



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, OKWENGU & MURGOR JJ.A.)

MISC CIVIL APPLICATION NO. 133 OF 2020

BETWEEN

1. MOSSY KHAEMBA MUCHANGA.....1ST APPLICANT

2. DAVIS WABWILE MUCHANGA.....2ND APPLICANT

AND

PAUL LUTOTI KHAWANGA.....RESPONDENT

(Being an application for stay of execution from the judgment of the Environment and Land Court at Bungoma (B. Olao, J.) dated 22nd October 2020

in

Misc Civil Application Number 17 of 2020)

RULING OF THE COURT

By a Notice of Motion dated 2nd November, 2020, **the applicants, Mossy Khaemba Muchanga and Davis Wabwile Muchanga** sought orders for stay of execution of the judgment of the Environment and Land Court (*B. Olao, J*) pending the hearing and determination of the appeal. The application was supported by the sworn affidavit of **Davis Wabwile Muchanga**, and the applicants' written submissions.

The motion was premised on the grounds that the draft Memorandum of appeal raises arguable issues pertaining to the dispensation of substantial justice, and has reasonable prospects of success; that unless the orders sought are granted, the respondent will enforce the decree and evict the applicants from land parcel known as *Title No. E. Bukusu/E. Sang'alo/311 (the disputed land)* where he had built their homes, and occupied since 1980. They claim that they have no other means of livelihood and sustenance, and it was in the interest of justice that the stay of execution orders be granted; that in the event the respondent suffered any loss, he could always be compensated in damages.

The background to the application is that by an agreement dated 25th February 1980, the applicants' late father bought the disputed land from the respondent's father, Ellam Khaemba Ludofiko; that their father took possession of the disputed land and constructed 3 residential houses. Despite the transfer having been signed, the applicants' father was unable to register it since the seller had lost the original certificate of title; that the applicant had remained on the land until one day. The applicants stated that they continued to live on the disputed land until one day, the respondent, as the registered proprietor, filed and obtained orders to have them evicted. The applicants thereafter sought to have the stay of execution orders, but their application was dismissed by the High Court; that, in the meantime, the applicants were aware that the respondent was in the process of obtaining orders to have the police oversee their eviction.

Their plea to this Court is to restrain the respondent from evicting them, as their families would be rendered homeless

In their written submissions, the applicants have informed the Court that they have since been evicted from the disputed land, which eviction was carried out on 3rd December 2020 and their houses were demolished after 2020.

The respondent swore a replying affidavit on 5th December 2020 and also filed written submissions opposing the application. It was contended that the draft memorandum of appeal did not disclose any arguable issues, and that in any event, as confirmed by the applicants, the respondent had evicted them from the disputed land and taken over possession. It was further contended that the applicants and their

families were comfortably settled on their father's parcel of land, namely Title Nos. East/Bukusu/East Sang'alo/203 and 2017.

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, in terms of the arguability of the intended appeal it is observed that the appeal is against ruling of the Environment and Land Court that dismissed the applicants' application for stay of execution of the eviction orders. However, it is observed that the issues central to the grounds of appeal in the draft memorandum of appeal attached to the application are directed at the judgment of the Environment and Land Court that upheld the trial court's decision which is not the subject of this appeal. We therefore find nothing that satisfies the first limb that the intended appeal is arguable.

The prerequisite of arguability having failed, means that we need not go into the second limb to ascertain whether the appeal is nugatory, save to observe, that both the applicants and the respondent have disclosed that the applicants were evicted from the disputed land. That being the case, it is clear that the orders sought have in any event been overtaken.

In effect, the applicants having failed to satisfy the twin threshold requirements, the motion fails and is accordingly dismissed. The eviction having been effected before the application was determined, we order each party to bear their own costs.

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

W. KARANJA

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JUDGE OF APPEAL

H. OKWENGU

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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