



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MURGOR, SICHALE & KANTAI, J.J.A.)

CIVIL APPLICATION NO. NAL E415 OF 2020

BETWEEN

SERAH WANJIRU KUNG'U.....APPELLANT/APPLICANT

AND

GODFREY G. GICHANA AKUMA.....RESPONDENT

(Application for stay of execution of the Judgment and Decree of the Environment and Land

Court of Kenya at Nairobi (S. Okong'o, J.) dated 15th October, 2020 in E.L.C. No. 411 of 2010)

RULING OF THE COURT

In the Motion brought under various provisions of law including rule 5 (2) (b) of the Court of Appeal Rules it is prayed in the main that we grant an order staying enforcement and/or execution of the Judgment of the Environment and Land Court (“ELC”) made on 15th October, 2020 (S. Okongo, J.) together with consequential orders pending the hearing and determination of the application and of the appeal. The Motion is supported by the grounds on its face and by the supporting affidavit of the applicant Serah Wanjiru Kungu to the effect that the applicant purchased Plot D2-268 situate at Kayole area in Embakasi from one Joseph Mwanga Kilonzo and had since then been paying all land rates to the County Government of Nairobi; that the applicant and the said County Government were sued by the respondent (Godfrey G. Gichana Akuma) in ELC Case No. 411 of 2012 where it was alleged that the applicant was in possession of the respondent’s land and Judgment was entered for the respondent. Further, that the respondent did not prove ownership of the said land; that the learned Judge erred in the way he understood minutes of a meeting of the County Government of Nairobi which minutes are said to have recognized that the disputed plot had been repossessed from the respondent for non-payment of rates; that the applicant face imminent eviction as a result of findings in the said Judgment for which the applicant would suffer irreparable loss. It is said that there are pertinent issues to be argued on appeal. Attached to the affidavit is a copy of sale agreement dated 22nd February, 2006 between Joseph Mwanzia and Eva Loko Mwanzia (as vendors) and the applicant (as purchaser). The agreement identified the Plot to be sold as Plot Number D2-268 Kayole Site and Service Scheme Nairobi. The purchase price was Ksh.200,000 which was paid in cash on execution of the agreement.

The respondent, in a replying affidavit states that the applicant had not proved that she ever occupied the plot in dispute; that in absence of occupation the applicant could not suffer loss; at paragraphs 8 and 9 of the replying affidavit:

“8. THAT, I have no intention of disposing the said Land Parcel Plot No. D2-268, situate at Kayole, but rather I want to develop the same as planned before, the more reason why I instituted a suit against the Appellate/Applicant together with the Nairobi City Council for interfering with the plans to develop the said land parcel.

9. THAT, the allegation of intended eviction of the Applicant from the subject land resonates in all the papers filed by the Applicant, however, there is no iota of evidence of any threat that I intend to evict the Applicant, who otherwise has never been in physical occupation of the said land.”

Both sides filed written submissions which we have carefully considered. In an application of this nature an applicant must demonstrate that the appeal, or intended appeal, as the case may be, is arguable which is the same as saying that the appeal is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See the case of **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR** where the said principles were well summarized.

The dispute between the parties is on ownership of a plot of land in Kayole. The applicant says and produced documents to the trial court

showing that she purchased the land in the year 2006 and had since paid rates to the County Government of Nairobi. She further says that the land had been repossessed from the respondent by the County Government after not paying rates payable. In those circumstances the issue of ownership of the land is an arguable point on appeal. An arguable point is not one that must succeed – See the case of ***Dennis Mogambi Mongare v Attorney General & 3 Others Civil Application No. NAI. 265 of 2011.***

On the nugatory aspect which an applicant must also satisfy to be accorded the protection under **rule 5(2) (b)** of the **rules of this Court** the applicant fears imminent eviction after the orders made by the ELC which orders she intends to appeal. On the other hand the respondent says that he will not evict the applicant but he also says that he wants to enter the land and commence some developments. In those circumstances it is just and expedient that the status quo – ante be preserved pending hearing and determination of the intended appeal

The Motion succeeds and is granted. Costs 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

F. SICHALE

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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