



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO. 215 OF 2019

BETWEEN

PATRICK TUMUTI KIMUTWE.....APPELLANT/ APPLICANT

AND

STEPHEN WANJAU MWANGI,

OBADIAH KARIUKI MWANGI,

DAMARIS WANJIKU MWANGI

(Administrators of the Estate of Moses Mwangi Wanjau).....RESPONDENTS

(Application for stay of execution pending the hearing and determination of the

appeal against the judgment of the Environment and Land Court

at Milimani (Obaga, J.) dated 17th January, 2019

in

ELC Suit No. 346 of 2017)

RULING OF THE COURT

By the motion dated 12th July 2019 the applicant seeks an order of stay of execution of the judgment of the Environment and Land Court at **Milimani** in **ELC Suit No. 346 of 2017** on 17th July 2019, pending the hearing and determination of his appeal against the same. By that decision a permanent injunction was issued restraining the appellant from interfering with the respondents' enjoyment and occupation of the suit property LR No. 8285/981.

The motion is predicated on grounds on its face to the effect that the intended appeal is arguable and has high chances of success, and that if orders sought are not granted the appeal will be rendered nugatory and the applicant will suffer irreparable loss and damage.

In a supporting affidavit sworn by the applicant on 12th July 2019, it is deposed that the applicant is in danger of being evicted from the suit property in execution of the impugned judgment. The applicant further avers that he has been in occupation of the suit premises since 2005 while the respondents have never occupied or developed the suit premises hence no prejudice will be occasioned to them.

In a replying affidavit sworn by **Obadiah Kariuki Mwangi**, the respondent contends that the firm of **B. Otieno & Co. Advocates** have not obtained leave of the Court to come on record for the applicant. The respondent further argues that the applicant having filed an application for review against the impugned judgment in the High Court, he cannot competently, and simultaneously pursue an appeal against the same judgment. It is further asserted that the impugned judgment of 17th January 2019 was executed in the same year it was issued and the application is therefore overtaken by events. The respondent also filed written submissions dated 10th March 2021 further elaborating his response.

We have given due consideration to the application, the applicant's affidavit, the contending submissions and the law. This being a **Rule 5(2) (b)** application, it is trite that an applicant needs to demonstrate that he has an arguable appeal. This merely means an appeal that raises at least one *bona fide* issue worthy of the Court's consideration on appeal or, put another way, the appeal should not be frivolous. It does not, however, mean an appeal that must necessarily succeed. The second matter which the applicant must show is that the appeal would be rendered nugatory without the Court's intervention in the interim. An appeal would be rendered nugatory if damage of a great/or irreversible character, prejudicial or probably destructive of the substratum of the appeal, would have occurred in the intervening period. A full discussion of these principles and the notable jurisprudence on them is found in this Court's decision in **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 2 OTHERS [2013] eKLR.**

As contended by the respondent, and evinced by a motion dated 15th April 2019, the applicant has already sought to have the Environment and Land Court review and set aside its judgment dated 17th January 2019. It being patent law that one cannot pursue a review application and an appeal simultaneously, the instant appeal is clearly incompetent and consequently not arguable before this Court.

Further, having been asserted without serious controvert that execution of the impugned judgment has already occurred, we find the application to have been overtaken by events. The Court cannot act in vain and the application fails on the nugatory aspect.

In the result, the motion is without merit and it is accordingly dismissed with costs.

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

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR