



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, MURGOR & J. MOHAMMED JJ.A.)

CIVIL APPLICATION NO. 112 OF 2020

BETWEEN

THE COUNTY GOVERNMENT OF

KAKAMEGA.....APPLICANT

AND

ANTHONY MILIMU LUBULLELEH.....1ST RESPONDENT

THE LAND REGISTRAR,

KAKAMEGA COUNTY.....2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

(Being an application for stay of execution from the ruling of the Environment and Land Court at Kakamega (N. Matheka, J) dated 26th September 2019

in

ELC Petition Number 8 of 2019)

RULING OF THE COURT

By a Notice of Motion dated 23rd September, 2020, **the applicant, the County Government of Kakamega** sought orders for stay of execution of the judgment of the Environment and Land Court (*N. Matheka, J.*) pending the hearing and determination of the appeal. The application was supported by the sworn affidavit of **Stephen S. Chune**, the applicant’s Director of Physical Planning, and the applicant’s written submissions.

The motion was premised on the grounds that in its judgment, the Environment and Land Court had ordered that the respondent be adequately compensated for the compulsory acquisition of the subject property, and that while the applicant was seeking to file the intended appeal, the respondent had proceeded to value the property; that the respondent had also demanded settlement of compensation in terms of the judgment, and should the applicant fail to pay, the respondent would proceed to execute the judgment against the applicant, which would render the appeal nugatory.

In a replying affidavit sworn by the respondent on 4th November 2020, and his written submissions, the respondent contended that he had filed *Kakamega ELC Petition No. 8 of 2019* seeking a declaration that he was the registered proprietor of the property known as Kakamega Municipality/Block III/2 (*the subject property*), and that the applicant’s entry onto, occupation and acquisition of the subject property was a contravention of his rights under **Article 40 (3) of the Constitution**; that a mandatory injunction do issue to compel the applicant to dismantle and remove the stone walls, grills, gates, cabro paving blocks, structures and machinery together with persons placed or being on the subject property, so as to restore the property back to its original condition; an order of permanent injunction be issued restraining the applicant from entering upon or remaining upon the subject property or using the same for any purpose whatsoever; that the **applicant be restrained permanently from alienating or dealing with or otherwise changing the registration status of the subject**

property or otherwise interfering with the respondent's title, mesne profits and general damages.

The respondent further asserted that the applicant did not at any time challenge his title, but instead sought to argue that since the respondent failed to comply with mandatory provisions, the lease had ceased, and the subject property had automatically reverted back to the public, and therefore the applicant was entitled to enter upon and undertake construction works on the subject property. That furthermore, the applicant had not demonstrated what loss would accrue to it if the stay of execution was not granted, or what substantial loss it would suffer; that in any event, it had not demonstrated that the respondent was incapable of refunding the compensation demanded in the event the appeal were to succeed. The respondent further undertook, as an officer of the Court, that he would refund the decretal sums in the event the appeal were to succeed so that the intended appeal would not be rendered nugatory.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Upon considering the application, the affidavits and submissions, in so far as the arguability of the intended appeal is concerned, one of the applicant's complaints is that the learned judge failed to take into account that the respondent's failure to adhere to the mandatory requirements of the lease, had resulted in the subject property automatically reverting to the applicant, as public land. In this regard, if indeed there are matters that the learned judge ought to have taken into account, and failed so to do, then, we consider the appeal to be arguable.

With respect to whether the intended appeal would be rendered nugatory, it is observed that central to the applicant's complaint was the trial court's order for the applicant *“...to adequately compensate the Petitioner for compulsorily acquiring his property...”*. In response to this, the respondent deponed that he is not a “man of straw” and in the event he were to be paid any compensation, he would be in a position to refund the amount paid. Given the respondent's capability to refund the compensation ordered, we are satisfied that the intended appeal would not be rendered nugatory in the event it were to succeed.

As such, the applicant having failed to satisfy the two threshold requirements necessary for granting the orders sought, the application is unmerited, and is hereby dismissed. Costs in the intended appeal.

It is so ordered

Dated and delivered at Nairobi this 19th day of February, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR