



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.)

CIVIL APPLICATION NO. NYR 97 OF 2020

BETWEEN

ALEX TONY GITONGA NJERU.....1ST APPLICANT
MARY GORETTI WANJA.....2ND APPLICANT
GRACE HELLEN MUTHONI.....3RD APPLICANT
JOHN NYAGA KIBOKO.....4TH APPLICANT
ANGELO NJAGI BINIFACE.....5TH APPLICANT
ASELIMO KATHUNI NJERU.....6TH APPLICANT
CHARLES NJUE NJERU.....7TH APPLICANT
SEMUEL MUNENE NJERU.....8TH APPLICANT
ROSE EVERLINE NJOKI.....9TH APPLICANT
ANN WAWIRA.....10TH APPLICANT
BETTY NJAGI.....11TH APPLICANT
LAWRENCE MUNYI.....12TH APPLICANT
BONIFACE NJERU.....13TH APPLICANT
PHILIP NJERU KARU.....14TH APPLICANT
DENNIS MUGAMBI NJERU.....15TH APPLICANT
ALFRED MURIITHI NJAGI.....16TH APPLICANT
ANTHONY NJAGI.....17TH APPLICANT
MARGARET M. NJAGI.....18TH APPLICANT
MARGARET WANYAGA.....19TH APPLICANT
LUKA MUNYI NJAGI.....20TH APPLICANT

AND

COUNTY GOVERNMENT OF EMBU.....1ST RESPONDENT

NDWIGA WAINAINA.....	2ND RESPONDENT
PETER NTIGA.....	3RD RESPONDENT
NJERU KARIUKI.....	4TH RESPONDENT
ANASTACIA MUNYI.....	5TH RESPONDENT
TARACISIO MWANGI.....	6TH RESPONDENT
FERDINARD NYAGA.....	7TH RESPONDENT
THOMAS NJERU.....	8TH RESPONDENT
FELISTA IKAMBA.....	9TH RESPONDENT
JOHN NYAGA.....	10TH RESPONDENT
MBUGUA CHARAGU.....	11TH RESPONDENT
NJUE CHARAGU.....	12TH RESPONDENT
FERDINARD NJIRU WAINAINA.....	13TH RESPONDENT

(Application for an order of maintenance of status quo pending the hearing and determination of an appeal against the Judgment of the Environment and Land Court of Kenya at Embu (Angima, J.) dated 5th May 2020

in

ELCC No. 332 of 2015 (O.S))

RULING OF THE COURT

On 5th May 2020 the *Environment and Land Court* at *Embu (Angima, J.)* dismissed an originating summons taken out by the applicants who claimed that the property known as *LR No. Gaturi/Nambure 3072 (the suit property)* was registered in the name of the *County Government of Embu (the 1st respondent)* in trust for the *Muthiga Clan*. They sought a further order for the termination of the trust and registration of the suit property in their names on behalf of the said clan.

The other respondents in this application, litigating as interested parties, opposed the summons on the ground that the trust in favour of the Muthiga Clan was in fact determined in their favour in an earlier suit, namely, *Nyeri HCCC No. 201 of 2000(OS)* which later became *Nyeri ELC No 700 of 2014 (the Nyeri suit)*. Although the applicants were not parties to the Nyeri suit, the 2nd to 13th respondents added that the applicants were members of the *Karukeny Family* which had previously filed Embu *HCCC No. 14 of 2004* claiming the suit property, but the same was struck out as *res judicata*.

In his judgment the learned judge noted that the applicants and the respondents were members of two different families belonging to the Muthiga clan. Whereas the applicants belonged to the *Karukeny* family, the 2nd to the 13th respondents were members of the *Wainana* family. After carefully considering the litigation history of the matter and the various judgments on record, the learned judge noted that the previous litigation had ended in favour of the family of the 2nd to 13th respondents and that when the applicants filed the summons that gave rise to this application, they deliberately sued only the 1st respondent and left out the other respondents. Subsequently the applicants and the 1st respondent entered into a consent order to transfer the suit property to the applicants, but the consent judgment was set aside for having been procured through collusion. Ultimately the learned judge held that the summons was *res judicata*, scandalous and an abuse of the court process because the applicants and their family were aware of the Nyeri suit.

The applicants were aggrieved and filed *Civil Appeal No. 92 of 2020*, followed by the application now before us, brought primarily under *rule 5(2)(b)* of the Rules of this Court, in which they seek an order prohibiting all dealings in the suit property and an order for maintenance of the status quo, pending the hearing and determination of the appeal. They contend, in the application and written submissions, that because they were not parties to the Nyeri suit, the learned judge erred by finding that their suit was *res judicata*. They add that the decree in the Nyeri suit was time barred.

The applicants further contend that their appeal will be rendered nugatory should the respondents transfer the suit property to themselves and further that there is a danger that the suit property will be alienated.

The 1st respondent supported the application, curiously, on the *Giella v. Cassman Brown* principles rather than the twin principles that guide applications under *rule 5(2) (b)* of the *Court of Appeal Rules*.

Although served electronically, the 2nd to the 13th respondents did not file any replying affidavit or submissions.

We have carefully considered this application. As has been stated time and again, to entitle the applicants to an order under **rule 5(2)(b)** of the **Court of Appeal Rules**, they must satisfy the court first, that their intended appeal is arguable and second, unless an injunction is granted, the intended appeal will be rendered nugatory if it succeeds. (See **Githunguri v. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838**). Both of those requirements must be satisfied; it will not suffice to establish only one of them. (See **Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31**).

On whether the intended appeal is arguable, we agree with the applicants that it is. As has been consistently stated, an arguable appeal is not one which must necessarily succeed. Neither is it one that raises a multiplicity of issues. It is simply an appeal that is not frivolous, one that raises even a single *bona fide* issue deserving of full consideration by the Court. (See **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA No. Nai. 72 of 2001**). We are satisfied that the issues the applicants wish to argue are not frivolous.

As regards whether the intended appeal will be rendered nugatory, we noted that this limb of the application is based purely on conjecture and supposition without any positive averment that the 2nd to the 13th respondents are disposing of the suit property. Transfer of property to the name of a party can be easily undone, and is also not *ipso facto* evidence that the transferee intends to sell and transfer the property to a third party. The affidavit sworn on 25th September 2020 by the 1st applicant in support of the application merely alleges:

“18. That there is danger of the land being alienated before the appeal before this court is heard and determined.

19. That should the said land be alienated the appeal before this court will be rendered nugatory.”

What may render an appeal nugatory depends on the peculiar circumstances of each case as was stated in **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR**, the primary consideration is whether what is intended to be stayed is reversible and if it is not, whether damages will adequately compensate the successful party.

The Court cannot issue orders on the basis of suppositions that are not grounded on evidence.

Accordingly, the applicants have not satisfied the second consideration with the consequence that this application is hereby dismissed with costs to the 2nd to 13th respondents.

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

M. K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR