



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL
AT NAIROBI**

Civil Appli. Nai 57 of 2007 (UR.40/07)

RAHAB WAITHIRA NDERU1ST APPLICANT

THE ESTATE OF FRANCIS KINUTHIA NDERU2ND APPLICANT

ZAKAYO KAGOMBE NDERU3RD APPLICANT

THE ESTATE OF HARRISON KARIUKI NDERU4TH APPLICANT

THE ESTATE OF ARTHUR KIMAN I NDERU5TH APPLICANT

ERICK KARANJA NDERU6TH APPLICANT

THE ESTATE OF ANTHONY NG'ANG'A NDERU 7TH APPLICANT

AND

JOSEPHINE MUKAMI NDERURESPONDENT

*(An application for stay of execution against the judgment of the High Court of Kenya at Nairobi
(Ransley, J.) dated 1st March, 2006*

in

NAIROBI H.C.C.SUIT NO. 1398 of 1993

(as consolidated with

NAIROBI CIVIL SUIT NO. 1817 OF 1994) (OS)

RULING OF THE COURT

The matter before us is an application under **rule 5(2)(b)** of the rules of this Court (the rules) seeking an order:

“THAT this Honourable Court be pleased to grant a stay of execution of the judgment and Decree of the High Court of Kenya at Nairobi (Ransley J.) delivered on the 1st of March, 2006 pending the hearing and determination of the instant appeal”.

The dispute between the parties relates to a piece of land otherwise known as **LR. Nyandarua/Wanjohi/433**, (“*the suit land*”) situate in Wanjohi Settlement Scheme in Nyandarua. **Josephine Mukami Nderu** (Josephine), who is the respondent here and the plaintiff before the superior court, claimed that the suit land was allocated to her by the Settlement Fund Trustees (SFT) in 1966 and was eventually registered in her name in 1988 upon completion of the payments due to SFT. She now holds the title under the Registered Land Act and is entitled to enjoy her full rights under **section 28** of that Act. On the other side of the dispute is **Zakayo Kagombe Nderu** (Zakayo) (3rd Applicant) who was married to Josephine between 1965 and 1973 when they separated, and **Rahab Waithira Nderu** (1st applicant) who is Zakayo’s mother and therefore Josephine’s mother-in-law. The rest of the applicants as originally sued were the children of Rahab with one **Andrew Nderu Kagombe** who died in 1993 (“*the deceased*”). Most of them are now deceased. All the applicants variously claimed in defences and counterclaims filed in the superior court on their behalf that the suit land was originally allocated to the deceased by SFT but he chose to have it registered in Josephine’s name to hold in trust for the family. They wanted the trust terminated and the suit land transferred to them or the deceased’s estate. They claimed further that it was the deceased who paid the instalments due to SFT and, together with his wife Rahab, occupied the suit land until 1977 when he moved out. Some of the applicants also claimed long occupation of the suit land and therefore pleaded ownership through adverse possession.

The superior court (Ransley J) heard witnesses on both sides and came to the conclusion that Josephine was the lawful allottee of the suit land and it was lawfully registered in her name as the absolute proprietor. There was no trust in favour of the deceased, any of the applicants, their estates or anyone else. He further found that the applicants or any of them did not prove any adverse possession of the suit land, and if there was any periodic occupation of the suit land by them, it was with the permission of Josephine. Orders were given accordingly in favour of Josephine for an injunction restraining all the applicants together with their agents or servants from interfering with Josephine’s quiet use of the suit land. An eviction order was issued against the applicants or anyone else living in the suit land. Finally, the applicants’ counterclaim that the suit land was held in trust and that there was adverse possession was dismissed.

It is common ground that an appeal against those orders has been filed, being **Civil Appeal No. 99 of 2006**. An application for stay of the orders was first made before the superior court but was dismissed by Angawa J on 27th February, 2007. The applicants then came before us as stated earlier under **rule 5(2)(b)** of the rules which grants us original jurisdiction to consider the matter.

Counsel on both sides agree, and in any event we find on our own after considering the grounds of appeal and the material before us, that the appeal is arguable as to whether the superior court was right in dismissing the claim on **Trust** and the contention by the applicants that they had acquired interest in the suit land by **adverse possession**. That is the first limb of the requirements which an applicant must satisfy if an application under **rule 5(2)(b)** will be considered favourably. We need not belabour it.

The second limb of the requirements is to show that the intended appeal would, if successful, be rendered nugatory, if the orders now sought are not granted. Again both Mr. Kirundi for the applicants and Mr. Gichachi for the respondent appreciate that the intended appeal would be rendered nugatory if the respondent was at liberty to dispose of the suit land or otherwise encumber it before the appeal is heard and determined. To allay those fears the respondent gave an undertaking in the superior court and repeated it in her affidavit in reply to the motion before us, that she has no intention of alienating the suit land before the appeal is heard. Indeed she had no objection to the stay being granted subject only to the condition that her enjoyment of the suit land is not interfered with by the applicants. The suit land, she swears, has remained vacant despite her intentions to occupy and use it, due to real and threatened violence from her estranged husband, Zakayo. She further swears that all the applicants are dead except her old and senile mother-in-law, who stays with her daughter-in-law, and Zakayo, her ex-husband, who stays in Mombasa. None of them resides on the suit land.

The applicants were however uncomfortable with what Mr. Kirundi referred to as “*a mere undertaking*” and pleaded with us to make an order for deposit of the Title of the suit land in court. They further pleaded that we grant an order maintaining the *status quo* until the appeal is heard. That *status quo*, according to them, is that the property remains unoccupied since there are some houses and three graveyards which the respondent might interfere with.

We have carefully considered the application, the affidavits on record and the submissions of counsel. The superior court held, rightly or wrongly, that the lawful owner of the suit land was the respondent and that she ought to have uninterrupted use of the property. Those findings cannot be wished away even if there was a pending appeal. They remain valid until they are vacated on appeal. From all indications, the suit land is vacant. We think in the circumstances that it is only just that the registered owner should keep possession of the suit land until the hearing and determination of the appeal. That, to us, should be the *status quo*. We also think it is just, and we so direct, that the suit land should not be sold or otherwise alienated or encumbered until the hearing and determination of the appeal. In the result we allow the application and order that the *status quo* as stated above shall be maintained until the appeal is heard and determined. The costs of the application shall abide the result of the appeal.

Dated and delivered at Nairobi this 27TH day of April 2007.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR