



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, MUSINGA & SICHALE, JJ. A.)

CIVIL APPLICATION NO. 12 OF 2021

BETWEEN

ELKANA KIPLETING KIBOR.....1ST APPLICANT

EVANS KIPKOSGEI KIBOR.....2ND APPLICANT

ERICK KIPCHUMBA KIBOR.....3RD APPLICANT

AND

JACKSON KIPROTICH KIBOR.....RESPONDENT

(Being an application for stay of execution of the Judgment

and Decree of the Environment and Land Court at Eldoret

(Ombwayo, J.) dated 6th May 2020 in *E.L.C Case No. 94 of 2016.*)

RULING OF THE COURT

1. The applicants' application dated 17th February 2021 seeks stay of execution of the orders issued by the Environment and Land Court (ELC) on 6th May 2021 in *ELC Case No. 94 of 2016* directing the Land Registrar, Uasin Gishu County, to nullify and cancel the consolidation, subdivision and issuance of title numbers *Soy/Kapsang Block 10 (Samitoi) 13, 14 & 16* (the suit properties) to them (applicants).
2. The applicants, being aggrieved by the aforesaid decision, have filed a notice of appeal, and applied for certified copies of the proceedings and the judgment with a view to filing an appeal.
3. The applicants believe that their intended appeal is arguable and have annexed to their affidavit a draft memorandum of appeal. Among their proposed grounds of appeal are that the learned judge failed to find that the respondent personally gifted the land inter vivos in their favour and processed the transfers; that the learned judge failed to hold that the respondent did not prove any fraud against them; and that the learned judge failed to make a finding on the issues of limitation of time and adverse possession which they raised during the trial.
4. The applicants argued that unless the order sought is granted, there is a likelihood that the respondent will evict them from the suit properties as he has developed hostility and intolerance against them, though they are the respondent's sons. If execution of the judgment is carried out, the intended appeal shall be rendered nugatory, the applicants added.
5. The respondent opposed the application. He stated that the intended appeal is not arguable and will not be rendered nugatory if the orders sought are not granted; that he has no intention of evicting the applicants from the suit properties or disposing of the same. He added that the court can reverse the order of cancellation of the titles if the intended appeal succeeds. On those grounds, we were urged to dismiss the application.
6. This application was virtually canvassed by way of written submissions only. The principles that guide this Court in its determination of **rule 5(2) (b)** applications are well settled. The Court first considers whether the appeal or intended appeal is arguable; and secondly, whether the appeal will be rendered nugatory unless the orders sought are granted. See *Jaribu Holding Limited v Kenya Commercial Bank Limited*

[2008] eKLR.

7. We have perused the impugned judgment, and looking at the draft memorandum of appeal, we are satisfied that the intended appeal is arguable. It must be borne in mind that an intended appeal is not one that must succeed, rather it is an appeal that raises at least one ground that is not frivolous and merits full consideration by the Court. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.

8. Turning to the second limb of the twin principles, the applicants are sons of the respondent. They have been in occupation of the suit properties for many years. There is no dispute that their relationship with the respondent is quite strained, so much so that shortly after delivery of the impugned judgment the respondent caused the arrest and incarceration of the applicants at Soy Police Station on account of alleged trespass to the suit properties.

9. Unless the order sought is granted, there is no telling what the respondent may decide to do with the suit properties before the appeal is heard and determined. In the event that he evicts the applicants and disposes of the suit property, the appeal will be rendered nugatory.

10. We are satisfied that the applicants have satisfied the twin principles for grant of an order of stay of execution of the trial court's judgment as sought. Consequently, we allow the application dated 17th February 2021. The costs of the application shall be in the appeal.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR