



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & SICHALE J.J.A)

CIVIL APPLICATION NO. NAI. 87 OF 2020

BETWEEN

PATRICIA LOIS MUCHIRI.....1ST APPLICANT

JULIA WACERA MAGONDU ..... 2ND APPLICANT

MARGARET WANGUI MWAURA ..... 3RD APPLICANT

LYDIA GATHONI WAMBUGU ..... 4TH APPLICANT

DAVID KAMAU WAMATHU .....5TH APPLICANT

DAVID KARIUKI WABANDE .....6TH APPLICANT

AND

THE BOARD OF MANAGEMENT

BURUBURU GIRLS SECONDARY SCHOOL..... 1ST RESPONDENT

NAIROBI CITY COUNCIL .....2ND RESPONDENT

NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

DIRECTOR OF SURVEYS ..... 5TH RESPONDENT

METROPOLITAN HEALTH SERVICES LTD..... 6TH RESPONDENT

*(An application for injunction pending the hearing and determination of an intended appeal from the judgment and decree of the Environment and Land Court of Kenya at Nairobi (K. Bor, J.) dated 6th March, 2019*

in

*ELC Case No. 251 OF 2010)*

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RULING OF THE COURT

By the motion dated 15th March 2020, the six applicants, who are owners of various homes within a residential area in Nairobi's BuruBuru Estate more particularly known as Metro Villas Estate, seek various orders on their own behalf and on behalf of all residents of the said Metro Villas Estate. The main target of their application is the Board of Management of BuruBuru Girls Secondary School, the 1st respondent. They accuse it of having erected a wall, gate and barrier across the entrance to the 34 affected homes via Rabai Road.

Among the orders sought are orders compelling the respondents to remove the said wall, gate, barrier or any obstacle so erected; or to permit the applicants to remove the same at the respondents' cost; and an injunction restraining the respondents from erecting any such wall, gate or barrier that would interfere with the applicants' access to their homes from Rabai Road.

In view of the extra-ordinary circumstances brought about by the Covid-19 Pandemic, we did not hear the application by way of ordinary courts sitting, confining ourselves to the papers filed by the applicants. The respondents were served but had filed nothing in response by the time the motion came for our consideration on the date it was listed for hearing.

We have considered the said application, the grounds on which it is based and the supporting affidavit of **David Kamau Wamathu** sworn on 15th March 2020. We have perused the draft memorandum of appeal annexed to the said affidavit and are readily satisfied that the applicants intended appeal is an arguable one.

In order to succeed on application for stay of execution or injunction pending appeal, however, the applicant must in addition demonstrate that the intended appeal would be rendered nugatory unless the interim relief sought is granted. All the applicable principles and the considerations that go into a determination of such application were aptly summarized by this Court in **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013] eKLR.**

On the applicant's own showing, that which they seek is the demolition or removal of a wall or barrier that is already in place. The propriety of that wall or barrier is inextricably linked to the ownership of the disputed land, which will be for determination in the intended appeal. Before a such determination is made, it would be unwise to grant the drastic orders of demolition that the applicants seek. The nugatory argument thus stands negated by the fact that there is a ***fait accompli*** that ought to be reversed only upon a merit determining of the intended appeal. The application for injunction pending appeal accordingly fails.

As the complaints of inconvenience and hardship made by the applicants are serious and not idle, and so as to ensure that there is finality to the matters in dispute, we direct that the applicants' appeal, once filed, be fast-tracked for expedited hearing and disposal.

The costs of the motion shall be in the intended appeal.

**Dated and delivered at Nairobi this 24th day of April, 2020.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

***Signed***

**DEPUTY REGISTRAR**