



**IN THE COURT OF APPEAL**

**AT NYERI**

**CORAM: KOOME, KIAGE & MURGOR, JJA**

**CIVIL APPLICATION NO. 96 OF 2020**

**BETWEEN**

**MICHAEL MUNENE KUBURIA .....1<sup>ST</sup> APPLICANT**

**JOHN KITHIGA MWAI.....2<sup>ND</sup> APPLICANT**

**AND**

**SOFIA MUTHONI (Suing in her legal capacity as legal representative of**

**Samuel Gachubi.....1<sup>st</sup> RESPONDENT**

**VIRGINIA MUTHONI GACUBI (Suing in her legal capacity as legal**

**representative of Samuel Gachubi.....2<sup>ND</sup> RESPONDENT**

**(An application for stay of execution against the judgment of the Environment and Land Court of Kenya at Nairobi (Cherono, J.) dated 28<sup>th</sup> June 2020 in Kerugoya ELC No. 66 of 2017)**

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**RULING OF THE COURT**

This Notice of Motion dated 28<sup>th</sup> September 2020 is brought under *rules 5 (2) (b)* of the *Court of Appeal Rules*, and seeks for orders of stay of execution of the judgment (*Cherono, J*) dated 28<sup>th</sup> June 2020 pending the hearing and determination of *Civil Appeal No. 143 of 2020*.

The application is supported by the sworn affidavit of the *1<sup>st</sup> applicant, Michael Munene Kuburia*, and was brought on the grounds that the applicants instituted proceedings against the estate of *Samuel Gachubi (deceased)* seeking for a declaration of a trust over the property known as LR NO. Inoi/Kiaga/63 (the disputed land) that was registered in the name of their deceased uncle. In response the respondents *Sofia Muthoni* and *Virginia Muthoni Gacubi*, suing in their capacities as legal representatives of *Samuel Gachubi (deceased)* denied the existence of a trust and instead filed a counterclaim seeking to have the applicants evicted. After hearing the dispute, the learned judge dismissed the suit and granted the eviction orders sought. The applicants were aggrieved and have since filed the abovementioned appeal.

In the meantime, the applicants claim that the respondents have commenced their eviction from the portion of the disputed land in which they are in occupation, and have gone so far as to cut down the applicants' trees. They have also written to demand that the applicants vacate the disputed land. The applicant contends that in the event they are evicted, they will be rendered homeless and destitute.

It is the applicant's case that he has an arguable appeal, with a high chance of success because, instead of reevaluating the evidence that was before it, in its judgment, the trial court relied on this Court's decision in *Civil Appeal No. 184 of 2008*, which did not relate to the disputed land, and in so doing arrived at the wrong decision. It was also contended that *Succession Cause No. 78 of 2001*, in respect of the estate of the registered owner of the disputed land is pending before the lower court, and should the decree pertaining to that cause be executed before the appeal is heard and determined, there was the risk of this appeal being rendered nugatory.

Learned Counsel *Mr. Magee Wa Magee* who appeared for the applicants on a virtual platform owing to the Covid-19 Pandemic, largely reiterated the contents of the application and the applicant's affidavit in his submissions before us, but there was no appearance by the respondents or their counsel despite they having been served with a hearing notice on 18<sup>th</sup> January 2021.

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 affidavits and submissions, it is evident that central to the applicant's appeal is their assertion that the learned judge failed to properly evaluate all the evidence in order to ascertain whether or not a trust existed; that instead the court relied on this Court's decision in *Civil Appeal 184 of 2008*, which concerned different parties and a different parcel of land to arrive at its decision; that in so doing, the trial court arrived at the wrong decision. We have stated variously that whether or not the trial court properly evaluated the evidence that was before it is an issue that is eligible for ventilation before this Court. As such, the aforesaid issues appear to be arguable.

As to whether the appeal would be rendered nugatory were it to succeed, it is apparent that the applicants who are in occupation of a part of the disputed land are currently facing threats of eviction. There is no doubt that were they to be evicted, and the appeal was successful, there is every chance that it would be rendered nugatory.

In sum, the two threshold criteria having been met the motion dated 28<sup>th</sup> September 2020 is merited, and is allowed. Costs in the appeal.

**It is so ordered.**

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

**M.K. KOOME**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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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**