REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KOOME, ASIKE-MAKHANDIA & MURGOR JJ.A)

CIVIL APPLICATION NO. 4 OF 2021

BETWEEN

PETER MACHARIA KARIUKI.....APPLICANT

AND

EUNICE MUGURE MUCHORI.....1ST RESPONDENT

IBRAHIM BAIYA MUCHORI.....2ND RESPONDENT

JIM B. MUCHORI.....3RD RESPONDENT

(An application stay of execution against the judgment and decree of the Environment and Land Court at Kitale (Mwangi Njoroge, J) delivered on 17*th* December 2020 in ELC No. 34 of 1998)

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RULING OF THE COURT

The Notice of Motion dated 8th August 2018 is brought pursuant to ***sections 3A*** and ***B*** of the ***Appellate Jurisdiction Act,*** and ***rules 5 (2) (b), 42 and 47*** of the ***Court of Appeal rules 2010*** where **the applicant, Peter Macharia Kariuki** seeks orders of stay of execution of judgment and decree of the Environment and Land Court *(Mwangi Njoroge, J)* delivered on 17th December 2020. It also seeks an injunction to restrain the respondents, ***Eunice Mugure Muchori,*** **Ibrahim Baiya Muchori** and ***Jim B. Muchori*** their servants and employees from alienating ***Land*** **parcels No. Kiminini/Kapkoi Block 2/Waumini 'B'/169, *'B'/744, 'B'/743 and 'B'/742*** *(the disputed parcels).* The application was brought alongside winding repetitive grounds, and the applicant's supporting affidavit and his written submissions.

The background to this application is that following a dispute dating back to 1994 over the land parcels between John Muchori Baiya (deceased) and Kariuki Macharia (deceased), the Saboti Land Disputes Tribunal determined the dispute in favour of Kariuki Macharia and awarded him the land parcels. The award was later adopted as a judgment of the court in *Kitale PMC land case 4 of 1994*. John Baiya was aggrieved and filed *Eldoret JR No. 150 of 1997*, following which, the award and judgment were quashed. However, during the pendency of the Judicial Review proceedings, the applicant's family went ahead to transfer the land parcels into the names of the late Kariuki Macharia, Esther Waithera Alias Esther Wambui Kariuki, Lucy Wangari Kariuki, Freda Wanjiku and Naomi Wanjiru Kariuki.

According to the respondents, John Baiya had initially purchased 39 acres of land belonging to Waumini A Company. Thereafter, he bought 3 more acres in 1998 from his brother Steven which was adjacent to his 39 acres. Another brother, Dr. John sold him 4.5 acres, and finally he also purchased 1.5 acres from one Muchai Kabira, bringing the total acreage of the newly acquired land to 9 acres. The respondents' family took over the land parcels and have been in possession ever since. They therefore sought for a declaration that the land parcels registered in the names of the applicant's family were void for being in contravention of the prevailing court order, and for them to be quashed, and for the register to be rectified to delete the names of the applicant's family.

When it was the applicant's turn to present their evidence, the applicant's counsel who had previously sought several adjournments sought another adjournment which the court declined, and fixed the hearing during the afternoon session. When the case was called out, his counsel stated that his witness was not in court, prompting the court to close the applicant's case. But in a ruling of 30th June 2020, the court reopened the proceedings and allowed the applicant to proceed with its case. The applicant's evidence was that the Land Tribunal had awarded his father Kariuki Macharia the land parcels, and that he was not aware of the stay orders issued in *Eldoret JR No. 150 of 1997*, but

he was aware that the Land tribunal's decision had been quashed. He also stated that it was following adjudication that the family was issued with the titles to the land parcels.

The trial court on hearing the evidence determined that once the High Court quashed the tribunal's award and the judgment of the Principal Magistrates' court, the award ceased to have any effect. Of pertinence, the learned judge observed;

> **"…the nullification of the award and judgment… left the defendant's father in the same position that he was in before the award: landless. It is logical then that the late John Muchori Baya was also left in the same position that he was in before the award, that is, as owner of the suit land."**

The court found that on a balance of probabilities that the respondents had proved their case, entered judgment in their favour, and issued the orders as prayed.

The applicant was aggrieved by the court's decision and filed a notice of appeal expressing his intention to appeal against the decision. In the meantime, he has brought this application seeking a stay of execution of the Environment and Land Court's order. He contends that the intended appeal is arguable with a high chance of success, the main reason being that he was not afforded a fair hearing, as was condemned unheard, that he suffered discrimination and biasness, and as a result he was dispossessed of the land parcels. He further claimed that the appeal would be rendered nugatory as the titles to the land parcels are registered in his name which are at the risk of being cancelled.

In their reply and written submissions, the respondents assert that the claims of bias of the learned judge are unfounded, particularly as the court bent over backwards to provide them with various opportunities to present their case. That the applicant is not and has never been in possession of the land parcels, and furthermore, he has not filed any appeal against the Judicial Review decision, as a consequence of which, his appeal is not arguable.

Bearing the aforegoing in mind, 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."**

In reference to the arguability of the intended appeal, the applicant's complaints in the main are that the trial court was biased and did not adhere to the rules of natural justice in failing to accord him an opportunity to be heard. Given the acrimonious nature of the dispute, we consider that this issue is arguable.

With respect to whether the intended appeal would be rendered nugatory if the stay of execution orders against the judgment were to be declined, we are also satisfied that since the dispute is still pending determination, it would be efficacious to grant an order maintaining the prevailing *status quo* in regard to the disputed portion of nine (9) acres. As the titles to the land parcels were already issued, the same should be maintained in their current state pending the hearing and determination of the intended appeal. Costs in the intended appeal.

It is so ordered.

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

M.K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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