



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 122 OF 2019

BETWEEN

PAUL NJERU MWATHE.....APPLICANT

AND

VIDYA THIRA MWATHE.....1ST RESPONDENT

CATHERINE MUTHONI.....2ND RESPONDENT

MARY WARUE JOHN.....3RD RESPONDENT

ALOIS NYAGA MBOGO.....4TH RESPONDENT

(An application for stay of execution against the Ruling and Orders of the Environment and Land Court at Embu (Y. Angima, J.) delivered on 19th March, 2019

in

ELC Cause No. 239 of 2015)

RULING OF THE COURT

Subsequent to the Environment and Land Court declaring that the respondents held 2.6 acres of land parcel No. **KYENI/MUFU/7142 to 7148** in trust for the applicant, following a finding that the latter was in adverse possession, there have been numerous applications.

To begin with, the applicant was aggrieved and brought an application for review of the above order complaining that the portion awarded to him was “too small considering the nature of the case”. Not finding any substance in the claim, Olao, J. dismissed it with costs. Angima, J. subsequently dismissed the applicant’s notice of motion for an order of injunction to restrain the respondents from evicting the applicant from the suit land.

But what has prompted the taking out of this application is an order issued by Angima, J. on 19th March, 2019 by which the learned Judge directed that;

“all cautions, restrictions and/or prohibitory order lodged on “the suit land” be and are hereby lifted”.

The applicant moving under **Rule 5(2)(b)** of the Court’s rules is seeking that we stay those orders and issue an order of injunction to restrain the respondents from evicting him. The application is based on the grounds that the respondents have obtained orders for the survey and subdivision of the suit land; and that this will be prejudicial to him as he stands to be evicted from the portion of the suit land that he occupies.

Applications under **Rule 5(2) (b)** are a daily affair in this Court and it is firmly established that in considering such an application, the court exercises unfettered judicial discretion; that the court has jurisdiction to entertain an application of this nature only and only after a notice of appeal has been filed under **Rule 75. Halai & Another vs. Thornton & Turpin** (1963) Ltd. (1990) KLR 365.

The applicant must simultaneously satisfy both limbs to the twin principles; first, whether the appeal is arguable; and, second, whether it will be rendered nugatory, if it were to succeed. We have looked at the record and noted that the respondents have not filed any response to the application. The position notwithstanding, it is our obligation to satisfy ourselves that the application meets the threshold of applicable principles before allowing it. None of the parties have filed submissions as directed in the hearing notice of 27th November, 2020.

On the merits of the application, the first consideration is the notice of appeal which gives the Court jurisdiction to hear the application. Again, our perusal of the record makes it clear that no notice of appeal has been filed in respect of the decision of Angima, J. rendered on 19th March, 2019. The notice we see on record is one against the ruling of Olao, J. of 20th March, 2018.

Obviously, without a notice of appeal, we must down tools. But before we do so, we also do not think the appeal contemplated by the applicants is arguable, or that it will be rendered nugatory, if successful, considering the nature of the order intended to be impugned which simply removed any impediments to the implementation of the order declaring the applicant to be entitled to a portion of the suit land.

For the foregoing reasons, we find no merit in the application which accordingly we dismiss with no orders as to costs.

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

W. OUKO, (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR