



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPLICATION NO. 29 OF 2020

BETWEEN

KIPLAGAT KENDAGOR.....1ST APPLICANT

KIMELI KENDAGOR CHALAL.....2ND APPLICANT

SHADRACK KIGEN KENDAGOR.....3RD APPLICANT

AND

JOEL KENDAGOR.....RESPONDENT

(An application for stay of execution of the decision of the High Court of Kenya at

Eldoret (H. A. Omondi, J.) given on 9th December 2019 in *H.C. Misc. Appl. No. 43 of 2002*)

RULING OF THE COURT

[1] The applicants have moved this Court for orders of stay of proceedings in Eldoret HC Misc. Civil Application No. 43 of 2002, pending the hearing and determination of an intended appeal to this Court against the Ruling delivered by the High Court on 9th December, 2019.

[2] In the Ruling subject of the intended appeal, the learned Judge of the High Court allowed an application that had been filed by the respondent, seeking to set aside an order of dismissal that had been made on 8th March, 2019, dismissing the respondent's application for judicial review for want of prosecution. The learned Judge reinstated the application and directed that it be listed for hearing within 60 days.

[3] The applicants are aggrieved by the Ruling of the High Court because they were in the process of executing an award given in their favour by the Uasin Gishu Land Disputes Tribunal, and adopted by the Chief Magistrates' Court in Eldoret (Award No. 15 of 2001) in regard to L.R. No. Plateau/Plateau/Block 2 (Ruiyobei) 224 (suit land). This award was the subject of the respondent's application for judicial review. The applicants maintain that they will be prejudiced if the order made by the court reinstating the suit is not stayed, as they have also extensively developed their respective portions on the suit land.

[4] This being an application for stay of proceedings, the applicants have to satisfy the twin requirements of Rule 5(2)(b) of the Court of Appeal Rules, as restated in **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others** (2013) eKLR. The requirements are that the applicants have an arguable appeal and that the intended appeal if successful, would be rendered nugatory if the order of stay that is sought is not granted.

[5] In this matter, it is evident that the order, subject of the intended appeal, is an order in which the learned Judge of the High Court exercised her discretion in reinstating an application for judicial review which had been dismissed. An appellate court can only interfere with the exercise of discretion of a trial court where it is demonstrated that that discretion has not been exercised judicially. The applicants have not annexed any draft memorandum of appeal, but from the affidavit sworn by the 3rd applicant, it is evident that the applicants have not addressed the exercise of discretion by the learned Judge, but are merely concerned with the fact that they will not be able to execute the judgment of the Chief Magistrates' court which is in their favour.

[6] It is not disputed that the respondent's former advocate, Mr. Machio, died during the pendency of the application and that this is what affected the prosecution of the respondent's application for judicial review. The trial court having exercised its discretion in setting aside the

order of dismissal, the applicant has not demonstrated what arguable issues arise or how the hearing of the application for judicial review on merit will cause prejudice to it. In the circumstances, we are not persuaded that the intended appeal raises any arguable issues.

[7] The applicants are requesting this Court to stay the proceedings in the judicial review application because they are in the process of executing the orders adopted in the Chief Magistrates' court, which are subject of the judicial review proceedings. We do not see how the reinstatement of the judicial review proceedings will render the applicants' intended appeal against the reinstatement of the judicial review application; nugatory. If anything, it is the respondent who stand to be prejudiced if an order of stay of proceedings is granted, as the applicants will proceed with executing the orders that the respondent intend to challenge in the judicial review proceedings.

[8] For these reasons, we find that the applicants have failed to satisfy the twin requirements of Rule 5(2)(b) of the Court's Rules. The application is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 10th day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR