



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPLICATION NO. 41 OF 2020**

**BETWEEN**

**FREDRICK KINOTI M'MWONGO.....1<sup>ST</sup> APPLICANT**

**STANLEY KIOGORA ARTHUR.....2<sup>ND</sup> APPLICANT**

**AND**

**CATHERINE M'MWONGO.....1<sup>ST</sup> RESPONDENT**

**AGNES KANAU.....2<sup>ND</sup> RESPONDENT**

**JENNIFER KENDI.....3<sup>RD</sup> RESPONDENT**

(Being an application for stay of execution of the orders of the High Court at Meru (F. Gikonyo, J.) dated 21<sup>st</sup> April 2020 in **(Succession cause no. 245 of 2007)**)

**RULING OF THE COURT**

The High Court sitting at Meru (**Gikonyo. J**) by a ruling dated 21<sup>st</sup> April 2020 dismissed the applicants' application seeking to review and set aside the ruling delivered by the same court on 6<sup>th</sup> November 2018 as well as the revocation of documents of title in respect of all that piece or parcel of land known as Ntima/Igoki/10254 ("the suit premises") that arose from the said ruling. By that ruling the court distributed the estate of Mukaru M'Bagine- deceased and gave the suit premises to the respondents much to chagrin of the applicants. The deceased was the grandfather to the parties to this application. The applicants claimed that as a result of the ruling, the respondents had obtained the title documents in respect of the suit premises, which they had extensively developed. That the applicants had suffered prejudice as a result, as the respondents had taken over the said developments without any sweat.

Countering the application, the respondents took a dim view of the applicants' claims. They asserted that the application was an afterthought, the applicants had never occupied the suit premises and the allegations that they had developed the suit premises was a fabrication.

Upon hearing the parties, the trial court held that the applicants had not established any or any sufficient reason to warrant the review sought under Order 45 of the Civil Procedure Rules. Accordingly the application was dismissed.

The applicants were aggrieved by that outcome and are bent on appealing it to this court. Indeed, they have already filed a notice of appeal evidencing that intention. Pursuant to the said notice the applicants have now taken out this motion on notice dated 28<sup>th</sup> May 2020 pursuant to rule 5(2) (b) of the Court of Appeal Rules ("the Rules") substantively seeking stay execution of the ruling as well as an injunction to restrain the respondents from subdividing or transferring the suit premises.

From the application, the grounds in support thereof, the supporting affidavit as well as the written submissions, we decipher in a nutshell the applicants claim to be that they have allegedly carried out substantial and extensive developments on the suit premises and are therefore entitled to its possession. On the other hand, they claim the respondents merely want to enrich themselves from their sweat by wresting the suit premises from them without any sweat. We were urged that in reaching our determination on this application we should invoke the doctrine that justice must not just be done but it must be seen to be done as held by this court in **Juma Mohamed Tuwano v. Mohammed Hamisi Mwabwazo [1997] eKLR**. The applicants also question the partiality of the trial court in the whole matter and in particular they impute bias against them by the trial court.

The respondents did not file any papers in opposition to the application despite having been reminded by this Court when served with the

hearing notice informing them that the application will be heard virtually, on written submissions and without appearance of counsel and that they were at liberty to file any documents and submissions that they wished to rely on.

We have considered the application, the submissions and the authorities cited. The application is premised on Rule 5(2)(b) of the rules whose purpose really is to preserve the substratum of an appeal. The principles that apply to applications of these nature are well known. First the applicants have to demonstrate that the intended appeal or the appeal is arguable and not frivolous or idle. Secondly that in the absence of stay or injunction, and the appeal succeeds, the same shall have been rendered nugatory. See generally the case of **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others (2013) eKLR.**

From the onset we wish to state that the applicants in support of the instant application merely repeated and reiterated what they had raised in their application for review in the High Court. They brought on board nothing new. In other words, they failed to appreciate that this was an application filed in the Court of Appeal under its rules for stay as well as an injunction. In this court these kinds of applications attract totally different considerations from those in the High Court. The applicants did not at all address the arguability of the intended appeal either in the grounds in support of the appeal, the supporting affidavit as well as the written submissions. That being the case we have no basis on which to ascertain whether indeed the intended appeal will be arguable. Similarly, the applicants have not addressed the nugatory aspect in their application, the grounds in support thereof as well in the written submissions. We are therefore in absolute darkness as to the loss that the applicants will suffer if the stay and injunction sought is granted and if such loss can or cannot be undone. Given the foregoing there is no meat upon which we can determine the arguability of the appeal and the nugatory aspect. In a nutshell the applicants have not brought themselves within the strictures of Rule 5 (2) (b) of the rules.

The application is therefore bereft of merit and is accordingly dismissed with no order as to costs, this being a family dispute.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2021.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**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**