



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO, (P), MUSINGA, & KANTAI, J.J.A.)**

**CIVIL APPLICATION NO. NAI. 268 OF 2019**

**BETWEEN**

**PETER K. NG'ANG'A.....APPLICANT**

**AND**

**JOHN W. KARIMI.....1ST RESPONDENT**

**THE BOARD OF MANAGEMENT**

**BURUBURU GIRLS SECONDARY SCHOOL.....2ND RESPONDENT**

**RULING OF THE COURT**

*(An application for injunction and/or a stay of execution pending the lodging, hearing and determination of an intended appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (J.M. Onyango, J.) delivered on 23rd May, 2019 in E.L.C Case No. 444 of 2005.)*

1. This is an application under **rules 1(2) and 5(2)(b)** of the **Court of Appeal Rules, 2010**. The applicant seeks stay of execution of the judgment and decree of the Environment and Land Court delivered on 23rd May, 2019 pending filing, hearing and determination of an intended appeal.
2. According to the applicant, in December, 2004 he purchased a property known as **L.R No. 209/12116/17** ("**the suit property**") from the 2nd respondent and paid the entire purchase price. The 2nd respondent subsequently executed a transfer of the suit property in favour of the applicant sometimes in 2004. The applicant proceeded to develop the suit property at a cost of more than Kshs.50,000,000/=.
3. Earlier on in 1994, the 1st respondent entered into an agreement with the 2nd respondent for the purchase of the suit property at an agreed price of Kshs.375,000/=. The 1st respondent paid 10% deposit of the purchase price. The 2nd respondent serviced the plot and increased the price to Kshs.500,000/=. The 1st respondent was unwilling to pay the new purchase price and that culminated in a suit between the 1st respondent and the 2nd respondent, **Nairobi CMCC No.4607 of 1995**.
4. The suit was decided in favour of the 2nd respondent and the 1st respondent filed an appeal, **HCCA 690 of 2000**. A consent judgment was entered on 19th February, 2003 to the effect that upon payment of certain amounts of money by the 1st respondent to the 2nd respondent, the 2nd respondent would transfer the suit property to the 1st respondent.
5. The 1st respondent failed to honour the terms of the consent order. As a result, the 2nd respondent sold the suit property to the applicant. The 1st respondent filed suit against the applicant seeking, *inter alia*, a declaration that he is the owner of the suit property; a perpetual injunction to restrain the applicant from erecting buildings thereon; and a mandatory injunction to compel the applicant to vacate and/or demolish

any structures or improvements on the suit property.

6. The Environment and Land Court issued the mandatory injunctions as prayed. The applicant has filed a notice of appeal against that decision and has also applied for typed copies of the proceedings with a view to filing an appeal.

7. The applicant, through his learned counsel, **Mr. V.H. Awuor**, submitted that the intended appeal is arguable; and that unless the orders sought are granted, the intended appeal, if successful, shall be rendered nugatory.

8. The 1st respondent, through his learned counsel, **Mrs. C. Chege**, opposed the application. In his replying affidavit, the 1st respondent set out the background of the dispute. With respect to the principles upon which this Court considers applications under **rule 5(2)(b)** of this Court's Rules, the 1st respondent stated that the intended appeal is not arguable since the applicant has no lawful interest in the suit property.

9. The 1st respondent further stated that the intended appeal, if successful, shall not be rendered nugatory. He argued that he is capable of paying any damages that the court may order him to meet in the event that the intended appeal is successful. The 1st respondent exhibited a copy of a valuation report dated 18th September, 2019 for a property known as L.R 22021 that is valued at Kshs.65,700,000/=.

10. Lastly, the 1st respondent opined that, in the event that this Court grants the order of stay as sought, it should order that the rental income accruing from the suit property from October 2019 be deposited with an independent estate agent, duly appointed by this Court, who should also manage the property pending hearing and determination of the appeal.

11. By way of a supplementary affidavit, the applicant objected to the 1st respondent's suggestion for appointment of an estate agent to collect rent and manage the suit property pending hearing and determination of the appeal. He stated that there is no rental income currently accruing from the suit property. Instead, the 1st respondent had served notices upon the tenants there to vacate the premises, and was keen on demolishing the suit property.

12. The 2nd respondent, though served with the application for stay and a hearing notice, neither filed any replying affidavit nor was it represented at all during the hearing of the application.

13. We have considered the application, the affidavits on record, the list of authorities and submissions by counsel. The principles that govern the exercise of this Court's discretion in an application of this nature are well settled. Firstly, the applicant must demonstrate existence of an arguable appeal; and secondly, the applicant must also show that the intended appeal, if successful, is likely to be rendered nugatory unless the order sought is granted. See **Trust Bank Limited & Another v Investech Bank Limited & 3 Others [2000] eKLR**.

14. The applicant has filed a notice of appeal and a draft memorandum of appeal that consists 11 proposed grounds of appeal. Looking at those proposed grounds of appeal, we are satisfied that the intended appeal is arguable. We need not say more at this stage.

15. Turning to the second limb, the Environment and Land Court, having held that the 1st respondent is the owner of the suit property, ordered, *inter alia*, a mandatory injunction to compel the applicant to demolish all the structures erected on the suit property.

16. The developments on the suit property are valued at **Kshs.85,000,000/=**. The 1st respondent's counsel conceded that the developments were put up by the applicant. Unless stay of execution is granted, the developments on the suit property shall be demolished. We think that the intended appeal, if successful, shall be rendered nugatory.

17. Consequently, pending the hearing and determination of the intended appeal, we order stay of

execution of the judgment and decree of the Environment and Land Court delivered on 23rd May, 2019. We further direct that the record of appeal, if not yet filed, be filed within the next 45 days from the date hereof. The costs of this application shall abide the outcome of the appeal.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2020**

**W. OUKO, (P)**

**JUDGE OF APPEAL**

**D.K. MUSINGA**

**JUDGE OF APPEAL**

**S. OLE KANTAI**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**