



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

(CORAM: KOOME, ASIKE-MAKHANDIA & MURGOR JJ.A)

CIVIL (APPLICATION) NO. 80 OF 2019

EMILIO MARANGU M'NDIIRI.....APPLICANT

AND

ANGERO MUNENE MARINDI.....RESPONDENT

(An application for stay of execution pending the lodgement, hearing and determination of intended appeal from the judgment of the Environment and Land Court at Chuka (P.M. Njoroge, J) delivered on 13th December, 2018

in

ELC Case No. 99 of 2017 (formerly Meru HCC No. 73 of 2006)

RULING OF THE COURT

The Notice of Motion dated 30th May 2019 is brought pursuant to **rules 5 (2) (b), 41, 42, and 47** of the ***Court of Appeal Rules, 2010***. It seeks orders of stay of execution of the judgment (*P.M Njoroge, J*) delivered on 13th December 2018 pending the hearing and determination of an intended appeal.

As a brief background to the dispute, which was a claim predicated on the doctrine of adverse possession, ***the applicant Emilio Marangu M'Ndiiri*** claimed ownership of *Land Parcel No. Muthambi/Upper-Karimba/1279* and all parcels of land (*the suit properties*) emanating therefrom, for reasons that he has been in open, continuous and exclusive possession of the suit properties since his birth which was well before registration of the properties. He also claimed to have extensively developed the land.

The respondents on the other hand filed their counter-claim seeking a declaration that they were the lawful proprietors of their respective parcels of suit properties and consequently they sought an order of eviction of the applicant.

Upon considering the pleadings and the parties' submissions, the Environment and Land Court (*P.M Njoroge, J*) dismissed the applicant's suit and entered judgment in respect of the respondents' counterclaim. Consequently, the court declared *Erasto Njeru Munene, Lawrence Antony Kinyua, Faith Nkinga Kabucha, Eric Gitonga Mbaka and Everlyne Makena Mitambo* to be the lawful proprietors of their respective parcels of land and ordered the eviction of the applicant from Land Parcels No. Upper-Karimba/2028, 2029, 1600, 1601, 1598, 1599 and 1278.

Aggrieved by the trial court's orders, the applicant seeks to lodge an appeal in this Court, but in the meantime, has brought this Notice of Motion seeking to stay the execution of the orders on grounds, that intended appeal raises arguable points and has high chances of success as demonstrated in the Draft Memorandum of Appeal; that in particular, the learned judge wrongly concluded that firstly, time in a claim for adverse possession stopped running when *Meru HCCC No 39 of 1992* was filed against the applicant, and secondly, in finding that the applicant had occupied the suit property with the respondent's consent. It was further asserted that, the applicant is likely to suffer irreparable loss and damage as he will be forcefully evicted from the suit properties and will be rendered destitute, yet he has been in occupation of the suit properties and has no other place to live; that if he is evicted, the intended appeal will be rendered nugatory. The applicant's application was also supported by written submissions.

In a replying affidavit sworn by **Lawrence Antony Kinyua** on 26th February 2021 on behalf of the respondents, it was deponed that the application herein was overtaken by events as the applicant was evicted from the suit properties on 12th February 2021 between 8 a.m. and 2 p.m. in an exercise that was overseen by the Officer -in -Charge of Ntumu Police Station. It was further deponed that during the eviction, the houses on the suit properties were demolished, and that the respondent had taken over occupation. The averments were largely reiterated in the respondent's written submission.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Upon considering the application, the affidavit in support and the submissions, the applicant's grievances are that the learned judge was wrong in finding that time for a claim of adverse possession stopped running when *Meru HCCC No 39 of 1992* was filed against the applicant and in further finding that the applicant's occupation of the suit properties was with the respondent's consent. As to when time stopped running, or whether it begun to run at all are matters that will require a re-evaluation of the evidence that was before the trial court so as to discern whether the trial judge arrives at the correct conclusion. As such, we consider these to be arguable issues.

As to whether the appeal would be rendered nugatory if the orders were not granted and the appeal were to succeed, according to the respondent, the application has been overtaken by events, as the applicant was on 12th February 2021 evicted from the suit properties between 8 a.m. and 2 p.m., and the respondent has since taken over occupation. As a consequence of the eviction, there is nothing for this Court to stay.

Accordingly, the applicant having failed to satisfy the second limb of the **rule 5 (2) (b)** precondition, the motion dated 30th May 2019 fails and is dismissed. Costs in the intended appeal.

It is so ordered.

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

M.K. KOOME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR