



IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPLICATION NO. 74 OF 2020

BETWEEN

RAYMOND RUTO.....1ST APPLICANT

KIPKORIS RUTO.....2ND APPLICANT

KIPROP RUTO.....3RD APPLICANT

KIPCHUMBA RUTO.....4TH APPLICANT

CHEPCHIRCHIR RUTO.....5TH APPLICANT

CHEPKOECH RUTO.....6TH APPLICANT

AND

STEPHEN KIBOWEN.....RESPONDENT

(Being an application for stay of further proceedings pending the hearing

and determination of the intended appeal from the ruling of the Environment

and Land Court at Nakuru (D.O. Ohungo, J.) dated 15th February, 2018 in NKR. ELC No. 174 of 2015)

RULING OF THE COURT

[1] The 1st to the 6th applicants seem to be related to each other and to *Jeruto Tapkili Tengekyon* (Jeruto) who was the original owner of a parcel of land known as **Lembes/Kilombe/157** (suit premises). *Jeruto* had charged the suit premises to *Agricultural Finance Corporation (AFC)* to secure a loan which she allegedly defaulted to pay. AFC allegedly exercised its statutory power of sale whereupon *Stephen Kibowen* (the respondent) bought the suit premises in a public auction in 2014. As AFC delayed/renege in effecting the transfer pursuant to the sale by public auction, the respondent sued AFC in **Nakuru ELC No. 174 of 2015 (the Nakuru matter)** seeking declaratory orders that he is the legal owner of the suit premises, a permanent injunction restraining the applicants from dealing with the suit premises, as well as their eviction.

[2] *Jeruto* and *Samuel Kipruto Chepkeitany (Samuel)* who is described as the father of the applicants applied to be enjoined in the Nakuru matter with *AFC* as defendants. It is indicated in the applicant's affidavits that the suit is slated for hearing sometimes in May 2021. For reasons that are not clear to us, *Jeruto* and *Samuel* filed another suit being **Eldoret High Court Civil Case No. 77 of 2018 (formerly Eldoret ELC No. 119 of 2017)** against *AFC*, *Kolato Auctioneers* and the respondent over the same suit premises. In it, they are principally seeking a declaration that the auction and sale of the suit premises was unlawful, null and void *ab initio*; a permanent injunction to restrain the respondent from dealing with the suit property and cancellation of the title and restoration of the suit premises to the original owner.

[3] By a motion dated, 21st March, 2017 the applicants applied to transfer the Nakuru matter to Eldoret and consolidation of the same on the grounds that the issues raised therein were directly and substantially the same as the Eldoret matter. The motion was heard by **Ohungo, J.** who in a Ruling delivered on 15th February, 2018 in the Nakuru matter dismissed the application and in doing so

the Judge made the following key findings in the impugned ruling;

“Paragraph 14 of Gazette Notice No. 5178 dated the 25th July, 2014 which states:

All new cases relating to environment and the use and occupation of, and title to land under paragraph 8 above shall be filed in the nearest Environment and Land Court for hearing and determination by the said court and must be within the purview of the jurisdiction conferred upon the Environment and Land Court with particular regard to the jurisdictional limitations set under Article 162 (2)(b) of the Constitution and Section 13 of the Environment and Land Act No. 19 of 2011.

There is evidence before the court that the suit property is nearer Nakuru than Eldoret. This evidence has not been challenged by the applicants. I therefore have difficulty in (sic) finding that this suit was properly filed in Nakuru pursuant to paragraph 14 of the gazette notice No 5178 dated 25th July, 2014.

I also note that the Eldoret suit was filed in the year 2017 while this suit has been pending in Nakuru since the year 2015. It therefore takes precedence. As regards the fears of conflicting decisions, the parties are at liberty to keep the courts abreast of orders and decisions that may be made in the tow different stations”

[4] The applicants were aggrieved by the aforesaid outcome and they therefore filed a Notice of Appeal on dated 21st February, 2018 evincing their intention to appeal. They subsequently filed the instant notice of motion dated 29th July, 2020 seeking inter alia a stay of further proceedings in the Nakuru matter, pending the hearing and determination of the appeal against the aforesaid Ruling. The application is predicated upon the provisions of various enactments of the law, to wit; **Rule 5 (2) (b)** of the **Court of Appeal Rules, Article 159(2)(d)** of the Constitution, **Section 1A, 1B, 3 and 3A** of the **Civil Procedure Act** and **Order 42 Rule 6** of the **Civil Procedure Rules**. It is also supported by an affidavit sworn by **Raymond Ruto** (1st applicant) which was sworn on 29th July, 2020.

[5] According to the averments, the grounds stated on the body of the application and the draft memorandum of appeal, the applicants contend that the intended appeal is arguable. It is their view that the Judge erred in law and fact in failing to consider the import of the provisions of **Order 11** of the **Civil Procedure Rules** and failing to appreciate that both suits were similar and finally the fact that the parties will be prejudiced if the order of eviction that was sought in the Nakuru matter was enforced while the same issues that led to the sale by auction of the suit premises were pending in the Eldoret matter. They add that an order of eviction during the pendency of Eldoret matter would render the proceedings otiose. Furthermore, the proceedings challenging the irregular exercise of power of sale are canvassed in the Eldoret matter which will be rendered nugatory as the parties shall have been condemned unheard.

[6] The respondent opposed the motion vide his replying affidavit sworn on 26th February, 2021. He stated that on or about 5th May, 2014, he read an advertisement in one of the dailies about a public auction of the suit premises. The auction was conducted by **Kolato Auctioneers** instructed by **AFC** in, exercise of its statutory power of sale. The respondent attended the auction and upon being declared the highest bidder, paid for the suit premises a sum of Kshs.5 million. Later, AFC attempted to resile from the sale and that is when the respondent instituted the Nakuru matter against them, which suit was decided in his favour on 19th March, 2015. The respondent was subsequently registered as the owner of the suit premises on 11th August, 2015.

[7] According to the respondent, the applicants have no legal interest in the suit premises as his interests as a buyer are well protected by dint of the provisions of **Section 99** of the **Land Act**. That the matters in dispute in the Nakuru matter fall within the jurisdiction of the Environment and Land Court whereas the matters in dispute in Eldoret are within the jurisdiction of the High Court and it is not possible to have the two suits consolidated let alone transferred. On whether the appeal will be rendered nugatory, it was his view that the application was overtaken by events as both cases have proceeded to hearing and are close to conclusion.

[8] By way of a rejoinder, the applicants filed a supplementary affidavit dated 25th February, 2021 stating that the fear of having the appeal rendered nugatory have been confirmed further in the Nakuru matter wherein the respondent and 1st applicant have both testified and the applicant’s case is proceeding for further hearing on 20th May, 2021. As for the Eldoret matter, the 1st and 2nd plaintiff have testified and the matter fixed for further hearing on 20th April, 2021.

[9] We have considered this application, the replying affidavit by the respondent and submissions as captured by the above summary. This motion was considered by the Court without appearance of counsel and parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global Pandemic. The orders sought by the applicant to stay the proceedings fall within the realm of **Rule 5(2)(b)** of this Court Rules which provides as follows:-

“...The Court may –

....

(b) In civil proceedings, where a notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings as the Court may think just.”

We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings

which essentially is an interruption of the other parties right to conduct their hearing.

[10] That said, the principles that guide the Court under the aforesaid rule are now an old hat; that is, for the applicants to succeed, they must establish that, the appeal is arguable and not frivolous and that if the order of stay of proceedings sought is not granted, the appeal will be rendered nugatory. See the case of Ismael Kagunji Thande vs. Housing Finance Kenya Ltd CivilApplication No. Nai. 157 of 2006 (unreported).

“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.)”

[11] The learned authors of; *Halsbury’s Law of England, 4th Edition. Vol. 37* page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

[12] We now wish to consider this application within the above 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 if an order of stay of proceedings is not granted. It is common ground that the suit premises is located in Nakuru and according to the court practice directions that the Judge alluded to, cases relating to environment and the use and occupation of, and title to land are supposed to be filed in the nearest Environment and Land Court. The Judge further found the Nakuru court was seized of the matter on account of its territorial jurisdiction and the fact that it was filed first. It is the Bench which will determine the appeal that will interrogate and determine those grounds. On the face of the matters disclosed in this application, we are not persuaded of the arguability of the applicant’s intended appeal, granted that it was based on the Judge’ exercise of discretion.

[13] Even on the nugatory aspect, we are not persuaded that the applicant’s appeal will be rendered nugatory if it succeeds without stay of proceedings. The dispute between the parties has not been determined. Even if it is determined against the applicants they have a right of appeal and moreover, they are challenging a sale of the suit premises whose loss if established can be compensated in monetary terms.

[14] Accordingly, the applicants have not satisfied the twin principles to warrant an order of stay of the proceedings. The motion is dismissed with costs to the respondent.

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

M. K. KOOME

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JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR