



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P) NAMBUYE & OKWENGU, J.J.A)

CIVIL APPLICATION NO. 94 OF 2020 (UR 80/2020)

BETWEEN

FRANCIS MURUGA WERU.....APPLICANT

AND

MWANIKI KIBUI.....RESPONDENT

(Being an application for stay of execution pending appeal against the ruling

of the Environment and Land Court at Kerugoya (E. C. Cheron, J.)

dated 30th April, 2020 in Kerugoya ELC No. 66 of 2012)

RULING OF THE COURT

[1] By a notice of motion dated 27th August 2020, **Francis Muruga Weru** the applicant, has moved this Court under Rule 5(2)(b) of the Court's Rules seeking an order of stay of execution of the ruling of the High Court (**Cheron, J**) dated 30th April, 2020, pending the hearing and determination of his intended appeal against that ruling. The applicant also seeks an order of injunction restraining the respondent, **Mwaniki Kibue** from alienating, or in any way dealing with parcel no. LR Inoi/Kiamburi/1013-1019 (*suit property*) or interfering with the applicant's quiet possession, pending the hearing and determination of the appeal.

[2] The application originates from a judgment of the ELC at Kerugoya (**Oloa, J**), dated 12th May, 2016, in which the court declared the respondent to have become entitled by adverse possession to 2 acres out of the suit property, and ordered the Land Registrar Kirinyaga, to register him as the proprietor of the 2 acres. On 11th April, 2017, the court ordered that the Deputy Registrar of the court executes all the relevant documents to facilitate execution of the decree, because the applicant had refused to comply.

[3] Following an application made by the respondent for review of the order made on the 11th April, 2017, the ELC delivered the ruling dated 30th April 2020, allowing the application for review and directing that subdivisions of LR. Inoi/Kiamburi/172 giving rise to Inoi/Kiamburi/1013-1019 be cancelled to revert back to the original number LR. No. Inoi/Kiamburi/172, so that the order made by the court in favour of the respondent on 12th May, 2016 is executed and the respondent registered as proprietor of the 2 acres

[4] The applicant is aggrieved by that ruling, hence his application for stay of execution and the order of interlocutory injunction. The applicant contends that unless the orders are issued, his appeal against the order of 30th April 2020 and the judgment delivered on 12th May, 2016, will be rendered nugatory as his title will be cancelled and he may lose part of his land.

[5] In opposing the motion, the respondent filed a replying affidavit and written submissions in which he maintained that the applicant's motion was incompetent, bad in law, and an abuse of the Court process, as the applicant has not filed any appeal against the judgment of the ELC delivered on 12th May, 2016. The respondent contended that contrary to the applicant's argument, the ELC was not *functus officio* at the time it delivered the ruling of 30th April 2020; that the ruling did not amend the plaint as alleged by the applicant, but merely ordered cancellation of the subdivision of LR. Inoi/Kiamburi/172 to facilitate execution of the judgment. The respondent urged that the applicant had not met the threshold for granting an order for stay of execution, as he had not demonstrated that he stands to suffer substantial loss if the order of stay of execution is not granted. In addition, that the applicant had also not met the legal threshold for grant of order of injunction.

[6] We have considered the motion before us. It is trite that an applicant seeking orders under Rule 5(2)(b) of the Court Rules must satisfy the Court that he has filed an appeal or a notice of appeal indicating his intention to appeal against the orders sought to be stayed. In addition,

the applicant must satisfy the court that the appeal or intended appeal is arguable, and that the appeal, if successful would be rendered nugatory if the order of stay or injunction is not granted (see **Ahmed Musa Ismael vs Kumba Ole Ntamorua & 4 others** [2014] eKLR; and **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others** [2013] eKLR).

[7] In this matter, contrary to the respondent's contention that the applicant has not appealed against the judgment/order sought to be stayed, a notice of appeal against the ruling/order dated 30th April 2020 which was annexed to the applicant's affidavit has been exhibited, and this is sufficient to anchor the applicant's motion which seeks stay of execution of that order.

[8] A perusal of the ruling dated 30th April 2020 reveals that the learned Judge reviewed the earlier judgment and issued orders for cancellation of the subdivisions of the suit property that had already been registered. As cancellation of subdivisions was not one of the orders sought in the applicant's originating summons, there is an arguable issue as to whether in granting the orders the learned Judge addressed a different issue other than that which was pleaded. As stated in **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others** (supra), a single arguable issue is sufficient to meet the requirement. Therefore, the requirement of arguability has been satisfied.

[9] With regard to whether the intended appeal will be rendered nugatory if the orders sought are not granted and an interlocutory injunction issued, it is not disputed that the effect of the orders issued by the ELC will be to have 2 acres excised from the suit property and registered in the respondent's name. Absent an order of injunction, there would be nothing to prevent the respondent from disposing of the 2 acres, and should this happen the applicant's appeal would be rendered nugatory.

[10] For these reasons, we are satisfied that the applicant's motion is merited. We therefore issue orders of stay of execution as prayed in the applicant's motion and interlocutory injunction restraining the respondent from disposing of the suit property, pending the hearing and determination of the appeal. Costs shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR