



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & M'INOTI, J.J.A.)

MALINDI MISC.CIVIL APPLICATION NO. E10 OF 2020

BETWEEN

JOSEPH NICHOLAS MURAGE (As the Administrator

of the Estate of BERNARD CHIORI MURAGE).....APPLICANT

AND

SOFTWHITE BEACH LIMITED.....1ST RESPONDENT

JOSEPH KASHURU MUMBO.....2ND RESPONDENT

MASUMBUKO YERRY KOMBE.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

THE CHIEF LAND REGISTRAR.....5TH RESPONDENT

THE DISTRICT LAND REGISTRAR, KILIFI.....6TH RESPONDENT

(An application for injunction and stay of execution pending the hearing and determination of an appeal against the judgment of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) delivered on 13th May, 2020 in ELC Case No. 30 of 2011 Consolidated with HCCC No. 22 of 2011)

RULING OF THE COURT

1. Before us is a Notice of Motion filed by Joseph Nicholas Murage (the applicant) under **Rule 5(2)(b)** of the Court of Appeal Rules, under certificate of Urgency dated 26th October, 2020 in which he seeks several orders as against the six respondents herein. Basically however, the prayers are for orders of stay of execution of the judgment dated 13th May, 2020 and the decree arising therefrom issued in **ELC Case No. 30 of 2011** as consolidated with **HCCC No. 22 of 2011** by the Environment and Land Court (ELC). He is also seeking injunctive orders against 1st to 3rd respondents, their servants, agents etc from claiming any ownership rights over Land Parcel No. **Chambe/Kibabamshe/393** (the suit property) or any part thereof, or interfering with the applicant's quiet possession and peaceful enjoyment of the said property, pending the hearing and determination of his intended appeal.

2. The application is predicted on some 19 grounds on its face and supported by the applicant's affidavit sworn on 26th October, 2020. The gist of these grounds and the depositions in the affidavit is that the suit property is registered in the name of the applicant's late father, Bernard Chiori Murage, and Titled Deed was issued to him on 22nd September, 1978. The land was subsequently charged to Kenya Commercial Bank (KCB) for Ksh. 500,000 way back in 1982 and the Title remains undischarged to date. The property however remains undeveloped but the applicant's caretaker has been living thereon and taking care of it.

3. It would, nonetheless, appear that unbeknownst to the applicant, the land was allegedly allocated to third parties and somehow changed hands and ended up with La Marina Limited, who then subdivided it into two portions which were allocated new numbers; No. 651 and No. 652. These two properties were then sold to **Softwhite Beach Limited** (1st respondent herein). Meanwhile, **Joseph Kashuru Mumbo** and **Masumbuko Yerry Kombe** (2nd and 3rd respondents) claim to hold the original Title for plot No. 393.

4. A dispute arose between the 1st respondent herein and the 2nd and 3rd respondents after the 1st respondent discovered that the two had staked a claim over the property and were claiming to be the original owners. The 1st respondent moved the ELC seeking orders of injunction against the 2nd and 3rd respondents, and a declaration that it was the legitimate owner of the said properties and the 2nd and 3rd

respondents' title deeds should be nullified. We do not need to get into details relating to the said suit, but suffice to say that all this time, none of the parties seemed aware that there existed another original Title Deed for the same property, in the name of the applicant's late father which was being held by Kenya Commercial Bank, and further that the applicant was in physical possession of the property.

5. The court heard the consolidated suits and reserved judgment. Pending delivery of the judgment, the applicant herein appears to have gotten wind of the matter and moved to ELC under Certificate of Urgency by way of Notice of Motion dated 25th July, 2019, seeking to be joined as a party to the suit and also asking the Court to arrest the judgment. The Notice of Motion was heard and in a Ruling rendered on 5th December,

2019, the learned Judge dismissed the application and pronounced himself as follows:-

“In my considered view, the applicant would have no claim against any of the parties in the existing suit even where it were established that the subsequent allocation of the suit property by the Government was without basis. In such circumstances, it is my view that the applicant's remedy, if any, lies in seeking compensation from the Government and such relief would not be compatible with the existing cause of action and the reliefs sought herein by the existing parties.”

The learned Judge thereafter delivered the impugned judgment determining the fate of the suit property in absence of the applicant's claim being considered. That is the judgment the applicant herein has appealed against and in the meanwhile implores the Court to stay its execution pending determination of the appeal.

6. The submissions filed by the firm of Murage Juma & Co. Advocates on 13th November, 2020 on behalf of the applicant highlight the issues summarized above and urge the court to be persuaded that the applicant's intended appeal is arguable; and if the orders sought are not granted the appeal will be rendered nugatory. On the limb of arguability, learned counsel urges, *inter alia* that the applicant's Title was cancelled without him being given an opportunity to be heard and that was a violation of his constitutional right to fair trial and an affront to his right to property.

7. On the nugatory aspect counsel submitted that the 3rd respondent is already in the process of executing the decree and has been actively marketing the suit property for sale, and if execution is not stayed, the 6th respondent will amend the land's records at the registry and transfer the same to a 3rd party purchaser. We were urged to allow the application in order to obviate such a scenario.

8. We have considered this application along with the applicant's affidavit, submissions and the law. We note that there was no response to this application though served on counsel for the respondents by email as demonstrated through the affidavit of service dated 13th November, 2020. For the applicant to succeed in this application, all he needs to demonstrate is that he has an arguable appeal. An arguable appeal is not necessarily one that will succeed, but one that is not frivolous and one deserving this Court's consideration. See this Court's decision in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR.

Additionally, the applicant needs to demonstrate that his intended appeal will be rendered nugatory if the orders sought are not granted.

9. On the first limb, we are persuaded that the point that the applicant was divested of his proprietary rights over the suit property without being accorded opportunity to be heard is arguable. He needs not demonstrate any other issue.

10. On the nugatory aspect, from the brief history of the matter we have given above, it is clear that this property can change hands very quickly and in the process affect other persons who may not be parties to the suits already in court. If the appeal succeeds and the applicant is found to be *bona fide* owner of the suit property, and in the meantime the property will have changed hands, it will be arduous to recover it from whoever will have bought it. This Court has held before that where the recovery process, be it of monies paid or property transferred pending appeal is arduous or cumbersome, then the nugatory aspect will have been demonstrated.

11. For these reasons, we are satisfied that the applicant has demonstrated both limbs on arguability and the nugatory aspect. This application succeeds. We allow it and grant prayers 4, 5 and 6 of the application with costs in the intended appeal.

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

W. KARANJA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR