



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

(CORAM: OMOLO, GITHINJI & WAKI, J.J.A)

CIVIL APPLICATION NO. NAI. 338 OF 2004 (UR 177/04)

FREDRICK WAMBARI CHEGE APPLICANT

AND

- 1. JAMES KARUME WANJEMA**
- 2. CLEMENT GACHIRE WANJEMA RESPONDENTS**
- 3. NDICU WANJEMA**

(Application for an injunction pending the filing, hearing and determination of an intended appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Ransley, J) dated 11th November, 2004

in

H.C.C.C No. 5610 of 1991 (O.S)

RULING OF THE COURT

This is an application under **rule 5(2) (b)** of the Court of Appeal Rules for an order of injunction in the following terms:

“3. A temporary injunction do issue restraining the respondents, whether by themselves, their servants, agents or employees from selling, alienating, transferring or in any other way dealing with title number Gatamaiyu/Gachoiri/ 587 and from evicting the applicant from the said property or in any way interfering with the applicant’s possession thereof pending the hearing and determination of this appeal.”

The applicant’s suit in the superior court claiming land title **No. Gatamaiyu/Gachoiri/587** comprising of 8 acres by adverse possession was dismissed by the superior court (Ransley, J) on 11/11/2004. The applicant intends to appeal to this Court against that decision and has already filed a notice of appeal.

The purpose of an injunction pending appeal is to preserve the status quo pending appeal. Although the jurisdiction of the Court is discretionary, it would however be wrong to grant an injunction pending appeal where the intended appeal is frivolous or where the refusal of an order of injunction would not render the intended appeal nugatory or where the order of injunction could inflict greater hardship than it would avoid. **(See Madhupaper International Limited Kerr [1985] KLR 840 and J.K Industries vs.**

Kenya Commercial Bank & Another [1987] KLR 506).

The issue here is whether the applicant has made out a case for maintenance of status quo pending the appeal.

The applicant deposes that he has an arguable appeal and has set out six grounds of appeal in paragraph 6 of the supporting affidavit.

The suit land was registered in the name of Samuel Wanjema (the deceased) who died on 8/5/1973. The third respondent, George Ndichu Wanjema, is a son and the administrator of the estate of the deceased, having obtained a grant of letters of administration on 10/2/1992. The first and the second respondents are also sons of the deceased. The applicant filed a suit in the superior court on 22/10/1991 against the three respondents mainly seeking a declaration that he had acquired the title to the suit land by way of adverse possession.

The basis of the claim was that the deceased sold the suit land to him in 1967 for **Sh.15,000/=**, and immediately took possession; that the sale agreement was reduced into writing on 12/2/1968 and the applicant paid the purchase price and that since 1967, the applicant had been in complete physical and uninterrupted possession for a period of about 24 years.

By the sale agreement dated 12/2/1968 relied on by the applicant at the trial, the sale price of the suit land was Sh.15,000/=. The deceased acknowledged receipt of Sh.7,000/= and it was agreed that the balance of the purchase price was to be paid by annual instalments of Sh.1,000/=.

The learned Judge found that the last instalment was due on or about 12/2/1973 just before the deceased died on 8/5/1973; that the applicant entered in possession of the suit land with permission of the deceased and whilst the applicant paid the agreed installments; that the deceased had not taken steps to terminate the applicant's occupation before he died; that the applicant's possession was permissive until 1/4/1980 when the deceased's relatives terminated the applicant's license to remain on the land and that it was in April, 1980 when the applicant's possession of the land became adverse. The learned Judge ultimately held that the applicant had not been in adverse possession of the suit land for 12 years from April, 1980 to 22/10/1991 when he filed the suit.

We have perused the grounds of appeal and considered the submissions of the counsel. The agreement of sale in this case is dated 12/2/1968. The Land Control Act (**Cap 302**) commenced on 12/2/1967 about 2 months before the date of the agreement of sale. It is apparent that the applicant will be contending at the hearing of the appeal, inter alia , that possession of the applicant became adverse in 1968, six months after the date of the agreement when the agreement of sale became null and void on account of failure by the parties to obtain the consent of the land control board as required by the Land Control Act. The applicant will be further contending that permission by the deceased to the applicant to occupy the land after the agreement became null and void would be in furtherance of a void transaction and therefore illegal under **section 22** of the Act.

Those are not frivolous issues and constitute arguable grounds.

The applicant has been in occupation of the said land and has used the land for many years. Indeed, the 3rd respondent states in his letter dated 23/11/2004 (exhibit FWC 6) that the applicant has used the land for more than 30 years. The applicant has put 6 acres under tea bushes and is cultivating the remaining 2 acres. The land is now registered in the name of the third respondent. The third respondent states in the aforesaid letter that he has taken possession of the land peacefully and has put the farm under a 24-hour guard thereby denying the applicant access to the land and to the tea bushes.

The applicant is exercising his undoubted right of appeal. It is probable that the land could be alienated before the appeal is determined. Moreover, it would be inequitable to dispossess him and deny him the use of the six acres of tea bushes before the appeal is determined

. In the circumstances, it is just that the status quo should be maintained pending the appeal.

We therefore allow the application and grant the order of injunction in the terms sought. The costs of the application shall be costs in the appeal.

Dated and delivered at Nairobi this 14th day of January, 2005.

R.S.C OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR