



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KANTAL, OMONDI & MUMBI NGUGI, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 34 OF 2021

BETWEEN

DAUDI KIPTUGEN.....APPLICANT

AND

COMMISSIONER OF LANDS.....1ST RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI .....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

COUNTY DISTRICT LAND REGISTRAR,

UASIN GISHU, ELDORET.....4TH RESPONDENT

HELDO FOODSTUFF LIMITED.....5TH RESPONDENT

SILAS KIPTUI KIPCHILAT (acting as the personal representative of the Estate of the late

LEAH JELAGAT KIPCHILAT (DECEASED).....6TH RESPONDENT

HARON CHEPKILOT KIPSANG t/a HELDO FOODSTUFF.....7TH RESPONDENT

(An application for stay of execution of the Judgment of the Environment and Land Court of Kenya at Eldoret (Ombwayo, J.) dated 27th January, 2021

in

ELC Cause No. 787 of 2012)

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RULING OF THE COURT

There are two applications before us. In the Motion dated 20th April, 2021 brought under rule 5(2) (b) of the Court of Appeal Rules and Sections 3A and 3B of the Appellate Jurisdiction Act the applicant, Haron Chepkilot Kipsang t/a Heldo Food Stuff prays in the main that pending hearing and determination of the application an injunction do issue restraining the respondent, his agents, servants, or employees from entering into, from disposing, selling, transferring or charging or interfering with the register at the District Land Registrar Uasin Gishu or processing title or certificate of lease or any other dealing with land known as L.R. No. Eldoret Municipality/Block 7/154. It is also prayed that we grant those orders pending hearing and determination of an appeal; that we grant an order staying execution and/or further executions of the Judgment and decree of the Environment and Land Court (ELC) (Ombwayo, J.) delivered on 27th January, 2021 pending hearing and determination of an appeal.

The Motion dated 7th May 2021 (the 2nd application) brought by Daudi Kiptugen (he is the 1st respondent in the first application) under rule 80, 83 and 84 of the said rules and it is prayed that the notices of appeal dated 3rd February, 2021 filed by the 1st, 2nd, 3rd and 4th respondents; the notice of appeal filed by the 5th respondent on 9th February, 2021 and the notice of appeal lodged on 3rd February, 2021 by

the 6th respondent be deemed as withdrawn. Further, that Civil Appeal No. 34 of 2021 lodged by the 7th respondent on 24th April, 2021 be struck out.

It is convenient to deal with the second application first as it seeks to have an appeal struck out and notices of appeal be deemed as withdrawn.

In grounds in support of the Motion and in an affidavit in support of the Motion by the applicant in that application (**Daudi Kiptugen**) it is stated amongst other things that the 1st, 2nd, 3rd and 4th respondents (respectively Commissioner of Lands, Chief Land Registrar, Nairobi, The Attorney General and County Land Registrar, Uasin Gishu) lodged their notices of appeal on 3rd February, 2021; that the 4th respondent (that is probably the 5th respondent Heldo Foods Stuff Limited) lodged his notice of appeal on 5th February, 2021; the 6th respondent (**Silas Kipchillat** acting as the personal representative of the estate of the late **Leah Jelagat Kipchillat**) lodged his notice on 2nd February, 2021; that the first notice of appeal was the one lodged by the 6th respondent on 2nd February, 2021 and was thus the operative one; that more than 92 days had lapsed since the notices by the 1st, 2nd, 3rd, 4th, 5th and 6th respondents were lodged; that the 6th respondent had failed to institute an appeal within 60 days as had the other respondents. The applicant says at paragraph 14 of the supporting affidavit:

***“THAT the notice by the 1st, 2nd, 3rd, 4th, 5th and 7th respondent are deemed and or treated as notice of address of service.”***

Further, that the Civil Appeal No. 34 of 2021 lodged by the 7th respondent is incompetent “... in the sense that the 7th respondent ought to have been treated as a respondent in the appeal.” It is also stated that the appeal is incompetent for excluding some documents and for not filing a supplementary record of appeal to include the excluded documents. The said notices of appeal are produced in the application as is a letter dated 24th February, 2021 by ELC advising **M/S Wambua Kigamwa & Company Advocates** that certified copies of typed proceedings and Judgment were ready for collection. **Haron Chepkilot Kipsang**, the appellant in Kisumu C.A. No. 34 of 2021 and the 7th respondent in the application depones in a replying affidavit to the Motion dated 7th May, 2021 that the application is defective as parties have been interchanged leading to confusion; that the appeal was filed on 25th March, 2021 within 60 days as required by the rules of this Court; that notices of appeal were filed on time on 3rd February, 2021; that all documents in ELC were included in record of appeal and for all that the Motion should fail.

There is also an affidavit by **Jonah K. Korir**, an advocate of the High Court of Kenya who, in response to the replying affidavit says that the letter dated 24th February, 2021 by ELC was copied to him; that pendency of an application for stay of execution pending appeal is not an excuse for the appellant to fail to institute an appeal on time. He says many other factual things that he should have left for his client to speak to as advocates should not enter the arena of the clients they represent.

We have seen and perused written submissions by respective parties and we are grateful to those parties for their submissions.

It is common ground that Judgment of ELC was delivered on 24th January, 2021. A party who desires to appeal to this Court from a Judgment of the High Court is required to lodge with the Registrar in writing within 14 days of the date of the decision against which it is desired to appeal and a notice of appeal— **Rule 75 of the Court of Appeal Rules**.

By **rule 80** of the said **Rules** where two or more parties give notice of appeal from the same decision the second and all subsequent notices are deemed to be notices of address of service.

We note that there is in our record a Notice of Appeal drawn by Wambua Kigamwa & Company Advocates lodged with the Deputy Registrar of ELC at Eldoret on 3rd February, 2021. That notice of appeal was lodged within 14 days as is required by **rule 75 of the rules**. By dint of **rule 80 of the rules** every other notice of appeal lodged became a notice of address for service. We note in any event all the notices were lodged within the period required by the rules.

The applicant says that Kisumu Civil Appeal No. 34 of 2021 should be struck out for omitting certain unnamed documents. If that allegation is true its simple answer is in **rule 92 of the rules** which allows a respondent who thinks that a record of appeal is defective or insufficient to lodge in the appropriate registry 4 copies of a supplementary record of appeal containing copies of any further documents required for the proper determination of the appeal.

Finally, to dispose of this Motion, it is required under rule 84 of the rules that an application to strike out a notice of appeal or an appeal shall not be brought after expiry of 30 days from the date of service of notice of appeal or record of appeal as the case may be. The applicant has not demonstrated that he complied with these time lines at all; his application is dated 7th May, 2021. The operative notice of appeal was lodged on 3rd February, 2021 and the appeal was filed on 25th March, 2021.

Now to the first application.

In grounds in support of the Motion and in a supporting affidavit of Haron Chepkilot Kipsang the applicant says that he is aggrieved by the Judgment of ELC which held that the suit property had first been allocated to the plaintiff (Daudi Kiptugen) and that the file at the Registry of Lands had been interfered with. There are 10 grounds set out in Memorandum of Appeal; that the Judge erred in not holding that the 1st respondent’s property was a different property; that the Judge ignored the applicant’s evidence and submissions; that the applicant’s counter-claim was ignored by the Judge. Further, that the appeal is arguable and would be rendered nugatory if stay of execution pending appeal is not granted as the suit land could be sold, transferred or charged; amongst other things.

The 1st respondent filed written submission which we have perused.

The Judge found in the impugned Judgment that the suit property had first been allocated to the plaintiff (Daudi Kiptugen) but the file at the lands office had been interfered with to deny him ownership; the Judge granted an order of permanent and perpetual injunction restraining the 1st, 2nd and 5th defendants (Commissioner of Lands, Chief Land Registrar, Nairobi and County Land Registrar, Uasin Gishu) from

issuing another lease and certificate of title to the 4th defendant (Heldo Food Stuff Limited) over the suit property. He further granted an order to the 1st and 2nd defendants to reinstate the expunged original records on the suit property indicating the plaintiff as the original owner and failure to do so copies thereto be treated as originals. The Judge also granted various declarations.

For a party to succeed in an application of this nature 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 a party 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 these principles are well summarized.

Amongst the grounds of appeal set out in Kisumu Civil Appeal No. 34 of 2021 is that the Judge erred in law and fact in finding that the 1st respondent's allotment letter to the suit property was first in time as opposed to that of the applicant. It is also taken on appeal that the Judge erred in law and fact in finding that the allotment in respect of Heldo Food Stuff Limited was in respect of a non-existent legal entity when allotment had followed all the procedures required in law. We find these not to be idle points; they are arguable points and an arguable point is not one which must succeed – See *Damji Pragji Mandaria v Sara Lee Household and Body Care (K) Limited, Civil Application No. NAI 345 of 2004 (ur)*.

On the nugatory aspect the applicant says that absent stay the disputed land could be sold. We agree with that submission. The disputed property could be interfered with and be beyond the appellant's reach and would make the appeal, if successful, an academic exercise.

The appellant has satisfied the principles that apply in an application of this nature.

For all those reasons we make the following orders:

- i. The Motion dated 7th May, 2021 fails and is dismissed with costs to the 1st respondent.*
- ii. The Motion dated 20th April, 2021 succeeds and is granted.*
- iii. There shall be a stay of execution of the Judgment delivered on 27th January, 2021 in Eldoret Environment and Land Court pending hearing and determination of Kisumu Civil Appeal No. 34 of 2021.*
- iv. Costs of the Motion dated 20th April, 2021 shall be in the said appeal.*

These are the orders of the Court.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**H. OMONDI**

.....

**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**