



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, MURGOR & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 113 OF 2020

BETWEEN

COUNTY GOVERNMENT OF KAKAMEGA.....1<sup>ST</sup> APPLICANT

KAKAMEGA COUNTY DEVELOPMENT CONTROL

& DISPUTES RESOLUTION COMMITTEE.....2<sup>ND</sup> APPLICANT

AND

MUNYAO SILA .....1<sup>ST</sup> RESPONDENT

LINDA CHEPKORIR RUTO.....2<sup>ND</sup> RESPONDENT

*(An application for stay of execution of the judgment and decree of the Environment & Land Court of Kenya at Kakamega (Matheka, J.) dated 25th September, 2019*

in

**E.L.C Petition No. 6 of 2018)**

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**RULING OF THE COURT**

### Background

1. **The County Government of Kakamega and The County Development Control and Disputes Resolution Committee** (the applicants) have moved this Court under **Rule 5 (2)(b)** of the **Court of Appeal Rules** (the Rules of this Court) praying for an order of stay of execution of the judgment of the Environment and Land Court (ELC) (Matheka, J.) dated 25th September, 2019 in E.L.C Petition No. 6 of 2018, pending the hearing and determination of the intended appeal against the said decision. **Munyao Sila** and **Linda Chepkorir Ruto** are the respondents herein. The application is anchored on the grounds that the applicants' appeal is arguable and would also be rendered nugatory if the stay sought is not granted.

2. The dispute that escalated in the instant application revolved around **Kakamega Municipality/Block III/7** (the suit property) which is adjacent to Kakamega Bukhungu Stadium. The respondents claimed to be the registered proprietors of the suit property following the purchase and registration in their favour on 22nd November, 2011. It was the respondents' further contention that the suit property was prone to encroachment; that in light of the foregoing, the respondents applied for planning permission to erect a fence around the suit property which was granted by the applicants; and that subsequently, the perimeter wall was erected by the respondents at a cost of Kshs.2, 500,000/- .

3. It was the respondent's further contention that on 7th December, 2017 persons claiming to act under the instructions of the applicants began demolishing the perimeter wall but were stopped by the police; that thereafter, on 11th December, 2017 the 2nd applicant attached an illegal enforcement notice on the allegation that the perimeter wall had not been approved and directed the respondents to demolish the same within 24 hours. It was the respondents' further claim that the applicants demolished the perimeter wall on the night of 12th /13th December, 2017 at around 1:00 a.m; that in September, 2018 the applicants forcefully entered the suit property and began construction works thereon; that the construction works entailed erecting a wall on one side of the suit property so as to annex it to be part of Bukhungu Stadium, and laying of concrete paving blocks (*cabro*) to create a parking area for the Bukhungu Stadium.

4. As far as the respondents were concerned, the applicants' conduct was part of a larger scheme to expropriate and forcefully take over the suit property. Further, the fact that the applicants on 20th day of October, 2018, during the Mashujaa Day festivities, used the suit property as a parking area for the public was a clear indication that they had forcefully taken the suit property from the respondents and converted the same for use by the general public. It is on that basis that the respondents filed suit at the ELC claiming that the applicants had infringed their rights under **Article 40** of the **Constitution**. The respondents sought *inter alia* declarations that the applicants abused their office and acted illegally and unconstitutionally in facilitating the demolition of the perimeter wall to the suit property and compensation for compulsory acquisition of their property. In the alternative, the respondents prayed for a declaration that they were the rightful owners of the suit property and an undertaking from the applicants not to interfere with their rights thereon.

5. On their part, the applicants' defence was that the respondents had obtained the suit property fraudulently and could not benefit from the same, in that the title in question was issued during the transition period take over by county governments, which period was marred with fraudulent acts and dealings by the employees of the defunct government; that the issuance of the title to the respondents was the subject of such fraud; and that the respondents had erected the perimeter wall without consent.

6. Upon considering the pleadings and the rival submissions by the parties the learned Judge found in favour of the respondents vide the impugned judgment. In doing so, the learned Judge issued the following orders:

**(1) A declaration that the respondents (the applicants herein) acted illegally and unconstitutionally in facilitating, the demolition of the perimeter wall to plot No. Kakamega Municipality Block III/7.**

**(2) A declaration that the respondents, jointly and/or severally, are in violation of Articles 2, 3, 10, 19, 20, 21, 27, 28, 40, 47, 50 (1), of the Constitution and the provisions of the Fair Administrative Actions Act, the Physical Planning Act, the Land Act and Land Registration Act, and International law in so far as the same relate to the petitioners.**

**(3) A declaration that the actions of the respondents constitute an eviction and/or a constructive eviction and/or a taking and/or constructive taking of the property of the petitioners for which the respondents are liable to pay full compensation.**

**(4) An order that the petitioners (the respondents herein) are entitled to full compensation for the value of the suit property in the sum of Kshs. 40,500,000/= subject only to the petitioners surrendering the leasehold title to the 1st respondent.**

**(5) Payment of the sum of Kshs. 2,400,000/= being the costs incurred by the petitioners to put up the wall that the respondents demolished.**

**(6) Special damages of Kshs. 60,000/= for the valuation report.**

**(7) Interest on the above from the date of filing this suit to full payment.**

**(8) Cost of the petition to be borne by the 1st and 2nd Respondents.**

7. Aggrieved by that decision, the applicants lodged a notice of appeal dated 27th September, 2019 and the instant application. From the record, there is no response by the respondents to the application or any written submissions filed on their behalf.

8. It was the applicants' contention that they had established the twin principles under **Rule 5(2)(b)** of this Court's Rules which calls upon the Court to exercise its discretion in their favour by granting the stay sought. In that regard, the applicants cited **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR**. Expounding on this line of argument, the applicants submitted that the draft memorandum of appeal annexed to the application demonstrated that the intended appeal raises substantial issues of law *inter alia* that the respondents had filed a bill of costs and demanded settlement of the compensation with the intention of commencing execution of the impugned judgment; that the applicants were apprehensive that should execution issue, public funds would be exposed to unnecessary risk and render the intended appeal nugatory; that in point of fact, the applicants being government entities, funded by tax payers, could not be rendered insolvent and would be able to honour the decree should the intended appeal be unsuccessful. In conclusion, the applicants urged this Court to grant an unconditional stay of the impugned judgment.

#### **Determination**

9. We have considered the application and the applicants' written submissions on record. The principles governing the exercise of this Court's discretion under **Rule 5(2)(b)** are well settled. An applicant must establish firstly, that the intended appeal or appeal in question is arguable and secondly, that the appeal or intended appeal would be rendered nugatory if the orders sought are not granted and the appeal succeeds. See this Court's decision in **Okiya Omtatah Okoiti & another vs. Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 3 others [2015] eKLR**.

10. On arguability of the appeal, we take caution not to make any definitive findings on the merits of the appeal which is not the subject of our consideration. Having considered the draft memorandum of appeal on record, we find that the question of whether the evidence adduced before the trial court demonstrated that the suit property was public land and whether the respondents obtained the same fraudulently, are arguable points which ought to be ventilated before this Court in the intended appeal.

11. On the nugatory aspect, we appreciate that whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, is reversible, or if it is not reversible, whether damages will reasonably compensate the parties aggrieved. In this case, we bear in mind that being a government entity and funded by tax payers, the applicant will be in a position to honour the decree in the event that the appeal is unsuccessful. We therefore find that the balance tilts in favour of the applicants.

12. Accordingly, we find that the application has merit and is hereby allowed. For clarity, we issue an order of stay of execution of the impugned judgment pending the hearing and determination of the intended appeal. Costs of this application shall abide by the outcome of the intended appeal.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of March, 2021.**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**