



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. E224 OF 2020

BETWEEN

OMAR SHURIE.....APPLICANT

AND

MARIAN RASHE YAFAR.....RESPONDENT

(Being an application for stay of execution of the judgment and decree of the Environment and Land Court at Garissa (*Cherono, J.*) delivered on 28th February, 2020 in ELCC No. 11 of 2018 pending the hearing and determination of the intended appeal)

RULING OF THE COURT

1. In his application made under Rule 5(2)(b) of the Court of Appeal Rules, the applicant prays for an order of stay of execution of the judgment of the Environment and Land Court (ELC) at Garissa (*Cherono, J.*) given on 28th February 2020 in which that court allowed the respondent's suit against him; declared that he is a trespasser on the property known as Title Number Garissa Municipality/Block III/253; restrained him from interfering with the respondent's occupation of the same; ordered him to vacate the property, demolish his house and fence and restore the property to its original condition within 45 days; and awarded the respondent mesne profits.
2. Aggrieved, the applicant filed a notice of appeal on which the present application is hinged. He complains that the Judge failed to consider that he purchased the property and is the legal owner and has been in occupation since purchasing it sometime between the years 1984 and 1995; that the Judge also failed to consider that the Garissa County Council transferred the property on 30th June 1998 and the applicant was issued with a transfer and a letter of allotment.
3. Learned counsel for the applicant, *Mr. Bashir*, submitted that the intended appeal is arguable and that if the orders sought are not granted, the order for demolition of the applicant's house will be executed and the appeal, if successful, will be rendered nugatory. He stressed that the applicant is still in possession of the property since 1988, has his home there and the risk of demolition and sale of the property by the respondent to third parties is real.
4. There was no appearance for the respondent during the hearing of the application.
5. Based on the material before us, and applying the established legal principles as articulated in *Stanley Kangethe Kinyanjui vs. Tony Ketter & others [2013] eKLR*, we are satisfied that this is a proper case for us to exercise our discretion in favour of the applicant. We think it is arguable, for instance, whether the learned Judge rightly concluded that the applicant is a trespasser.
6. As to whether the appeal will be rendered nugatory if we decline the application and the appeal ultimately succeeds, we think it will as the demolition of the applicant's house and his eviction from the property will effectively destroy the substratum of the appeal.
7. We accordingly allow the application as prayed. Costs of the application shall abide by the outcome of the appeal.
8. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021

W. KARANJA

.....

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