



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 95 OF 2020

BETWEEN

JULIUS MUGO MUCHIRI.....APPLICANT

AND

NJIRU K. NJAGI.....1ST RESPONDENT

EDWARD MUGO MUNENE.....2ND RESPONDENT

(Being an application for stay of execution against the judgment of the High Court of Kenya at Kerugoya (R. K. Limo, J.) dated 14th June 2016

in

Kerugoya Misc. Appl. No. 65 of 2013)

RULING OF THE COURT

[1] *Julius Mugo Muchiri* (the applicant) applied before the High Court in Kerugoya, to annul or revoke the grant of the letters of administration issued on 18th February, 2010 to *Njiru Njagi* (the 1st respondent) in respect of the estate of the late *Wanjoka Njagi* alias *Stella Wanjoka Njagi* (deceased). The said application was opposed by the respondents on grounds *inter alia* that **L.R. Baragwe/Guama/1088** (the disputed land) had already been litigated upon in **Kerugoya Succession Cause No. 77 of 1988**, in **Meru Civil Appeal No. 60 of 1991**(High court Meru); **Nyeri High court Civil Case No 57 of 1998** and **Civil Appeal No. 195 of 2005**. That the High Court Meru, set aside the grant that was issued in the Kerugoya court and ordered that the disputed land be inherited by the lawful heirs of the late *Njagi Gachoki* and the applicant was not one of them.

[2] By the court's ruling delivered on 14th June, 2016 which is the subject matter of the intended appeal, the learned Judge stated as follows in a pertinent paragraph of the said same: -

“...my considered view is that the applicant in essence is asking this court to overturn the judgment of the court dated 2nd June, 1995 in Meru Civil Appeal No. 60 of 1991...That is untenable in law as this court cannot overturn a decision of a court of concurrent jurisdiction. That judgment can only be entertained in the Court of Appeal.”

[3] Aggrieved by the aforesaid outcome, the applicant filed a Notice of Appeal dated 28th June, 2016 evincing his intention to appeal and subsequently filed the instant motion on notice dated 22nd September, 2020. In it, the applicant is seeking an order of stay of execution in regard to the orders issued on 14th June, 2016; an order of temporary injunction restraining the respondents from transferring, selling or dealing in any manner with about 13 resultant parcels of land being **Baragwe/Guama/4131-4143** and an order staying any proceedings in **Gichugu Criminal Proceedings No. 253 of 2020** against the applicant where he has been charged with the offence of forcible detainer of property contrary to **Section 91** of the **Penal Code**, until the intended appeal is heard and determined.

[4] The application is supported by the applicant's affidavit sworn on 22nd September, 2020 wherein he accuses the respondents of subdividing the disputed land into thirteen (13) resultant portions which he claims the 1st respondent is intent on selling to third parties and that unless restrained by an order by this Court, the disputed land which is the subject matter of the intended appeal will be alienated and the appeal rendered nugatory. Moreover, the applicant states that he has been arraigned before the Principal Magistrate's Court at Gichungu

together with his wife in **Criminal Case No. 253 of 2020** where they are charged with various offences including detaining the disputed land contrary to the provisions of the Penal Code and that unless stay of criminal proceedings is issued, they stand to be condemned unheard and unfairly.

[5] Although the respondents did not file any response to this application, we have a duty placed on us by law while exercising judicial discretion to arrive at every decision based on cogent reasons, so as to prevent abuse of the court process and an injustice to any party.

[6] That said, we have considered the instant motion without appearance of counsel or parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global Pandemic. The motion is predicated under the provisions of **Rule 5 (2) (b)** of this Court Rules. The applicable guidelines in regard to orders sought herein are well settled. For the applicant to succeed, he must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

[7] We now wish to consider this motion against the above set out principles to answer the twin issues of whether the applicant has an arguable appeal and secondly whether the appeal if successful will be rendered nugatory without an order of stay. The order issued by the trial court was a negative order as the court only dismissed the summons for revocation of grant and did not order any party to do anything or refrain from doing anything. The courts have on various occasions held that when a court has granted negative orders, there is nothing that can be stayed. In particular this Court had this to say in regard to a similar prayer where the applicant was seeking a stay of negative orders; - **Kaushik Panchatia & 3 others vs. Prime Bank Limited & another [2020] eKLR**

“This is a negative order. We are guided by the decision in the case of Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63, the court whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopted *inter alia* as follows: -

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

[8] Even if we were to consider the merit of the grounds set out in the motion, we are not persuaded the appeal is arguable as the applicant will have an uphill task to surmount having litigated over the same claim in other suits including Nyeri **Civil Appeal No. 195 of 2005**. In light of this, and also the decided authorities on negative orders, the motion dated 22nd September, 2020 has not satisfied the principles for granting stay of execution.

It therefore fails and is dismissed with no order as to costs.

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

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR