



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MURGOR, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPLICATION NO. NAI. 240 OF 2018

BETWEEN

AGNES WAMBUI.....APPLICANT

AND

JAMES MACHARIA MWANGI.....RESPONDENT

(Being an application for stay of execution of the Judgment of the Environment and Land Court of Kenya at Nairobi (Mary Gitumbi, J.) dated 8th December, 2017

in

E.L.C. No. 281 of 2016)

RULING OF THE COURT

It is prayed in the Motion brought under **rules 5 (2) (b) and 42 (1)** of the **Court of Appeal Rules** that we grant stay of execution of the orders and Judgment of the **Environment and Land Court (“ELC”)** in **ELC Case No. 281 of 2016** delivered on 8th December, 2017 and all consequential orders pending hearing and determination of the Motion and of an intended appeal. It is stated in grounds in support of the Motion and in an affidavit of the applicant, **Agnes Wambui**, that the intended appeal is arguable and raises substantive matters of law; that the appeal will be rendered nugatory and the applicant will suffer substantial irreparable loss and damage. Further, that **L.R. No. LOC 18/Gachocho/1811 (the suit property)** originally belonged to one **Mwangi Karuma (deceased)** and Letters of Administration had been granted to the applicant on 2nd April, 2013 and confirmed on 7th April, 2014; that ELC had delivered a Judgment vesting the applicant’s suit property in the respondent (James Macharia Mwangi) by adverse possession; that the suit property was not the subject of the Originating Summons in ELC; that ELC had ordered that the suit property to be transferred to the respondent, and the transfer documents had already been executed by the Deputy Registrar; that there was a real danger that the applicant would lose her property particularly as the Originating Summons was in respect of the property known as L.R. No. LOC 2/Gachocho/1811.

There was no replying affidavit when we considered the Motion virtually without hearing parties in view of the COVID-19 guidelines.

The principles that govern an application of this nature are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant, to succeed, must, in addition, show that the appeal would be rendered nugatory absent stay – see a summary of these principles in the case of **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR**.

There are thirteen grounds of appeal set out in the draft Memorandum of Appeal attached to the Motion. It is proposed to be argued on appeal that the Judge erred in finding that ingredients of adverse possession had been proved; that the Judge erred in fact and in law in failing to find that the respondent had pleaded adverse possession over L.R. No. LOC 2/Gachocho/1811 but wrongly granted orders over a property L.R. No. LOC 18/Gachocho/1811. We find these not to be idle points, they are arguable points and as has been held before by this Court, an arguable point is not one that must succeed – See **Dennis Mogambi Mongare v Attorney General & 3 Others Civil Application No. NAI. 265 of 2011**.

On the nugatory aspect the applicant says that the Deputy Registrar had already executed transfer forms as per the Judgment. If the suit property is transferred to the respondent it may be interfered with in a way that it would render it beyond the reach of the applicant and that may render the appeal nugatory, if it was to succeed.

The applicant has satisfied the principles applicable in an application of this nature. The application dated 13th August, 2018 is hereby granted. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

A.K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR