



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPLICATION NO. NYR 155 OF 2018

BETWEEN

SAMUEL MWEHIA GITAU.....APPLICANT

AND

JOHN MUTURI NG'ANG'A.....1ST RESPONDENT

BENSON M. KANGETHE.....2ND RESPONDENT

JAMES NJIRAINI KARANJA.....3RD RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal against the Judgment of the Environment and Land Court of Kenya at Nakuru (Ohungo, J.) dated 20th November 2018

in

ELCC No. 291 of 2013)

RULING OF THE COURT

In his motion on notice dated 4th December 2018, *the applicant Samuel Mwehia Gitau* seeks an order of stay of execution of the judgment of the *Environment and Land Court at Nakuru (Ohungo, J.)* dated 20th November 2018. By that judgment the learned judge dismissed a suit by the applicant for declaration that an agreement he had entered into with the respondents for the sale to them of the property known as *Nakuru/Rotharini/3 (the suit property)*, was null and void and for an injunction to stop the respondents from interfering with the suit property. Those remedies were sought on the basis that there was no consent from the Land Control Board authorising the transaction. The respondents opposed the suit on the grounds that it was the applicant who was responsible for failure to obtain the consent.

After taking evidence, the learned judge noted that the agreed purchase price was *Kshs 630,000* of which the respondents had already paid to the applicant *Kshs 550,000*, leaving a balance of *Kshs 80,000*. Noting that the court had power to extend the time to obtain consent of the Land Control Board the learned judge extended the period by six months and directed the applicant to execute all relevant documents after which the respondents were to pay the balance of the purchase price.

In the application now before us the applicant argues that his intended appeal is arguable because the transition did not have consent from the Land Control Board and he is apprehensive that the registrar will transfer the suit property to respondents who in turn may transfer the same to third parties.

The respondents did not file a replying affidavit.

We have anxiously considered this application. To entitle the applicants to an order of stay of execution under *rule 5(2)(b)* of the *Court of Appeal Rules*, he must satisfy the court that his intended appeal is arguable and further that unless an injunction is granted, the intended appeal will be rendered nugatory if it succeeds. (See *Githunguri v. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838*). The applicant must satisfy both requirements. It is not a case of either or. (See *Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR*

31).

We are satisfied that the intended appeal is arguable because, at the end of the day an arguable appeal is not one which must necessarily succeed and neither is it one that raises a multiplicity of issues (See Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA No. Nai. 72 of 2001 and Kenya Railways Corporation v. Edermann Properties Ltd, CA No. Nai. 176 of 2012).

Even a single *bona fide* issue deserving of full consideration by the Court will suffice. (See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR).

Turning to whether the intended appeal will be rendered nugatory, we note that the respondents have been in possession of the suit property since 2007. There is absolutely no indication that they have any intention to dispose of it. Transfer of the suit property to their name can be easily undone if the intended appeal is successful. Again, such transfer is not *ipso facto* evidence that the transferee intends to sell and transfer the property to a third party. The applicant merely asserts that he is apprehensive the respondents *may* transfer the property to third parties. The Court will not issue orders on the basis of conjecture and suppositions that are not grounded on evidence.

The applicant has failed to satisfy the second consideration. Accordingly, this application is dismissed with costs to the respondents. 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

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