



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & OKWENGU, J.J.A.)

CIVIL APPLICATION NO. NAI 45 OF 2019

BETWEEN

KEMBI & MUHIA ADVOCATES.....APPLICANT

AND

GEORGE OTIATO MBAYE.....1ST RESPONDENT

LOISE NYAKINYUA NJOROGE.....2ND RESPONDENT

(An Application for stay of proceedings pending the hearing and determination of the intended appeal from the Ruling, orders and decision of the High Court of Kenya at Nairobi (K. Bor, J.) delivered on 26th November, 2018

in

ELC No. 870 of 2013)

RULING OF THE COURT

1. **George Otiato Mbaye**, the 1st respondent herein filed before the Environment and Land Court (ELC) at Nairobi ELC Cause No. 870 of 2013 claiming several reliefs against **Loise Nyakinyua Njoroge** (2nd respondent) and the law firm of **Kembi & Muhia Advocates** (the applicant).
2. Hearing of the case proceeded before Gitumbi J. who after the 1st and 2nd respondents closed their cases on 7th October, 2016 and 1st defendant on 18th September, 2017 respectively ordered that the case against the applicant (Kembi and Muhia), who were the 2nd defendant would be deemed as closed for non-attendance as no representative from the said firm showed up for the hearing of their case on that date. The learned Judge further directed the parties to file submissions and appear before the court on 20th March, 2018 to confirm compliance with those directions and for a judgment date to be given.
3. The applicant was nonetheless aggrieved by the said orders and filed a notice of motion dated 25th September, 2017 seeking to reopen the case to allow them to adduce evidence. The court, on 27th September, 2018 allowed the application to have the case re-opened after counsel for the 2nd respondent intimated to the court that they were not opposed to the application to re-open the case. Counsel for the 1st respondent was not present in court on that date. The court rescheduled the hearing of the case to 26th November, 2018 but before that date, the 1st respondent filed an application dated 15th November, 2018 seeking to stay the hearing. The court directed that the application be served on all parties but in the meantime re-affirmed the hearing date of 26th November, 2018 for hearing of the substantive suit.
4. On 26th November, 2018 counsel for applicant urged the court not to proceed with the hearing before determination of the application dated 15th November, 2018. The court declined to accede to that request and ordered that the hearing of the main suit to proceed as scheduled. Counsel for the applicant then informed the court that his client was not present in court and communicated his desire to appeal that order. Leave to appeal was granted but the learned Judge nonetheless gave orders on filing of submissions in respect of the main suit and directed that parties should appear in court for highlighting the said submissions on 25th February, 2019.
5. It is pursuant to leave granted by the trial court on 26th November, 2018 that this matter found itself in this Court. The applicant by an application dated 8th February, 2019 pronounced to be brought under **Article 50(1)** and **159(2)** of the Constitution of Kenya 2010. **Section 3A** of the Appellate Jurisdiction Act and **Rules 5(2)b** and **42** of the Court of Appeal Rules 2010 among other enabling provisions of the law in which the applicant seeks in the main, orders of stay of any further proceedings in Nairobi ELC No. 80 of 2013 until the intended appeal is

heard and determined. The application is predicated on the grounds on its face and the supporting affidavit of Symon Thuo Gachahi Muhia sworn on 8th February, 2019. The grounds and depositions in the said affidavit give the history of the matter which we have given albeit briefly at the opening of this Ruling and it is not therefore necessary to repeat the same.

6. The hearing notice for the hearing of the application was served on all counsel on record for the respective parties herein on 1st March, 2021 by email. Directions were also given in the email for parties to file submissions before the hearing date. As at the time the application came up for hearing on 16th March, 2021 there had been no response to the said email. No submissions had been filed by any party either and the Court was left wondering whether the application had been overtaken by events. We also note that there is no replying affidavit on record and there was no way to confirm if the application itself had been served on the opposite parties

7. In light of all these uncertainties, the unresponsiveness of the parties, and in view of the paucity of material before us to inform or update us on the current status of the matter in question, we are disinclined to grant the orders sought, as the Court could be giving orders to stay what has already taken place. Even on the merit of the application, we are not satisfied that it meets the threshold set for applications premised on **Rule 5(2)b** of the Rules of this Court. Accordingly, this application is found to be devoid of merit and is dismissed with no order as to costs.

Dated and delivered at Nairobi this 9th day of July, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR