



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME, ASIKE-MAKHANDIA, J.J.A.)

CIVIL APPLICATION NO. 68 OF 2019

BETWEEN

GEORGE KARONGO KAGUNYA1ST APPLICANT

KANGUNYA KIBAKI.....2ND APPLICANT

AND

NJUGUNA KIBAKI MUNGARESPONDENT

(An application for stay of execution to file and serve the Notice of Appeal in an intended Appeal from a judgement of the

High Court of Kenya at Nairobi (Justice E.O. Obaga) dated 17th May, 2018

in

ELC APPEAL NO. 83 OF 2016)

RULING OF THE COURT

1. The Notice of Motion dated 28th February 2019 made under **Rule 4** and **5(2)(b)** of the Court of Appeal Rules, 2010, Article 47 and Article 50(1) of the Constitution, section 1(A), 3 and 3 (A) of the Civil Procedure Rules is for stay of execution against the judgement of the Environment and Land Court (Obaga, J.) dated 17th May, 2018 in ELC Appeal No. 83 of 2016 upholding the orders of the Kiambu Land Disputes Tribunal on the respondent's claim on the land parcel LR. No. Kiambaa/Kihara/2350.
2. The 2nd applicant and the respondent are brothers who inherited land parcel LR No. Kiambaa/Kihara/1227 and the issue before the superior court on a second appeal from the Land Disputes Appeal Committee was whether the respondent was entitled to a share of their father's property which had been given to them by their mother and registered in the 2nd applicant's name, the 1st applicant's son. The superior court in a second appeal made the conclusion that what remained of LR. No. 1227 after sub division of the land parcel being LR. No. Kiambaa/Kihara/2350 was held in trust for the respondent. The superior court found no merit in the applicant's appeal and judgment was entered in favour of the respondent with costs.
3. Aggrieved, the applicants pending the hearing and determination of their intended appeal lodged a Notice of Appeal on 14th June, 2018 challenging the judgement delivered on 17th May, 2018. The applicants have since attributed their delay in filing and serving a Record of Appeal to a letter dated 24th May 2018 seeking for certified copy of proceedings from the superior court which is yet to be replied. We also note that there was no response from the respondent on the arguments raised in favour of the orders herein sought.
4. We have considered the application along with materials and arguments in support thereof placed before us. The applicant's appeal to the Environment and Land Court against the decision of the Land Disputes Appeals Committee wherein the Environment and Land Court found thus;

“Since there was evidence that the 2nd appellant held the land in trust for his brother, there was nothing wrong in ordering That L.R No. Kiambaa/ Kihara/2350 be transferred to the respondent. I therefore do not find any merit in this appeal which is hereby dismissed with costs to the respondent.”

5. The applicant is required to satisfy this Court on the twin limbs that; the intended appeal is arguable and not frivolous and; that if stay is not granted, the intended appeal, if successful, would be rendered nugatory, (See ***Githunguri v Jimba Corporation Limited (1988) KLR 838***) and ***Northwood Development Company Limited v Husein Alibhai Pirbhai & 2 Others [2015] eKLR***). The applicant is also required to demonstrate whether an order of dismissal of a suit can be stayed. (See ***George Ole Sangui & 12 Others v Kedong Ranch Limited [2015]***)

eKLR). This Court in the case of **Republic v. Kenya Wildlife Service & 2 Others (CA NO. NAI 12 of 2007)** expressed itself as follows whilst considering whether an order of stay can be granted in respect of a negative order;

“It would appear to us that we have no jurisdiction to grant any order for injunction or stay on the terms sought or at all, for the reason that Aluoch J. neither granted or refused the application for stay. The Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay”.

(See ***Daniel Lomagul Kandeji & 2 Others v Kamanga Holdings Limited & 40 Others [2017] eKLR***).

6. We are satisfied that what the applicants are seeking to stay is a negative order incapable of benefiting from the Court’s discretion under rule 5 (2)

(b). And in the absence of the applicants persuading us otherwise, the application falls outside the purview of our discretion.

7. The upshot is that the applicant’s Notice of Motion dated February, 2019 has no merit as negative orders are not capable of being stayed as the superior court made no enforceable order which can be the subject matter of the orders for stay. The same is dismissed with costs.

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

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR