



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NYERI**

**CORAM: KOOME, M'INOTI & MURGOR JJA)**

**CIVIL APPLICATION NO. 152 OF 2019**

**BETWEEN**

**SIMON NDUNGU.....1<sup>ST</sup> APPLICANT**

**JOSEPH WAWERU .....2<sup>ND</sup> APPLICANT**

**AND**

**JAMES NDIGA MWAURA .....1<sup>ST</sup> RESPONDENT**

**KANGATHIA KIUNA .....2<sup>ND</sup> RESPONDENT**

*(An Application for stay of further proceedings in the Application dated 19<sup>th</sup> June 2019 or any other proceedings meant to review or opening this matter or Judgment dated 1<sup>st</sup> September 2016 of the Environment and Land Court at Nyeri (M. Oundo, J)*

**In**

***Nyeri ELC No 19 of 2018 (formerly H.C.C.C No 85 of 2009)***

**RULING OF THE COURT**

By a Notice of Motion lodged on 20<sup>th</sup> September 2019 and brought under **rule 5 (2) (b)** of the **Court of Appeal Rules** and **section 3A** of the **Civil Procedure Act**, the applicants, **Simon Ndungu** and **Joseph Waweru** seek orders that this;

**“1. ...Court may be pleased to suspend the hearing of an Application dated 19<sup>th</sup> June 2019 filed by the Respondent in the Environment and Land Court at Nyeri ELC Case No. 19 of 2018 (formerly H.C.C.C No 85 of 2009 or any other Application or case relating to the Land Parcel GATAMAIYU /KAGWE/1067 for it is RES JUDICATA and an abuse of the Court Process, the matter having been concluded on 1<sup>st</sup> September 2016, the decree was given on 14. 12. 2017 and issued on 12<sup>th</sup> January 2018 and implemented fully on 16.1.2019 when the said Land reverted back to the Applicants’ father MUNJI KIUNA because the Respondents DID NOT file a Notice of Appeal even now.**

**2. That the regional police Commander Central Region be ordered to make sure that the OCS Lari Police station has provided security to the Court Broker who will remove the respondent form the land Parcel GATAMAIYU /KAGWE/1067 until the Respondent and anybody under their authority are removed to give vacant possession of the said land in accordance of the eviction Order given on the 5<sup>th</sup> February and issued on 19<sup>th</sup> February 2019.”**

The motion is brought on the grounds that the respondents’ notice of motion dated 19<sup>th</sup> June 2019 and filed in the Environment and Land Court seeking stay of an eviction order and review of the judgment of 1<sup>st</sup> September 2016 is *res judicata* and an abuse of court process, since the dispute between the parties was concluded by the judgment of 1<sup>st</sup> September 2016, a decree was issued on 12<sup>th</sup> January 2018 and the orders implemented fully on 16<sup>th</sup> January 2019 when the land reverted back to the applicants’ father after the respondents failed to file a notice of appeal.

As a brief background to the application, the applicants filed a suit in the High Court claiming that the respondents had fraudulently

transferred their father's land ( Munji Kiuna), **Parcel No. Gatamaiyu /Kagwe/1067** (the land parcel) under questionable circumstances, as no Land Control Board consent for the transfer could be traced at the Lands office.

In a judgment of 1<sup>st</sup> September 2016, the trial court (Ombwayo, J.) was satisfied that fraud was established, ordered the cancellation of the respondents' titles and retransfer of the titles back to the applicants' father's name. The court further ordered the respondents to vacate the land parcel.

After retransfer of the titles, the applicants moved the court for an order of eviction of the respondents. The application was allowed, but upon service of the eviction orders, the respondents filed an application dated 24<sup>th</sup> February 2018 seeking a stay of execution which application was dismissed in a ruling dated 5<sup>th</sup> February 2019. Undeterred, the respondents filed another application for stay of execution before this Court dated 12<sup>th</sup> January 2018, but it was withdrawn on 6<sup>th</sup> May 2019. On 19<sup>th</sup> June 2019, the respondents filed yet another application in the trial court, once again seeking stay of execution and the setting aside of the impugned judgment. This time, the court granted the stay of execution orders sought ex parte.

The applicants were aggrieved, and it is for this reason that they filed a Notice of Appeal dated 24<sup>th</sup> July 2019 and the application herein seeking to stop the trial court from granting "impossible orders" and to "STOP the High Court from hearing proceedings of that application before it which was concluded..." They termed the orders and the respondents' actions as *res judicata* and an abuse of the court process.

There was no response to the application by the respondents.

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."***

Upon considering the application, the affidavit in support of the application and submissions, as is required of us under **rule 5 (2) (b)** we begin by ascertaining whether there is an arguable appeal. In the draft memorandum of appeal that was attached to the application, the applicants' complaint is that the learned judge failed to peruse the court file before granting the ex parte stay of execution order; that had the learned judge done so, she would have found that the case was finalised and that the titles had reverted back to the applicants' father, with the effect that there was nothing for the court to stay. As to whether the court rightly granted the ex parte orders, notwithstanding the already existing judgment of 1<sup>st</sup> September 2016 and the subsequent ensuing orders, we consider this to be an arguable matter.

On the nugatory aspect, the respondents have obtained a stay of execution of the orders of eviction. The applicants' are aggrieved by the orders granted, and in turn they seek to stay further proceedings in the Environment and Land Court pending the hearing and determination of the intended appeal. They have not however advanced any reason why the appeal would be rendered nugatory if the application that is before the lower court were to proceed. Since there is nothing to show how the intended appeal will be rendered nugatory, we find that the second criteria for granting of a **rule 5 (2) (b)** application has not been satisfied.

As such, the Notice of Motion dated 20<sup>th</sup> September 2019 is unmerited, and is dismissed. Costs in the intended appeal.

***It is so ordered.***

***Dated and delivered at Nairobi this 19<sup>th</sup> day of March, 2021.***

**M.K. KOOME**

.....

**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**