



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA, & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. E349 OF 2020

BETWEEN

GERALD KITHU MUCHANJE.....APPLICANT

AND

CATHERINE MUTHONI NGARI.....1ST RESPONDENT

GIBSON NYAGA NGARI.....2ND RESPONDENT

(An application for stay of the Ruling and Orders of the Environment and Land Court at Embu (Y. M. Angima, J.) delivered on 14th October 2020

in

E. L. C. Case No. 1 of 2018 (O.S.)

formerly Nairobi E.L.C. Case No. 465 of 2015.)

RULING OF THE COURT

1. The applicant's Notice of Motion dated 4th November 2020 seeks stay of execution of the orders of the Environment and Land Court (ELC) at Embu made on 14th October 2020 pending hearing and determination of an appeal. In the impugned judgment, the trial court issued a declaration that the respondents were entitled to be registered as proprietors of a parcel of land measuring 8 acres out of land **Title No. Mbeti/Gachuriri/5** (the suit land) which was in their possession by virtue of adverse possession. The trial court further directed the Land Registrar, Mbeere, to cause the respondents to be registered as proprietors of the suit land.
2. Being aggrieved by the said decision, the applicant sought orders for review and setting aside of the said ruling. That application was dismissed on 28th November 2019.
3. The applicant intends to appeal against the said ruling and has filed a notice of appeal against the same. He states that vide a ruling delivered on 14th October 2020, the trial court allowed the respondents to execute the decree emanating from the judgment.
4. The applicant believes that he has an arguable appeal which shall be rendered nugatory unless the Court grants the orders sought.
5. The application is opposed by the respondents. They submitted that there is no appeal against the judgment of the trial court; that the applicant's application for leave to appeal out of time was dismissed by this Court (**Makhandia, J.A.**) in **Civil Application No. 23 of 2020**, and that the respondents have since filed an application to strike out the record of appeal. On those grounds, **Mr. Wanjeru**, learned counsel for the respondents, urged us to dismiss the application.
6. In his brief reply, **Mr. Mwanza**, learned counsel for the applicant, conceded that the application for leave to appeal out of time against the judgment of the trial court was dismissed by Makhandia, J.A., but argued that since the applicant timeously filed a notice of appeal against the ruling dismissing the application for review, the orders sought ought to be granted. Counsel further conceded that there is no notice of appeal against the orders made on 14th October 2020 allowing the respondents to execute the decree.

7. We have considered the application; the affidavits on record; and the brief oral submissions by counsel. It is not in dispute that on 28th March 2019 the ELC at Embu delivered its judgment in favour of the respondents, and directed that they be registered as the proprietors of the suit land, which they are currently occupying.

8. The applicant did not timeously file an appeal against that judgment, and his attempt to challenge it out of time was unsuccessful, following dismissal of his application for leave to file a notice of appeal out of time.

9. What the applicant is pursuing now is an order of stay of the trial court's ruling dismissing his application for review and setting aside of the judgment of 28th March 2019.

10. For this Court to grant an order of stay under **rule 5(2)(b)** of this **Court's Rules**, it must be satisfied that the appeal or intended appeal is arguable, and that the appeal, if successful, shall be rendered nugatory unless the orders sought are granted.

11. Considering that the applicant is not challenging the substantive findings by the trial court in its judgment, we are not persuaded that the intended appeal is arguable. In any event, there are no positive orders that can be stayed. On 28th November 2019 the trial court dismissed the applicant's application for review and setting aside of the judgment that awarded the suit land to the respondents. It is trite law that a negative order cannot be stayed. See **Western College of Arts and Applied Sciences v E.P. Oranga & 3 Others [1976] eKLR 63**.

12. Having arrived at the conclusion, we need not consider whether the intended appeal shall be rendered nugatory unless the orders sought are granted. All in all, we find this application lacking in merit and dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 21st day of May, 2021

W. KARANJA

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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