



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR 112 OF 2020

BETWEEN

JAMES MURIITHI NDAMBIRI.....1ST APPLICANT

VERONICA NYAWIRA NDAMBIRI.....2ND RESPONDENT

AND

EFUREITHI IRIMA MUGO.....1ST RESPONDENT

MINISTER FOR LANDS.....2ND RESPONDENT

LAND REGISTRAR, MEBERE.....3RD RESPONDENT

*(Application for injunction pending the hearing and determination of an intended appeal against the ruling and order of the Environment and Land Court of Kenya at Embu (Angima, J.) dated 15th October 2020*

*in*

*ELCC No. 59 of 2016)*

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### RULING OF THE COURT

Before us is a notice of motion by **the applicants, James Muriithi Ndambiri and Veronica Nyawira Ndambiri** in which they seek an order of injunction to restrain any dealings with the property known as **Title No. Mbeere/Kirima/1100 (the suit property)** pending the hearing and determination of an intended appeal against the ruling and order of the **Environment and Land Court at Embu (Angima, J.)** dated 15th October, 2020. By that ruling the learned judge dismissed a similar application for injunction by the applicants.

The brief background to the application is as follows. The suit property is registered in the name of the **1st respondent, Efreithi Irima Mugo**. On 24th August 2016 the applicants filed case **No 59 of 2016** in the Environment and Land Court at Embu seeking a declaration that their late father was the owner of the suit property and nullification of the registration of the 1st respondent. They averred that the decision of the Minister for Lands to register the suit property in the name of the 1st respondent was in breach of the rules of natural justice. Simultaneously with the suit, the applicants applied for an injunction to restrain the respondents from interfering with their occupation of the suit property. The 1st respondent's defence was that he was lawfully registered as owner of the suit property following an adjudication process in which the applicant's father was represented and the 1st applicant was a witness.

Upon considering the application, the learned judge found that the applicants had not made out a *prima facie* case because they were heard in the disputes preceding the registration of the 1st respondent as proprietor of the suit property. Accordingly, he dismissed the application for injunction and the applicants responded by filing a notice of appeal, followed by this application.

The applicants contend, among others that their intended appeal is arguable because the learned judge erred by holding that they had not made out a *prima facie* case and by deciding the application against the weight of the evidence. They add that without an order of injunction, there is nothing to protect their interest in the suit property and that they are apprehensive that the 1st respondent may sell or alienate it

before the intended appeal is heard and determined.

The 1st respondent opposed the application vide a replying affidavit sworn on 5th March 2021 in which he contended that the intended appeal was not arguable because he became the registered owner of the suit property following the hearing and determination of three appeals in which the father of the applicants was fully represented and the 1st applicant participated as a witness.

We have carefully considered this application. To entitle the applicants to the order of injunction that they crave, they must satisfy us that their intended appeal is arguable and that unless we grant the induction, the appeal will be rendered nugatory if it succeeds. (See **Republic v. Municipal Council of Mombasa & 2 Others Exp Adopt A Light Ltd, CA No 15 of 2007**).

An arguable appeal is one which is not frivolous and raises even a single *bona fide* issue that deserves full consideration by the Court. (See **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai.72 of 2001**).

Whether or not an intended appeal will be rendered nugatory depends on the peculiar circumstances of each case, but the main concern of the court is to protect gains that accrue from a successful appeal, so that it is not rendered a mere pyrrhic victory. An appeal will not be rendered nugatory if what has occurred before the hearing and determination of the appeal can be undone or if the successful party can be adequately compensated by an award of damages. (See **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR**).

In the trial court the applicants' suit and application for injunction were founded on breach of the rules of natural justice on the basis that they were not aware of the proceedings leading to the registration of the 1st respondent and the owner of the suit property. The learned judge found otherwise after looking at the proceedings in the adjudication dispute and declined to grant the injunction. In the intended appeal, the applicants will be challenging exercise of discretion by the learned judge and in our view, they will be hard pressed to make out an arguable appeal.

But even if we grant that intended appeal is arguable, as regards whether the appeal will be rendered nugatory, the applicants have not deposed to any eminent or intended alienation of the suit property which remains registered in the name of the 1st respondent. They merely assert as follows:

*“that the land herein may be sold and/or alienated before the appeal is heard and determined.”*

The applicants have not even suggested that the 1st respondent is incapable of compensating them should the intended appeal terminate in their favour. This Court has stated time and again it will not issue orders on the basis of suppositions, conjuncture or theoretical postulates that are not backed by evidence.

The applicants were obliged to satisfy both considerations and have failed to do so. Accordingly, this application is dismissed with costs to the 1st respondent.

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

**M. K. KOOME**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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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**