



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 65 OF 2020

BETWEEN

SARAH MARIA LOBO & MYRTLE MARY DESA (*sued as the*

Legal Representative/Administrators of

the Estate of the late Paul Lobo).....**APPLICANTS**

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....**1ST RESPONDENT**

BENARD ATATI.....**2ND RESPONDENT**

SAMMY SILAS KOMEN MWAITA.....**3RD RESPONDENT**

(Being an application for stay of proceedings pending the hearing and determination of the appeal from the ruling of the Environment and Land Court of Kenya at Mombasa (Yano, J.) dated 12th March, 2020

in

ELC Case No. 175 of 2009)

RULING OF THE COURT

By a motion dated 28th August, 2020, the applicants have urged the Court to stay the proceedings in ELC No. 175 of 2009 pending the determination of an appeal against a ruling therein dated 12th March, 2020.

The dispute which provoked this motion revolved around LR No. MN/1/2408.

The 1st respondent claimed that the suit property was public land earmarked for staff quarters of the Kenya Civil Aviation Authority; and that the lease thereto was fraudulently issued to Paul Lobo (now deceased) and subsequently transferred to the 2nd respondent. Consequently, the 1st respondent instituted the said suit on 9th June, 2009 seeking a number of orders including cancellation of the corresponding entries in favour of the deceased and 2nd respondents in the register.

Unfortunately, the deceased passed away on 22nd November, 2010. By operation of the law, the action abated. But upon learning of the deceased's death, the 1st respondent, by a motion dated 17th October, 2018 applied for the revival of the suit and substitution of the deceased with the applicants, his legal representatives. The motion was allowed on 18th March, 2019.

The applicants denied knowledge of the existence of the suit against the deceased and contended that they only came to know of it and their substitution as the deceased's representatives sometime in April, 2019.

They believed that the substitution should not have taken place because as the legal representatives of the deceased's estate their mandate was limited only to institution and defence of suits related to the estate; that the suit property did not form part of the estate having been sold by the deceased during his lifetime; and that the cause of action, which was founded on fraud, extinguished as against the deceased upon his demise. To advance this position, the applicants, by a motion dated 5th July, 2020, prayed for review of the orders dated 18th March, 2019 which allowed their joinder. Yano, J. in a ruling dated 12th March, 2020 dismissed that motion. The applicants having evinced their intention to appeal against that ruling in this Court filed the current motion.

In their view, whether or not they should have been joined to the suit is an arguable point that should be considered by this Court in the intended appeal; that unless the proceedings are stayed, they would continue being saddled and inconvenienced by incurring legal fees in defending a suit in which they lack capacity or have no interest in; and that their appeal would be defeated.

In opposing the motion, the 1st respondent argued that the motion was brought four months after the impugned ruling solely to derail the hearing of the suit which has been pending for 12 years.

Besides, after the deceased was served with the plaint he actively participated in the suit until his death; that the applicants were the proper parties to be joined in the proceedings for purposes of ensuring that the estate's right to a fair trial is realized; that the issue of costs of representation could only be determined after the suit was heard on merits; and that should the proceedings be halted it will be highly prejudicial to the 1st respondent.

In the exercise of our unfettered discretionary jurisdiction under **Rule 5(2) (b)** of this Court's Rules, which has been invoked in this motion, we are guided by two well-known twin principles; that the applicants' appeal is not frivolous; and that if the stay sought is not granted, the appeal will be rendered nugatory, if it eventually succeeds. See **Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd.** [2002] 1 EA 227.

Without making any conclusive determination on the appeal, we are not satisfied that the appeal is arguable, considering the provisions of the **Law Reform Act** and those of the **Law of Succession Act**, on whether the cause of action in the suit survived the deceased, and whether the applicants as the legal representatives of the deceased were properly joined in the proceedings.

Similarly, there is nothing to suggest that the appeal, if successful will be rendered nugatory, since the costs which might have been incurred by the applicants in defence of the suit as well as the prosecution of the appeal, are capable of being recouped from an award of costs by the Court. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** [2013] eKLR.

In the end, we find that the motion lacks merit and hereby dismiss it with costs to the 1st respondent.

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

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR