



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & KANTAI, J.J.A.)

CIVIL APPLICATION NO. NAI. 402 OF 2019

BETWEEN

DAVID MIGICHI KAGENI.....APPLICANT

AND

JAMES GITINGU WAMAGATA.....1ST RESPONDENT

JOSPHAT MAINA MACHARIA.....2ND RESPONDENT

*(An application for stay of execution of the Judgment/Ruling of the Environment and Land*

*Court at Nairobi (K. Bor, J.) delivered on 15th October, 2018 in ELC Case No. 459 of 2010)*

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RULING OF THE COURT

The dispute at the **Environment and Land Court at Nairobi in ELC Case No. 459 of 2010** involved ownership and/or sub-division of a parcel of land known as **Plot No. Dagoretti/Kinoo/4176** (“the suit property”) measuring **0.15 hectares**. The respondents here **James Giting’u Wamagata** and **Josphat Maina Macharia** were the plaintiffs while the applicant, **David Migichi Kageni** was the defendant. The suit property was registered in the name of the respondents. In a Judgment delivered by **Bor, J.** on 15th October, 2018 the learned Judge found that the applicant did not pay the full purchase price for the suit property and directed the applicant to:

**“.... undertake a subdivision of Dagoretti/Kinoo/4176 into two portions measuring 0.1 ha and 0.05 ha within 60 days of the date of this Judgment. The portion measuring 0.05 will be transferred to the 1st Plaintiff while the Defendant will retain the portion measuring 0.1 ha. In subdividing Dagoretti/Kinoo/4176, the portion to be transferred to the 1st Plaintiff is the one with the improvements on it .....”**

In an earlier ruling made in an interlocutory application in the suit Okwengu, J (as she then was) had on 8th June, 2011 found that it had been established *prima facie* that the original agreement was for sale of 0.10 ha to the applicant although the whole title had been transferred to him. The Judge further found that whereas the applicant would be entitled to occupation and exclusive use of 0.10 ha, the interest of the 1st respondent in regard to the 0.05 ha needed to be protected. The Judge concluded:

**“..... Since the 0.05 hectares still forms part of one title in the suit property, it is only fair and just that an order of interlocutory injunction do issue restraining the defendant, his agents or servants from selling, transferring, alienating or charging the suit property pending the hearing and determination of the suit. For the avoidance of doubt, I hereby order that the defendant shall be at liberty to construct on his 0.10 portion of the suit property but shall not construct on the disputed portion of 0.05 hectares.”**

The applicant has come before us in the Motion on notice under **rule 5 (2) (b)** of the **rules of this Court** praying in the main that we grant a stay of execution of the Judgement of the Environment and Land Court pending hearing and determination of an intended appeal. In the grounds in support of the Motion and in an affidavit sworn by the applicant at Limuru on 2nd September, 2018 it is stated among other things that until delivery of the Judgement the applicant had been granted exclusive possession of 0.1 ha and further allowed to proceed with renovation and construction of the said portion by Okwengu, J.; that the applicant had proceeded and renovated the premises and carried out constructions; that the Bor, J. awarded the house the applicant had constructed to the respondents; and that the Judgment could not be executed:

**“...as the house lies on the premises occupied by the applicant and while the portion granted to the respondent which is 0.05 HA is not enough to cover the area of the house and further leave the 0.1HA awarded to the applicant.”**

The Motion is resisted through a replying affidavit of the 1st respondent who says that the Motion has no merit and should be dismissed.

For an applicant to succeed in this Court in an application for stay of execution pending appeal it must be shown that the appeal, if filed, or an intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. Such an applicant, if he passes that first test must, in addition, show that the appeal would be rendered nugatory absent stay.

We have carefully considered the material before us including the draft Memorandum of Appeal. One of the grounds of appeal taken is that the Judge ignored, in the Judgement, to take into account the orders granted by Okwengu, J. in the ruling on the interlocutory application which had allowed the applicant exclusive possession of 0.1 ha and further allowed him to proceed with renovation and construction on the said portion. It is also taken as a ground of appeal that the Judge erred in the Judgment in awarding a house to the respondent despite the earlier orders granted by Okwengu, J.

It is true to say that an applicant in an application for stay pending appeal need not establish a multiplicity of arguable points as one arguable point will suffice. Indeed that arguable point is not one that must succeed. See a good summary of the principles under **rule 5 (2) (b)** of the rules of this Court in the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR**. We find that the applicant here has established that there is an arguable appeal.

It is argued that the applicant moved into the premises, renovated the same and undertook permanent constructions. He fears that he will be evicted and lose those investments. That fear is not misplaced. If the applicant is evicted from the premises and the said constructions are interfered with the intended appeal would be rendered nugatory.

On the whole the applicant has satisfied us that he is entitled to a stay of execution of the Judgment delivered on 15th October, 2018 and we allow the Motion dated 17th December, 2019 with the effect that there will be a stay of execution of that Judgment pending hearing and determination of the intended appeal. Costs of the Motion will be in the appeal.

**Dated and delivered at Nairobi this 19th day of June, 2020.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**