



**IN THE COURT OF APPEAL**

**AT NYERI**

**CIVIL APPLICATION NO. 99 OF 2020 (UR 89/2020)**

**(CORAM: OUKO, KARANJA & OKWENGU, JJA)**

**NCHIRU CATHOLIC & PARISH**

**(Through the Catholic Church of Meru Registered Trustees).....APPLICANT**

**AND**

**DOMICIANO RATANYA.....RESPONDENT**

*(Being an application for stay of further proceedings in Environment and Land Case No. 58 of 2019*

*at Meru, pending the hearing and determination of an intended appeal against the Ruling of the*

*Environment and Land Court at Meru (L. Mbugua, J.) delivered on 8th July, 2020*

*in*

*ELC No. 58 of 2019)*

\*\*\*\*\*

**RULING OF THE COURT**

1. Nchiru Catholic Church and Parish who is the applicant before us, was the defendant in a suit filed in the Environment and Land Court (ELC) by **Domiciano Ratanya** (the respondent). In the suit, the respondent sought *inter alia*, cancellation of the applicant's registration as proprietor of LR. No. Nyambene/Uringu 1/1873 (originally Uringu 1 adjudication section P. No. 1873) (**the suit property**), and rectification of the register to the effect that he, i.e. the respondent is the sole lawful proprietor of the suit property. The respondent also filed an application seeking *inter alia*, an interlocutory order restraining the applicant, their trustees, servants or agents, from occupying, working on, or using or in any way interfering with the suit property.
2. The applicant filed a defence to the suit contending *inter alia*, that the respondent's claim was bad in law as it was barred by the statute of limitation, and that it was also *res judicata*, as the same issues raised in the suit were dealt with in **Judicial Review Application No. 33 of 2008**. In addition, the applicant filed a notice of preliminary objection in which it raised the same issues, and urged that the respondent's suit be struck out.
3. Upon hearing the respondent's application and the applicant's preliminary objection, the learned Judge delivered a ruling in which she overruled the preliminary objection and also dismissed the respondent's motion.
4. The applicant who is aggrieved by the ruling, has filed a notice of appeal, and is now before us with a notice of motion in which it seeks orders to stay the proceedings in the ELC pending the hearing of its appeal. It is the applicant's contention that the learned Judge erred in overruling its preliminary objection, and that unless the Court stays the proceedings in the ELC, the substratum of its appeal which is the propriety of the proceedings in the ELC, will be rendered nugatory. The applicant has filed a draft memorandum of appeal in which it has faulted the ruling on six (6) grounds.
5. In a replying affidavit sworn on 20th February, 2021, the respondent objects to the applicant's motion on the ground that it is intended to delay the expeditious hearing and disposal of the suit in the ELC, and that the preliminary objection was properly overruled as it could not dispose of the suit with finality. The respondent argues that the intended appeal is merely an academic exercise.
6. The respondent has also filed written submissions in which he argues that the applicant's preliminary objection did not meet the

requirements set out in **Mukhisa Biscuits Manufacturing Co. Ltd. vs West End Distributors Ltd. [1969] EA 696**. The respondent argued that it was best to have the ELC hear and determine the suit on merit, so that whichever party is dissatisfied with the final judgment can appeal to this Court, instead of dealing with the appeal on the preliminary objection only.

7. The motion before us being one under Rule 5(2)(b) of the Court of Appeal Rules, it is now well settled that the applicant must satisfy the Court that its intended appeal is arguable, and that if the order of stay of proceedings that it seeks is not granted, the intended appeal will be rendered nugatory. (See **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others** [2013] eKLR).

8. It is evident from the ruling of the learned Judge and the grounds set out in the draft memorandum of appeal, that the intended appeal raises issues regarding whether the respondent's suit is bad in law for being res judicata, and/or statute barred. The intended appeal is therefore arguable.

9. As regards the nugatory aspect, the intended appeal involves land whose character may change. The intended appeal also concerns the proceedings in the ELC. Should the orders of stay not be granted and the applicant succeeds in its appeal, there will be waste of judicial time as the proceedings may well have been finalized.

For these reasons, we find that the applicant has satisfied the twin requirement of Rule 5(2)(b) of the Court of Appeal Rules. We therefore allow the application and issue orders staying the proceedings in ELC No. 58 of 2019, pending the hearing and determination of the applicant's appeal.

**Dated and delivered at Nairobi this 19th day of May, 2021.**

**W. OUKO (P)**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**