



IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPLICATION NO. 159 OF 2019

BETWEEN

SAMUEL WAIYA GITHUKURIO.....APPLICANT

AND

STEPHEN MUNGAI WAI.....1ST RESPONDENT

LAND REGISTRAR NYANDARUA DISTRICT.....2ND RESPONDENT

DISTRICT SURVEYOR NYANDARUA.....3RD RESPONDENT

HON. THE ATTORNEY GENERAL.....4TH RESPONDENT

(Being an application for stay of execution of the decree from the ruling of (M.C. Oundo, J.) dated 25th June, 2019 in Nyahururu ELC Petition No. 20 of 2017)

RULING OF THE COURT

1. Samuel Waiya Githukurio, (the applicant) is the proprietor of L.R NYANDARUA/KIAMBAGA/1339 and L.R NYANDARUA/KIAMBAGA/1340 (the suit premises) since 2005. Sometimes in November 2018, he was served with pleadings relating to Nyahururu ELC No. 140B of 2018 and after perusal of the same, he realized that the boundaries of his parcels of land had been affected by judicial process that had started at the Land Disputes Tribunal, although he was not a party to those proceedings. It transpired that Stephen Mungai Waita, (the 1st respondent) had instituted a claim over a boundary dispute, being Land Dispute Case No. 28 of 2004, against one, Kiarie Githikurio Wangaruo (Kiarie) before the then Ol Kalou Division Land Disputes Tribunal. The dispute involved L.R Nyandarua/Kiambaga/315 belonging to the 1st respondent and L.R Nyandarua/Kiambaga/813 belonging to Kiarie.

2. The Ol Kalou Division Land Disputes Tribunal found there was a valid dispute between the 1st respondent's land and Kiarie's Land. Kiarie's land was subsequently divided into 3 portions giving rise to Plots Nos. L.R Nyandarua/Kiambaga/ 811, 812 and 813). After visiting the disputed land, it was the Tribunal's finding that Kiarie was utilizing the curved land which was part of L.R Nyandarua/Kiambaga/316. Kiarie, against whom the claim was made was given ninety (90) days to remove the posts he had fixed along the boundary.

3. Being aggrieved, Kiarie unsuccessfully lodged an appeal before the Nyandarua Provincial Land Appeal Tribunal and it upheld the award that was made by the Land Disputes Tribunal. This award was subsequently adopted as decree and order of the court in Nyahururu PMCC Land Dispute No. 45 of 2009. The decree of the said court directed the Nyandarua District Registrar and District Surveyor to cancel the 11th edition of RIM and the portion bordering L.R Nyandarua/Kiambaga/480 to be combined with L.R Nyandarua/Kiambaga/315.

4. Incidentally, the enforcement of the said court order affected the applicant who was not a party to all those proceedings. The applicant thus being aggrieved and affected by the said decision, filed a Constitutional Petition, being Nyahururu ELC Petition No. 20 of 2017 seeking several declaratory orders. In response to the Petition, the 1st respondent raised a Preliminary Objection to the Petition which the learned Judge upheld by her Ruling delivered on 25th June 2019, with the result that the applicant's petition was struck out with costs. The applicant

being aggrieved, lodged an appeal in **Nakuru Civil Appeal No. 75 of 2019** which he contends raises arguable issues and that its outcome directly affects the proceedings in **Nyahururu ELC Petition No. 20 of 2017** and **Nyahururu CMC ELC No. 140B of 2018** wherein the 1st respondent is proceeding rapidly to tax his bills of costs, and as a matter of fact, those matters were fixed for taxation on 7th October, 2019 and 7th November, 2019 respectively.

5. Pending the hearing and determination of the aforesaid appeal, the applicant filed the instant motion dated 11th October, 2019 seeking a stay of proceeding in **Nyahururu CMC ELC No. 140B of 2018** and **Nyahururu ELC Petition No. 20 of 2017**. All the respondents have not filed any response despite having been served with the notice by the court registry. This application came up for hearing by consideration of the record and submissions without appearance by counsel or parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global Pandemic.

6. We have considered the application which is brought under the provisions of **Rule 5 (2) (b)** of this Court Rules. The applicable guidelines in regard to orders sought in this regard are well settled. For the applicant to succeed, he must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“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.)”

7. It is also self-evident that the learned Judge ruled that although the Tribunals exceeded their mandate and the court has jurisdiction to nullify an award of a tribunal if made outside its jurisdiction, however, she ruled that jurisdiction is only exercisable where such decision had not transmuted into a judicial determination through adoption as a judgment of the court. The Judge further stated that since the award of the **Nyeri Provincial Land Dispute Tribunal** was adopted by the Principal Magistrate’s Court at Nyahururu, it ceased to exist on its own and thus, could not be the subject of a declaration but could only be varied, vacated, set aside or reviewed by the same court or by an appellate court. The court therefore struck out the petition on the grounds that although the Tribunals had no jurisdiction to determine issues of title, that award issued without jurisdiction had crystalized and the ELC’s jurisdiction was wrongly invoked by way of a petition instead of an appeal.

8. In view of those findings, we are persuaded that the applicant’s appeal is eminently arguable. Foremost, the applicant was not party to the proceedings before the tribunals and yet he was affected by the award that was adopted by the Magistrate’s court. Secondly, his land was excised in execution of those orders which the learned Judge found were made without jurisdiction. These are arguable matters and as this Court stated in the case of **Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 others [2014] eKLR**

“An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication.”

9. Whether or not the appeal will be rendered nugatory if an order of stay of proceedings is not granted, we would also answer this in the affirmative. The applicant has demonstrated that the 1st respondent has proceeded to tax the bills of costs and further proceedings may ensue to his detriment and the outcome of the intended appeal if successful, may be rendered nugatory. It is for the aforesaid reasons that we find the applicant’s application has merit. We accordingly allow it in terms of prayer No 3 of the Notice of Motion dated 2nd October, 2019 as follow:

1. Pending the hearing and determination of Nakuru Civil Appeal No 75 of 2019, a stay of proceedings in Nyahururu CMC NO. 140B of 2018 and Nyahururu ELC Petition No 20 of 2017 are hereby stayed.

2. We make no order as to costs

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

M. K. KOOME

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JUDGE OF APPEAL

K. M’INOTI

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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