



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. E330 OF 2020

BETWEEN

CHARLES KARANJA MASHUA.....APPLICANT

AND

JONAH MZEE ORUMOI.....1ST RESPONDENT

JOSEPH PARSANE ORUMOI.....2ND RESPONDENT

ROSE TITO METUO.....3RD RESPONDENT

JULIUS SARINKE ORUMOI.....4TH RESPONDENT

MUBIRO LIMITED.....5TH RESPONDENT

DISTRICT SURVEYOR, KAJIADO.....6TH RESPONDENT

DISTRICT LAND REGISTRAR, KAJIADO.....7TH RESPONDENT

DIRECTOR OF SURVEY NAIROBI.....8TH RESPONDENT

CHIEF LAND REGISTRAR NAIROBI.....9TH RESPONDENT

(Being an application for stay of proceedings pending the hearing and determination of an appeal from the ruling of the Environment and Land Court of Kenya at Kajiado (C. Ochieng, J.) dated 14th May, 2020

in

ELC No. 11 of 2019)

RULING OF THE COURT

At all material times, the applicant who was the proprietor of parcel Loitokitok/Olkaria/65 believed it to be 1550 acres based on the information in the register. Upon the sale of some 700 acres from it to the 5th respondent, the original parcel was subdivided into Loitokitok/Olkaria/ 254 and 255 with the former remaining with the applicant while the latter was transferred to the 5th respondent. However, subsequent to the sale and subdivision, the applicant discovered that the boundary with respect to his parcel had been unlawfully altered; in that, the mutation form dated 12th October, 1990 thereto indicated its size as 107 acres as opposed to 850 acres; that, in his estimation some 583 acres had been illegally excised from his parcel and annexed to Loitokitok/ Olkaria/256 belonging to the 1st to the 4th respondents.

This state of affairs prompted the applicant to file ELC No. 11 of 2019 at the Environment and Land Court (ELC) where he asked for, *inter alia*, a permanent injunction to restrain the respondents from selling, leasing or charging Loitokitok/ Olkaria/254, 256 & 257 pending the

determination of the suit; an order compelling the 1st to the 4th respondents to appoint qualified surveyors to re-establish common boundary between the original Loitokitok/ Olkaria/ 65 and 66, from which Loitokitok/ Olkaria 256 & 257 were established, as at 1968 when the land adjudication process was finalised; and rectification of the anomalies in the mutation form dated 12th October, 1990.

In turn, the 1st to the 4th respondents filed an application dated 6th June, 2019 imploring the ELC to strike out the said suit as against them on account of being time barred by dint of **Section 7** of the Limitations of Actions Act. C. Ochieng, J. agreed with the respondents and by a ruling dated 14th May, 2020 struck out the entire suit against those respondents.

Apart from filing an appeal challenging that decision in this Court, the applicant by the motion before us, brought pursuant to **Rule 5(2)(b)** of the Court's Rules prays for a temporary injunction to restrain the 1st to the 4th respondents from selling or interfering with his quiet possession of LR. Nos. Loitokitok/ Olkaria/255, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1871, 1872, 1873, 1874, 1875, 1876 & 1890; and stay of further proceedings at the ELC.

To satisfy the two principles under **Rule 5(2)(b)** and to comply with the consistent decisions of the Court, such as **Patel vs. Transworld Safaris Ltd.** [2004] eKLR, the applicant has submitted that the appeal is arguable as set out in the memorandum of appeal; that unless the orders sought are granted the applicant would be deprived of his right to exhaust the appellate process; and that the said respondents would proceed to subdivide and dispose of the above mentioned parcels thus defeating the appeal.

Opposing the motion, the 1st to the 4th respondents urged that it lacked merit; that Loitokitok/ Olkaria/255 belonged to the 5th respondent whilst the other listed parcels were not subject of the suit; that what was more, the suit having been struck out as against all of them, there were no proceedings to be stayed at least as far as they were concerned.

On its part, the 5th respondent argued that the appeal had no chance of success; that the issue of boundaries had been addressed by the District Surveyor, Director of Survey and District Land Registrar; that similarly, the suit was time barred as against it; that in any event, by virtue of **Section 18(2)** of the Land Registration Act, 2012 the ELC lacks jurisdiction to entertain the suit; and that in the unlikely event the appeal succeeds, the applicant was capable of being compensated by way of damages.

At the virtual hearing, the applicant, the 1st to the 4th respondents, and the 5th respondent were represented by Mr. Marete, Mr. Amunga & Mr. Kimondo, respectively. There was no appearance for the other respondents despite service of the hearing notice. Counsel relied on the submissions filed on behalf of their respective clients.

Our task is to determine if the application meets the threshold under **Rule 5(2) (b)** for us to exercise our discretion in his favour. We stress also that, though the applicant prays for both orders of stay of execution and further proceedings, the principles to be considered in dealing with the two are the same. **Oliver Collins Wanyama vs. Engineers Board of Kenya** [2019] eKLR.

Looking at the memorandum of appeal and without making any final determination on the merits of the appeal, we think the question of whether the learned Judge misconstrued and/or misapplied the provisions of the Limitations of Actions Act regarding when the period of limitation began to run in the circumstances of this case, is one that warrants the consideration of this Court when the appeal eventually comes up for hearing. By itself that single ground is sufficient for us to find that the appeal is arguable. See **Kenya Methodist University vs. Mary Kaungania & Another** [2017] eKLR.

Since the impugned ruling relates to the striking out of the 1st to the 4th respondents from the suit, should the proceedings in the ELC proceed without them and should the appeal eventually succeed, we are satisfied that that would result in the appeal being otiose. Having satisfied both principles the applicant is entitled to an order of temporary stay of further proceedings pending the determination of the appeal.

This will, in turn obviate any wastage of judicial time, if the appeal was to succeed, which would mean that those proceedings would be set aside and the suit heard afresh.

On the other hand, and with respect, we agree with the 1st to the 4th respondents that the temporary injunction sought against them cannot issue. Loitokitok/ Olkaria/255 belongs to the 5th respondent having been sold to it by the applicant, while the 14 other properties the dealing of which are sought to be restrained were not subject of the suit at the ELC and therefore cannot be the subject of the appeal. That prayer fails.

In the end, we allow the motion to the extent that we grant an order staying further proceedings in ELC No. 11 of 2019 pending the HEARING AND DETERMINATION OF CIVIL APPEAL NO. E021 OF 2020.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR