



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAL, J.J.A.)**

**CIVIL APPEAL (APPLICATION) NO. 45 OF 2020**

ANN MURIGO (as legal representative of

JAMES NDEGWA THUKU (DECEASED) .....APPELLANT/APPLICANT

AND

JORETH LIMITED .....1ST RESPONDENT

ASHER HOLDINGS LIMITED .....2ND RESPONDENT

*(Being an application to seek an order of injunction and stay of execution against the Judgment of the Environment and Land Court of Kenya at Nairobi (Bor, J.) dated 13th December, 2019*

in

ELC No. 962 of 2013

Consolidated with

ELC No. 1027 of 2012)

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**RULING OF THE COURT**

The Motion on notice is said to be brought under **rules 5 (2) (b) and 47** of the **Court of Appeal Rules, 2010** and it is prayed in the main:

“1. ...

**2. THAT an order of temporary injunction restraining the Respondents, their servants and or agents from evicting or dispossessing the Applicant from the said premises occupied by the Applicant and her tenants in L.R. No. 13330/548 Thome Five, Nairobi or in any other manner whatsoever interfering with the Applicant’s quiet possession and peaceful occupation of the said suit premises do issue and all further proceedings and execution of the Judgment given in ELC HCCC No. 962 of 2013 – Consolidated with ELC No. 1027 of 2013 before the ELC Court at Nairobi be stayed pending hearing of the Appeal herein against the Judgment and Orders given on 13th December 2019 in the said suit or until further orders of this court.”**

In grounds in support of the Motion and in a supporting affidavit of the applicant **Ann Murigo** it is said, *inter alia*, that the applicant has lodged an appeal against the ruling of **Bor, J., of Environment and Land Court (“ELC”)** given on 12th December, 2019 where the Judge dismissed the applicant’s claim to title to a suit property by adverse possession; that it should be in the interest of justice that an injunction be granted and proceedings and execution of the Judgment of ELC be stayed pending hearing and determination of an appeal; that the appeal has good chances of success and is arguable; that the appeal would be rendered nugatory if stay and injunction are not granted; that the applicant will suffer substantial irreversible loss because if orders of injunction are not granted and proceedings stayed, the applicant, her tenant and employees and their dependants are exposed to a real risk of the loss of their large business operations and other use of the suit property as well as their livelihoods. The applicant states further that after the appeal (Civil Appeal 45 of 2020) was filed by her husband died on 28th February, 2020; she successfully applied for substitution; that she could not file the application for stay and injunction before acquiring locus; that in the matter before ELC her late husband had applied for declaratory orders that he had acquired L.R. No. 13330/548 by adverse possession; that she had leased out part of that property while she occupied the other part; that she feared imminent eviction.

Both parties filed written submissions which we have perused.

The history of the case before ELC is given – there were two suits that were consolidated (ELC No. 1027 of 2012 (OS) and ELC No. 962 of 2013). The suit by the applicant’s husband (ELC No. 1027 of 2012) was found to have no merit and was dismissed. An order for eviction was subsequently issued in a decree made on 10th February 2020. It is submitted for the respondents that the appeal is not arguable because the applicant has not met the threshold to be entitled to orders of adverse possession and that the respondent be allowed to enjoy the fruits of Judgment. The respondents state in the said submissions that the appeal will not be rendered nugatory if injunction is not granted but that damages would be an adequate remedy if the appeal succeeds.

For an applicant to succeed in an application of this nature he must, firstly, demonstrate that the appeal or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must, in addition prove that the appeal would be rendered nugatory absent stay – *Dennis Mogambi Mang’are v Attorney-General & 3 Others (Civil Application No. 265 of 2011)*.

We have perused Memorandum of Appeal. It is proposed to be argued, on appeal, that the Judge erred in law and fact in not finding that the appellants had been on the suit property prior to the year 2011 when there was evidence of occupation. It is also proposed to be argued on appeal that the Judge misapprehended the principles applicable in a claim for adverse possession. We find these to be arguable points and an arguable point is not one that must succeed but one that calls for a full examination by the court (See the case of *Leo Sila Mutiso v Rose Wangari Mwangi [1999] 2 EA 233*).

On the nugatory aspect the applicant claims, and this is not denied by the respondents, that a decree was drawn and an eviction order issued. The respondents say that the applicant, if evicted, can be compensated by an award of damages.

We think that in a situation as obtains here where Civil Appeal No. 45 of 2020 is pending hearing, and where it is admitted by the respondents that the applicant is in actual possession of the property, it will meet the ends of justice that eviction be stayed pending hearing of the appeal. In the circumstances we hereby issue an injunction restraining the respondents or those claiming or acting under them from evicting the applicant from L.R. No. 1330/548 pending the hearing and determination of Civil Appeal No. 45 of 2020. Costs of the Motion will be in the appeal.

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

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**