



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 43 OF 2020

BETWEEN

JANE NJERI KARONGO & HARISSON MUNGA KARONGO

(Sued as the legal representative

of the estate of RONGO KIURI.....1ST APPLICANT

MARGARET WAMAITHA KARANJA

& STEPHEN NJENGA KARANJA *(Sued as*

the legal representatives of the estate of KARANJA KIURI.....2ND APPLICANT

AND

HANNAH WANJIKU KAMAU *(Suing as the legal*

representative of the estate of KAMAU KIURI KARONGO.....RESPONDENT

(Being an application for an injunction and/or a stay of the orders of the Environment and Land Court of Kenya at Nairobi (S. Okong'o, J.) dated 30th October, 2019

in

ELC No. 25 of 2018)

RULING OF THE COURT

We are asked, in the main, in the Motion brought under **rules 5(2) (b) and 47** of the **rules of this Court** to stay execution of the Judgment and decree of the Environment and Land Court (“**ELC**”) delivered on 30th October, 2019 (**S. Okongo, J.**) in **Nairobi ELC No. 25 of 2018** pending the filing, hearing and determination of the intended appeal from the said Judgment. In grounds in support of the Motion and in a supporting affidavit of **Jane Njeri Karongo (“the 1st applicant”)** it is stated amongst other things that a notice of appeal was filed against the said Judgment; that the applicants have an arguable appeal with good chances of success and that if an order of stay of execution of the said Judgment is not granted the applicants will suffer substantial loss and irreparable damage which would render the intended appeal nugatory. The 1st applicant also says that she is aggrieved by the decree which orders the applicants to excise some portions of the land and transfer the same to the respondent who it was found that the applicants held land in trust for. It is further stated that the parcel of land ordered to be transferred is currently occupied by an elderly person who gets her subsistence from it. Finally, that an application for stay of execution of the Judgment was filed at the trial court but the same was not certified urgent.

There is a replying affidavit of **Hanna Wanjiku Kamau** (Suing as the legal representative of the estate of **Kamau Kiuri Murigo**) (the respondent) where it is said that the Motion is an abuse of the court process; that the applicant had filed an application for stay of execution of the Judgment at the trial court after filing this Motion; that the applicants were granted stay of execution by the trial court on condition that they deposit security Ksh.1,000,000 within 60 days from the date of the ruling (15th July, 2020); that the applicants did not meet that

conditional stay but applied for review or variation of the said orders by applications dated 28th July, 2020 and 10th September, 2020. At paragraph 8-10 (inclusive) of the said replying affidavit the deponent says:

“8. THAT in the premises, my advocates on record therefore advise me that it would not be in the interests of good administration of justice for the appellate court to grant the Applicants further parallel stay orders or even entertain the attendant Motion.

9. THAT at any rate, the Applicants’ Motion should also fail on its merits because it hasn’t satisfied the legal threshold for grant of stay of execution pending appeal. Fundamentally, they have not demonstrated that they have an arguable appeal.

10. THAT it is noteworthy that the Applicants have never taken any steps to prosecute the intended appeal since delivery of the ELC Judgment given on 30th October, 2019. For starters, the Memorandum and Record of Appeal has not been filed to date. Neither were my Advocate served with the letter requesting for typed proceedings.”

We have seen those applications and an order by Okongo, J. given on 5th August, 2020 declining to certify the applications as urgent.

Although the principles that govern applications for stay of execution in this Court are well known we take a different path in this matter.

The applicants have not disclosed to us that they filed and have pending applications before the trial Court. They have not disclosed to us that they filed an application for stay pending appeal at the trial court which application in effect succeeded as they were given a conditional stay, a condition they did not disclose to us. The disclosure has been made by the respondent to which the applicants have no answer.

A party who comes to court with unclean hands is underserving of exercise of discretion by the court – See the Supreme Court decision in **Council of Governors v Senate & Anor [2014] eKLR:**

“Furthermore, that defence is one based on equity. As such, it requires one who seeks its aid to be of clean hands in line with the maxim that ‘he who comes to equity must come with clean hands’.”

We discern a situation where the applicants are engaged in forum shopping, something a Court should not permit when there is a valid court order where the applicants were given conditional stay of execution pending appeal. The applicants have not said that there is difficulty in meeting that condition. But more important is that there was no disclosure of those facts by the applicants; they withheld the same and in those premises they are not before us in clean hands.

The applicants are unworthy of any exercise of discretion and the Motion fails and is dismissed with costs.

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

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR