



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, GATEMBU & J. MOHAMMED, J.J.A)

ELDORET CIVIL APPLICATION NO. 166 OF 2019

BETWEEN

JESCAH GATAKAA AMBOKA.....1ST APPLICANT

JACKSON AMBOKA WANYUNGU.....2ND APPLICANT

AND

WILFRED KELI NDOLO.....RESPONDENT

(Being an Application for an order of stay of execution of the decree of the Judgment of the Environment and Land Court at Kitale (Mwangi Njoroge, J.) pending filing and hearing of the intended Appeal

in

ELC Case No. 8 of 2017

RULING OF THE COURT

1. By a judgment dated 30th September, 2019 the Environment and Land Court (ELC) in Kitale (Mwangi Njoroge, J.) entered judgment in favour of Wilfred Keli Ndolo (the respondent) herein against Jesca Gatakaa Kwamboka and Jackson Amboka Wanyungu (the applicants). In his judgment, the learned Judge gave a declaration that the applicants herein had offensively obstructed a public access road. The land which the learned Judge declared to be a public access road was part of a parcel of land purchased by the applicants from the respondent in the year 2014.
2. Aggrieved, the applicants filed on 1st October, 2019 a notice of appeal against the whole judgment and subsequently proffered the instant application, dated 26th November, 2019 under **Rule 5(2)(b)** of this Court's rules seeking stay of execution of the said judgment and decree pending the hearing and determination of the intended appeal.
3. The application is predicated on grounds, *inter alia*, that the learned Judge erred in failing to consider that the applicants had purchased the suit property in 2014 and the map indicating that there was an access road was drawn in 2015; that the court failed to order the respondents to compensate her for the area said to constitute the road reserve; that the portion she had bought had been considerably reduced without her being compensated.
4. The application is supported by the affidavit of the 1st applicant sworn on 26th November, 2019 in which she reiterates the grounds on the face of the application and adds that her right to fair trial was violated as the court failed to call as a witness the surveyor who had prepared the Index map for cross examination. Citing this Court's decision in **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR** the applicants contend that the intended appeal had high chances of success as it raises several issues as demonstrated in their grounds of intended appeal.
5. On the nugatory aspect, the applicant states that if the stay order is not granted, the respondent might dispose of the suit property and that would render her intended appeal nugatory. She implored us to allow the application. There was no response to the application either by way of grounds of opposition or replying affidavit.
6. This Court has carefully considered the application before it along with the submissions by the applicants and the applicable law. There is a notice of appeal duly filed, which clothes this Court with jurisdiction to entertain the application. (See: **Safaricom Ltd v. Ocean View**

Beach Hotel Ltd & 2 Others (2010) eKLR).

7. It is trite that for this Court to grant an order of stay of execution, the applicants must demonstrate that the intended appeal is arguable and that if stay is not granted, the intended appeal would be rendered nugatory in the event that the appeal succeeds. (See: **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others (supra)**).

8. An arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court. An applicant need not establish a multiplicity of arguable points and a single bona fide issue would suffice to demonstrate arguability. (See: **Kenya Tea Growers**

Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001).

9. The first issue for consideration is whether the applicants have an arguable appeal. On the limb on arguability, we note that the thrust of the applicants' intended appeal is that their land was reduced in size following the creation of the access road, and that the index map was produced in evidence without the surveyor being called for cross examination. From the record of the application before us, the proceedings are not annexed. We have no way of establishing whether the applicants applied to the court for the surveyor to be called for purposes of cross examination and the court declined to do so. Nor can the alleged denial of fair hearing be deciphered from the record before us. These being the main grounds of appeal, we are not persuaded, in the circumstances that the intended appeal is arguable.

10. Even if we were to assume that the applicant has an arguable point to be determined on appeal, the nugatory aspect needs to be demonstrated. On the nugatory aspect, the issue before the Court is whether the intended appeal will be rendered futile or a mere academic exercise if the order for stay is not granted.

11. It is evident that if an order of stay is not granted, the respondent and all the purchasers who bought land from the applicants will only use the road to gain access the surrounding areas and not for any other purpose. The access road was not transferred to the respondent and she cannot therefore dispose of the same to other 3rd parties.

12. On the limb of nugatory aspect, it is trite law that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

13. In the instant case, if the orders are not granted and the appeal succeeds, the subject of the stay is reversible since it would mean the access road will just be closed and the land will revert to the applicants. Furthermore, any damages accruing from non – use of the access road in the event the intended appeal succeeds can always be quantified and the applicants compensated for non use of the disputed portion.

14. Ultimately, as the applicants have failed to demonstrate both arguability and the nugatory aspect, this application fails and the same is dismissed with no order as to costs as it was not defended.

Delivered and dated at Nairobi this 19th day of February, 2021.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR