



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OUKO, (P) KOOME, ASIKE-MAKHANDIA, J.J.A)

CIVIL APPLICATION NO. 26 OF 2020

BETWEEN

ALLAN MAINAAPPLICANT/INTENDED APPELLANT

AND

CHIEF LAND REGISTRAR1st RESPONDENT

NATIONAL LAND COMMISSION.....2nd RESPONDENT

SETTLEMENT FUND TRUSTEES.....3rd RESPONDENT

PETER JUMA KURIA MWANGI.....4th RESPONDENT

CHARLES NJENGA KARIUKI.....5th RESPONDENT

[An application under Rule 5 (2) (b) of the Court of Appeal Rules for stay of execution pending the hearing and determination of this application and an intended appeal from the decision of the Environment and Land Court, (M.C.Oundo, J.) dated 29th October, 2019)

in

NYAHURURU E.L.C. PETITION NO. 10 OF 2017)

RULING OF THE COURT

[1] **Allan Maina** (the applicant) filed a suit by way of a constitutional petition before the Environment and Land Court at Nyahururu seeking a declaration that his property rights were deprived by an act of the **Settlement Fund Trustees** (the 3rd respondent) who subdivided a parcel of land known as **Nyandarua/Ndemi /1077** (original suit land) and caused it to be allocated to the 4th and 5th respondents. The applicant had claimed that he was allotted the original suit land by the 3rd respondent vide a letter dated 3rd July, 1981. On 19th September, 1981, the allotment was approved whereupon he signed a charge over the suit land and he was required to pay the 3rd respondent a sum of Ksh. 64,081 in 56 equal instalments.

[2] The applicant went on to claim that he took possession of the suit premises and tried to inquire by way of letters from the 3rd respondent the details of where he could make the payment without success. He however did a search on the original suit land sometimes in June 2015 and that is when he discovered to his utter shock that the land had been subdivided into two parcels **Nyandarua/Ndemi/8915** registered in the name of the 5th respondent while **Nyandarua/Ndemi/1816** was registered in the name of the 4th respondent.

[3] The suit was resisted by the respondents who claimed that the applicant was unable to comply with the terms of the offer to purchase the land and the same was repossessed by the 3rd respondent and legally allocated to the 4th and 5th respondent. Upon weighing the evidence, the learned trial Judge **Oundo, J.** found the applicant had not proved his case, especially the allegations that the 4th and 5th respondents obtained the registration of the aforesaid titles fraudulently. The applicant's suit was dismissed.

[4] Aggrieved by the said outcome, the applicant filed a notice of appeal evincing his intention to appeal and the instant motion on notice

dated 26th February, 2020 which is predicated under **Rule 5 (2) (b)** of the **Court of Appeal Rules**. In it the applicant seeks an order of injunction to restrain the respondents, their employees, agents or anybody acting under their authority from selling, alienating and or dealing in any manner whatsoever with land parcels **Nyandarua/8915** and **Nyandarua/Ndemi/1816** which were subdivided from the original suit land pending the hearing and determination of the appeal.

[5] The motion was canvassed by consideration of the submissions without appearance by counsel or parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global Pandemic. Although the parties were notified to file written submissions, only the applicant's counsel did. The respondents did not file any replying affidavit or written submissions. Nonetheless failure by the respondents to file a reply does not lessen the duty placed on us by law to examine the application according to the set guidelines and principles of law.

[6] In other words the applicant who seeks an order of injunction must establish that; the intended appeal is arguable and not frivolous and that if the injunction 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) where 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] Has the applicant demonstrated that the appeal is arguable? We think so, granted that the allegations made that he was allotted the original suit land, but the same was re-allocated to the 4th and 5th respondents without his knowledge; whether this amounted to deprivation of property to us is an arguable issue. The applicant therefore has met the first hurdle but with the usual rider that an arguable point may or may not succeed in the appeal. This is as was held in the case of; **Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 others [2014] eKLR** where the Court of Appeal stated thus:

“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.”

[8] As to whether the intended appeal will be rendered nugatory, we are satisfied it will as the applicant claims to have been in possession of the original suit land since 1981 and there are efforts by the respondents to execute the decree by cutting trees and his eventual eviction from the land. The applicant having satisfied both considerations, we allow the motion dated 26th February, 2020 in terms of prayer No 2. The respondents, their agents, employees or anybody acting on their behalf are hereby restrained by an order of injunction from dealing with the parcel of land known as **Nyandarua/Ndemi/8915, Nyandarua/Ndemis 8916** and **Nyandarua/Ndemi /1077** (the original suit land) until the hearing and determination of the intended appeal. Costs of this application will abide the outcome of the appeal.

Dated and delivered at Nairobi this 23rd day of April, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR