



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR 15 OF 2017

BETWEEN

DR BEN MUTUNGI MUTHIORA.....APPLICANT

AND

MARION MUTHAMIA KIARA (On behalf of the Estate of

ERASTUS MUTHAMIA KIARA).....RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal against the judgment and decree of the Environment and Land Court of Kenya at Nyeri (Waithaka, J.) dated 6th December 2016 in ELCC No. 233 of 2014)

RULING OF THE COURT

The background to this application is the double allocation of a parcel of land known as **2787/1274 (the suit property)** in the former **Nanyuki Municipality** to **the applicant, Dr Ben Mutungi Muthiora** and to the respondent's late husband, **Erastus Muthamia Kiara**. By a plaint dated 14th September 2020, **the respondent, Marion Muthamia Kiara**, in her capacity as the administrator of the estate of her deceased husband, prayed for a declaration that the suit property, registered in the name of the applicant and in his actual possession, was part of the estate of the deceased. She also prayed for a mandatory injunction to evict the applicant from the suit property.

The applicant's defence was that he was allotted the suit premises on 3rd December 1991 and started developing it in 1993, before he occupied the same in 1995. He contended that he was not aware of the respondent's interest in the suit property and that he was a *bona fide* allottee. It was also his case that the respondent's claim was time-barred.

By a judgment dated 6th December 2016, the learned judge found for the respondent and directed as follows:

“owing to the special circumstances of this case, to wit, the defendant (applicant) took possession and developed the suit properties on the mistaken belief that he had a good claim to it and given the fact that the plaintiff (respondent) is not opposed to giving the defendant an opportunity to redeem their interest in the suit property, I find and hold that it is just and equitable to give the defendant an opportunity to redeem his interest in the suit property by paying to the plaintiff the current market price of the land he occupies.”

The learned judge further directed the suit property to be valued and the applicant to pay off the respondent within 45 days of the judgment. In default the applicant was ordered to vacate the suit property.

The applicant was aggrieved and filed a notice of appeal, followed by the present application for stay of execution in which he argues that the learned judge erred in failing to find that the respondent's claim was time barred; by failing to find that he was an innocent allottee; by ignoring his occupation of the suit property for 18 years and the extensive developments he had undertaken thereon and by awarding reliefs which no party had prayed for. He added that unless execution of the decree was stayed, he stood to lose his home and lifelong investment.

A hearing notice was served by email upon the parties on 24th February 2021 and the court directed the parties to file their written submissions for hearing on 10th March 2021 without presence of counsel or parties in line with the Court of Appeal Practice Directions to mitigate the COVID-19 pandemic.

Only the applicant filed his submissions, in which he rehashed the arguments we have set out above. The respondent did not file a replying affidavit or grounds of opposition.

We have carefully considered the application. In an application for stay of execution, the applicant must demonstrate first, that he has an arguable appeal, and second, unless the order of stay of execution is granted, the intended appeal will be nugatory if it succeeds. (See *Exclusive Estates Ltd v Kenya Posts and Telecommunications Corporation & Another* [2005]1 EA 53). We have pursued the applicant's draft memorandum of appeal and we are satisfied that the issues he has raised are not frivolous. Those issues, among them whether the respondent's claim was time barred; whether the applicant was a bona fide allottee and whether the court awarded remedies which none of the parties had sought are weighty and deserve to be fully considered by this Court.

As to whether the intended appeal will be rendered nugatory, we are satisfied it will. The applicant has been in occupation of the suit property since 1995 and from the record he has substantially developed it. There is nothing on record to indicate the respondent's means or ability to compensate the applicant should his appeal succeed and in the meantime the suit property had been alienated.

The applicant has satisfied both considerations in an application for stay of execution. In the circumstances we allow the motion dated 13th February 2017 and stay execution of the judgment and decree of the Environment and Land Court at Nyeri dated 6th December 2017 until the hearing and determination of the intended appeal. Costs of this application will abide by the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M. K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR