to Kaguongo Njiri (4<sup>th</sup> respondent).

The judgment of the superior court delivered on 13<sup>th</sup> March, 2007 shows that the main dispute was on the ownership of land title Githunguri/Gathangari/1057. According to the judgment, the respondent's case was that out of the 11.2 acres, they were entitled to 4 acres they had allegedly bought while Mukoma was entitled to one (1) acre which he had bought and that the balance of 6.20 acres which was family land should be shared equally between Mukoma (1.55 acres) Hannah and 2<sup>nd</sup> respondent (1.55 acres), 3<sup>rd</sup> respondent (1.55 acres) and 4<sup>th</sup> respondent (1.55 acres). Thus, according to respondents, Mukoma was entitled to only 2.55 acres (one acre + 1.55 acres) while the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were entitled to 8.65 acres.

The applicant's case was partly that 4 acres out of 11.2 acres belonged to the family and that the rest of the land belonged to Mukoma absolutely. Mukoma also claimed to have bought the share of Kaguongo Njiri (4<sup>th</sup> respondent) and asserted that the share of 1<sup>st</sup> and 3<sup>rd</sup> respondents should be reduced to 0.68 acres and 0.80 acres respectively.

The superior court ultimately entered judgment in respect of land title No. Githunguri/Gathangari/1057, thus:

- (a) Hannah Wambui Githere and )  
 Wanjiku Githere ) 5.13 acres )  
 (1<sup>st</sup> and 2<sup>nd</sup> respondents) )
- (b) Kaguongo Njiri - 1.10 acres ) respondents.
- (c) Thiongo Njiri - 1.10 acres. )
- (d) Mukoma Njiri - 3.87 acres. )

In addition, the superior court awarded land title No. Githunguri/ Gathangari/ T.105 to 5<sup>th</sup> and 6<sup>th</sup> respondents in equal shares on the basis that they had acquired title by adverse possession.

The applicant being aggrieved by the decision of the superior court filed a notice of appeal on 15<sup>th</sup>

March, 2007.

This application relates only to land title No. Githunguri/ Gathangari/1057. The application seeks two orders, namely, stay of execution of the judgment and decree of the superior court and an order of injunction to restrain the respondents from interfering with the applicant's possession and enjoyment of the portion of land she is currently occupying. The second application for an order of injunction is in our view misconceived because the respondents cannot be enjoined from executing a lawful judgment of the court. Unless and until the execution of the judgment of the superior court is stayed, the respondents would be entitled to partition the suit land and recover the total land awarded to them by the superior court and that would definitely deny the applicant a large portion of the land that she is currently occupying. The application for stay of execution is the appropriate and more efficacious remedy in the circumstances of this case.

The principles upon which the court exercises its original and unfettered discretion under **Rule 5 (2) (b)** of the Court of Appeal Rules are well settled. The applicant is required to demonstrate that the intended appeal is arguable and further that unless the application is allowed, the appeal, if successful, would be rendered nugatory.

The applicant asserts that the intended appeal is arguable and is not frivolous. She has enumerated in paragraphs 2 (a) – (h) and 3 (i) – (iii) of the application the issues of fact and law respectively that she intends to raise in the appeal. The applicant has in addition filed a draft memorandum of appeal containing eight grounds of the intended appeal. The grounds of appeal raise wide ranging issues of both fact and law challenging the findings of the superior court particularly on the issue of trust and adverse possession.

It is not necessary to consider the merits of each of the several grounds of appeal in this application. It is sufficient to say that having considered the reliefs sought in the originating summons, the facts in support thereof, the replying affidavit to the originating summons, the judgment of the superior court and the proposed grounds of appeal, we are satisfied that the intended appeal is not frivolous.

The applicant further states in paragraphs 41 and 42 of the supporting affidavit that unless the orders sought are granted, she is apprehensive that the respondents will invade the land, sub-divide it and that once they get possession and title, they may transfer the land, thus, defeating the intended appeal.

The 1<sup>st</sup> respondent denies that the respondents would sell the land after getting title deeds and deposes that the respondents should be allowed to enjoy the fruits of judgment which they have waited for 20 years and that a stay of execution will further aggravate their position.

The applicant is exercising her undoubted right of appeal and this Court should exercise its discretion in a manner that would ensure that the appeal, if successful, would not be rendered nugatory, (see ***Butt v Rent Restriction Tribunal*** [1982] KLR 417).

In this case land title No. Githunguri/Gathangari/1057 is registered in the name of Mukoma Njiri, the deceased husband of the applicant. The applicant deposes that she occupies most of the land, except for a small portion, with her three sons and that the entire land is developed. She claims that five acres is under tea bushes and that there are homesteads, trees and nappier grass in the remaining land. The applicant however admits that Hannah occupies a portion of about 2 acres of the land. There is no dispute that the rest of the respondents do not live or use any part of this land. Thus, the applicant and her three sons are in possession of about 9.2 acres of the land and have occupied the land for many years. If the decree of the superior court is executed, the applicant will have to surrender most of the land and retain only 3.87 acres. There has been a protracted land dispute between family members. The judgment of the superior court is silent on how the land will be demarcated to excise the 7.33 acres given to respondents. Since the whole land is developed the manner of demarcation is a potential source of further dispute. The issue of compensation for developments undertaken by the applicant may also arise.

In Mukoma vs. Abuoga [1988] KLR 545 and Malcom Bell vs. Hon. Daniel Toroitich Arap Moi & Another, Nakuru Civil Application No. Nai. 342 of 2005 (unreported) relied on by the applicant, this Court in not dissimilar circumstances preserved the *status quo* in respect of disputed lands pending appeal. Similarly, we are satisfied that unless the status quo in respect of the suit land is preserved, the intended appeal, if successful, would be rendered nugatory.

Consequently, we allow the application to the extent that we grant an order of stay of execution of the judgment and decree of the superior court in terms of the application. The result is that both the applicant and the 1<sup>st</sup> respondent (Hannah) shall continue occupying the respective portions of suit land that they are currently occupying until the determination of the pending appeal. The costs of this application shall be costs in the appeal.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of March, 2008.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J. ALUOCH**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**