



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: KOOME, ASIKE-MAKHANDIA & MUSINGA, J.J.A)**

**CIVIL APPLICATION NO. 58 OF 2020**

**BETWEEN**

**RICHARD K. BUSIENEI.....APPLICANT**

**AND**

**SHELLY J. BUSIENEI.....1<sup>ST</sup> RESPONDENT**

**JACKSON K. CHEBET.....2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution of the ruling/orders pending the hearing and*

*determination of an appeal or intended appeal from the ruling/orders of the*

*Environment and Land Court of Kenya at Eldoret (Odeny, J.) dated 10<sup>th</sup> March, 2020*

**in**

**ELC No. 235 of 2014)**

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**RULING OF THE COURT**

[1] The notice of motion dated 18<sup>th</sup> May, 2020 is taken out by **Richard Busieni** (the applicant). It seeks an order of stay of execution of the orders issued by **Eldoret Environment and Land Court (ELC) Case No. 235 of 2014** on 10<sup>th</sup> March, 2020 until the hearing and determination of the intended appeal. The motion is supported by the applicant's affidavit and the grounds stated therein. It is the applicant's case that the ruling delivered on 10<sup>th</sup> March, 2020 resulted in an order directing that his land parcel **No. LR No 6459/5** (the suit land) be surveyed, and subdivided by excising 50 acres from the lower portion. That the transfer of the 50 acres was to be made to **Jackson Chebet** (the 2<sup>nd</sup> respondent) according to the orders issued by the court on 9<sup>th</sup> April, 2019.

[2] The applicant states that he is aggrieved by the said orders and has filed a Notice of Appeal and a draft memorandum of appeal. The applicant has raised two grounds of appeal in the said draft memo to wit: -

***“1. That the learned Judge erred in law and fact by finding that the appellant failed to approach the 2<sup>nd</sup> respondent before instituting the application.***

***2. That the learned Judge erred in law and fact by finding that the appellant did not disclose any vitiating factors to vary the consent.”***

According to the applicant the above grounds of appeal are arguable.

[3] On the nugatory aspect, it was the applicant's case that if the 50 acres are excised and transferred to the 2<sup>nd</sup> respondent, he will suffer irreparable loss as he had already sold part of the suit premises so as to pay the 2<sup>nd</sup> respondent Ksh. 34,000,000 pursuant to a consent judgment, but the remittance of the money which money was delayed due to transfer challenges. Moreover, the original land which was the

subject of the agreement was auctioned thus excising another 50 acres from the suit land would leave the applicant and his family destitute thereby rendering the intended appeal nugatory.

[4] The motion was opposed by the 2<sup>nd</sup> respondent by his replying affidavit sworn on 9<sup>th</sup> October, 2020. The 2<sup>nd</sup> respondent gives a background of the matter which started with a sale agreement dated 19<sup>th</sup> May, 2014 entered between the applicant and the 1<sup>st</sup> respondent to sell **LR No. 6459/4** measuring 108.64 acres or thereabouts. The 1<sup>st</sup> respondent, who is the wife of the applicant, denied knowledge of the transaction and filed **Eldoret ELC No. 235 of 2014** seeking to nullify the sale transaction. However, parties entered into a consent which was adopted as the order of the court to the effect that the applicant would refund to the 2<sup>nd</sup> respondent a sum of Ksh. 34,340,000 within sixty (60) days from the 9<sup>th</sup> April, 2019. That in default, the applicant was ordered to transfer 50 acres from the lower part of the suit land to the 2<sup>nd</sup> respondent.

[5] As fate would have it, the applicant did not honour the consent order. Therefore, on 10<sup>th</sup> June, 2019 the 2<sup>nd</sup> respondent was back in court seeking to enforce the consent order. The 2<sup>nd</sup> respondent was granted the orders which directed the Deputy Registrar to execute the requisite transfer documents in regard to the 50 acres of land. Unrelenting, the applicant unsuccessfully applied for stay of the said order and when that application was dismissed on 14<sup>th</sup> May, 2020 the 2<sup>nd</sup> respondent embarked on execution. The 2<sup>nd</sup> respondent argued that the appeal is not arguable as the applicant failed to honour a consent order, misrepresented to court that he had sold the suit land when indeed it was another parcel of land he had sold as per the attached copy of a sale agreement. On the allegation that the appeal would be rendered nugatory, he contended that it had been overtaken by events. He attached copies of the deed plan and the transfer of title duly signed as per the court order.

[6] We have considered this motion which was heard virtually vide ‘Go TO MEETING’ Platform pursuant to the Court Practice Directions to mitigate the spread of the COVID 19 Pandemic. We have done this against the background of established principles under **Rule 5 (2) (b)** of this Court’s Rules, that for the application to succeed, it must establish that the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd. Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus:-

**“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”**

[7] The first issue for determination is whether the appeal is arguable. On a cursory glance at the two proposed grounds of appeal, we are not in the least persuaded of their arguability. Although it is for the appellate bench to interrogate those grounds on merit, on the face of it, it appears that the applicant entered into a consent and failed to honor the terms of the said consent which is the foundation of the orders granted. That consent is not challenged. Moreover, all the learned Judge did was to allow the 2<sup>nd</sup> respondent to proceed with execution due to the applicant’s own default. On the nugatory aspect, the 2<sup>nd</sup> respondent states that the survey was undertaken and he has attached a deed plan and a transfer of the title executed by the Deputy Registrar. In effect the matter is overtaken by events and there is nothing to stay.

[8] In the circumstances, we find no merit in the motion dated 12<sup>th</sup> March, 2020 which we order dismissed. We award costs to the 2<sup>nd</sup> respondent.

***Dated and delivered at Nairobi this 5<sup>th</sup> day of February, 2021.***

**M. K. KOOME**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**