



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, MUSINGA & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 26 OF 2020

BETWEEN

JANE KISAKA MONGA'U.....APPLICANT

AND

JOSEPH OUMA ONDITI.....RESPONDENT

(An application for stay of execution of the Judgment of the High Court of Kenya at Eldoret (E. Obaga, J.) dated 31st July 2017

in

ELC No. 38 of 2012.)

RULING OF THE COURT

1. In this application brought under **rule 5(2) (b)** of the **Court of Appeal Rules**, the applicant seeks stay of execution of the judgment delivered by the trial court on 31st July 2017 pending hearing and determination of the appeal.
2. The background to this application is that sometime in 2012, the respondent filed a suit in the Environment and Land Court at Eldoret, (ELC) to wit, **ELC No. 38 of 2012**, seeking a declaration that he was the registered proprietor of a parcel of land known as **L.R No. Kitale Municipality Block 8/Bidii/779** (“the suit land”).
3. The respondent’s contention was that he purchased the suit land in 2005 from one **Mark Opiyo Okal** at a consideration of Kshs.180,000 and became the registered proprietor thereof on 12th July, 2010. Subsequent thereto, the respondent learnt that the applicant had unlawfully entered the suit land and started to construct a house thereon.
4. In her defence, the applicant stated that she bought the suit land from **Malachi Opiyo Okul** vide an agreement dated 14th December 2004 at a consideration of Kshs.170,000. She paid Kshs.130,000 upon signing the sale agreement but the balance of Kshs.40,000 was settled much later. She contended that Malachi Opiyo Okul is also known as Mark Opiyo Okul.
5. The applicant took possession of the suit land immediately after the signing of the sale agreement and has put up a homestead. By way of a counterclaim, the applicant sought a declaration that the suit land was fraudulently registered in the respondent’s name. She also sought a cancellation of the title that had been issued to the respondent.
6. The trial court held that the respondent was the rightful owner of the suit land; dismissed the applicant’s counterclaim; and ordered the applicant to voluntarily demolish her homestead and vacate the suit land within 60 days, failing which the respondent would be at liberty to evict her at her own cost.
7. Being aggrieved by that decision, the applicant preferred an appeal to this Court, having filed a notice of appeal on 14th August 2017.
8. The applicant urges the Court to find that her appeal is arguable, and that the same will be rendered nugatory unless the orders sought are granted as she will be evicted, and her homestead demolished.
9. The respondent did not file a replying affidavit to the applicant’s application.

10. The twin principles that an applicant must satisfy in a **rule 5(2)(b)** application are well known. Briefly stated, the applicant must show that the appeal or intended appeal is arguable; and that the appeal, if successful, shall be rendered nugatory unless the orders sought are granted; see **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR**.

11. Having considered the record of appeal and the uncontested application, we are satisfied that the appeal is arguable. On the second limb, the applicant has been in occupation of the suit land for many years. She has put up a home there and is likely to be evicted and her houses demolished, unless the orders sought are granted, in which event the appeal will have been rendered nugatory.

12. Consequently, we order stay of execution of the judgment delivered by the Environment and Land Court on 31st July 2017. The costs of this application shall abide the outcome of the appeal.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRARE