



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA, & KIAGE, J.J.A.)

CIVIL APPLICATION NO. E224 OF 2019

BETWEEN

ABDIRAHMAN MOHAMED ELMI

T/A ELMI TRADERS.....APPLICANT

VERSUS

MARY NYAMBEKI.....1ST RESPONDENT

FRANCIS KIMANI NGUGI

T/A ALFED AGENCIES.....2ND RESPONDENT

THE CHIEF LANDS REGISTRAR.....3RD RESPONDENT

(An application for an order of an injunction pending the hearing and determination of an intended appeal from the judgment of the Environment and Land Court of Kenya at Nairobi (Bor, J.) dated 1st July, 2019 in E&LC Cause No. 302 of 2017)

RULING OF THE COURT

The applicant claimed before the Environment and Land Court that **Plot Nos. D and XVI** were allotted to him in 1996 and 1997, respectively, subject to payment of Kshs. 275,230 and that the plots were later registered as **L.R. No. xxxxx and xxxxx**; that before he could process the titles, the deed plans went missing and only resurfaced in 2014. He later discovered that the two parcels had been allotted to the 1st and 2nd respondents, who went ahead to process the titles.

The applicant insisted that the titles issued to the two were unlawful.

After this turn of events, it was the applicant's case that he engaged the 1st and 2nd respondents, to negotiate a settlement, the result of which was a deed of settlement between the main parties, where it was agreed that the applicant would abandon any claim to the two parcels of land in consideration of being paid Kshs. 53,000,000 by the 1st and 2nd respondents. According to the applicant, the 1st and 2nd failed to honour this agreement, prompting the applicant to institute an action in the court below for orders directed at the 3rd respondent to revoke and cancel the grant issued to the two, an order to compel the 3rd respondent to issue the titles of the two properties to him or, alternatively, an order to compel the 1st and 2nd respondents to pay to him Kshs. 53,000,000, together with interest.

The 1st and 2nd respondents did not participate in the trial despite service by alternative substituted means. The 3rd respondent, in its defence, denied the applicant's claim and stated that the 1st and 2nd respondents were the registered proprietors; that before registering them, the 3rd respondent exercised due diligence and believed that the documents they presented for registration were genuine.

Bor, J. in determining the dispute did not believe the applicant and the origin of his letters of allotment. In her opinion, the applicant did not meet the terms and conditions of the letters of allotment, particularly their 30 days validity which the applicant failed to comply with. The Judge, finally, concluded that the applicant had failed to prove that the titles held by the 1st and 2nd respondents were irregularly issued; that no evidence was presented to suggest the existence of any negotiations in which it was agreed that the applicant would pay any money, as

alleged.

With that, the learned Judge rejected the applicant's action in a judgment rendered on 1st July, 2019.

In the instant motion to stay those orders and for an injunction to restrain the respondents from interfering with or transferring the suit properties until the appeal is heard and determined, the applicant has expressed apprehension, in compliance with the requirements of **Rule 5(2)(b)** of the Court of Appeal Rules, that if the reliefs sought are not granted the appeal, which he submits is arguable, will serve no purpose as execution will have occurred and the properties will have been dealt with in a manner that may be prejudicial or detrimental to his interest.

Whether the relief sought is stay of execution or stay of further proceedings or an order of injunction, the twin consideration of arguability of the appeal and its nugatory aspect, should it succeed, are the same. Of course, we must restate a well-known line, that where the court dismissed an action with no positive order, capable of execution, an application for stay of execution would ordinarily fail. Aware of this, perhaps, the applicant has prayed, in the alternative, for an order of temporary injunction, which is not caught up by the above strictures.

On the question of arguability of the appeal, the applicant relies on the draft memorandum of appeal, which lists 13 grounds. It is settled that a single *bona fide* arguable ground is sufficient. See **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd**, Civil Application No. Nai 345 of 2004.

Related to this is the principle that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others**, Civil Application No. 124 of 2008. In our view, the overarching issue in all those grounds is whether the allotment and final registration of the 1st and 2nd respondents as the owners of the suit properties was done legally or put differently, whether the process was fraudulent.

Despite the parties being served on 5th March, 2021 with the hearing notice and directions requiring them to file and exchange written arguments, in accordance with the Court's Covid-19 Practice Note, only the applicant has complied. We are nonetheless required to consider the merit of the application, applying the two principles stated above.

From what we have identified above as the crux of the dispute; how the 1st and 2nd respondents obtained the titles to the suit properties, we have no doubt that that question is arguable, though it does not have to be one that must succeed.

We are however not persuaded that the appeal, if successful, will be rendered negatory in the absence of an order of injunction. The applicant, as we have seen, applied to the court below to reverse the registration of the 1st and 2nd respondents and to have the properties vested in him and in the alternative, an order compelling those respondents to pay him Kshs. 53,000,000 in terms of some deed of settlement. Should the appeal succeed, and the properties are not available, the payment of the funds can still be enforced.

It is a mandatory requirement of the rule upon which this application is premised, that both limbs be satisfied before the relief can be granted. **Josephine Koki Raymond vs. Philomena Kanini Maingi (personal representative of Maingi Musila Mutava (Deceased) & another** [2018] eKLR. Having only demonstrated one limb, this motion fails.

Accordingly, it is dismissed without an order of costs.

Dated and delivered at Nairobi this 7th day of May, 2021.

W. OUKO, (P)

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR