



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, MAKHANDIA & MURGOR, J.J.A)

CIVIL APPLICATION NO. 182 OF 2019

BETWEEN

OBADIAH MURUJA MUGENDI.....1ST APPLICANT

AND

CHARLES KABITI JAPHET.....1ST RESPONDENT

MERU SOUTH/MAARA LANDS ADJUDICATION OFFICER....2ND RESPONDENT

THE DISTRICT LAND REGISTRAR MERU SOUTH.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

(Being an application for stay of execution of the judgment of the High Court of Kenya at Chuka (Njoroge, J.) dated 29th May, 2019 in **CHUKA ELC PETITION NO 03 OF 2018**)

RULING OF THE COURT

1. On 29th May, 2019 the learned trial Judge (Njoroge, J.) delivered a judgment in which he dismissed the petition with costs that had been filed by **Obadiah Muruja Mugendi** (the applicant). Aggrieved by the said order, the applicant filed a Notice of Motion dated 10th December, 2019 in which he sought an order to stay execution of the said judgment. The applicant also sought an order that the Court be pleased to allow him to file the intended appeal out of time. He also attached a copy of a notice of appeal that is dated 1st October, 2019 although it has not been endorsed by this Court.

2. The grounds in support of the application are indicated on the face thereof and also a supporting affidavit by the applicant gives the justification for the orders sought. The applicant states that the respondent is in the process of executing the judgment and unless the order of stay is granted, the appeal will be rendered nugatory and he will suffer irreparable damage. The applicant also stated that he is advanced in age and his health is deteriorating; the application was made without delay; that the respondents will not suffer any prejudice if the order of stay is granted as the 1st respondent has already registered himself as the proprietor of land parcel **No. Muthambi/Kandungu/1636** having subdivided it from parcel **No. Muthambi/Kandungu/136** illegally.

3. The motion was opposed by **Charles Kabiti Japhet** (the 1st respondent) who submitted that although he was notified of the hearing of this application by the Court registry through a telephone call, he was not served with the application. Nonetheless he went on to state that the application has no merit because he bought the subject parcel of land in 2001 from one **Fredrick Mwenda Naichu** who was the registered proprietor. That he took possession of the parcel, and built his home which he occupies with his family and he has carried out other developments. However, the applicant filed a complaint against him in 2010 before the **Muthambi Land Dispute Tribunal**. After hearing the dispute, the said tribunal confirmed that the suit land belonged to 1st respondent and the applicant's case was dismissed.

4. Unrelenting, the applicant appealed before the *Eastern Province Land Dispute Appeals Tribunal* in Embu. The applicant's appeal was also dismissed whereupon, he filed another suit before the *Senior Principal Magistrate's Court* at Chuka **Civil Case No 109 of 2014**. The applicant withdrew the said suit before it was heard and filed a Petition in the High Court alleging infringement of constitutional rights which was also dismissed.

5. The 1st respondent urged us to dismiss this application as it lacks merit stating that the applicant's parcel of land is not near the suit land, and that he has never been a registered proprietor of the same.

6. We have considered this application against the background of established principles under *Rule 5 (2) (b)* of this Court Rules, that for an applicant to succeed he/she must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of *Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006* (unreported). In this case the principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (see also *Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.*)”

7. Firstly, this is an omnibus application where the applicant is seeking an order of stay of execution and leave to file a notice of appeal out of time. Granted, the applicant is an elderly citizen of 88 years who is acting in person and he may not be familiar with the Rules of this Court, unfortunately, much as we are sympathetic to the applicant, his age or any other prevailing condition for that matter, does not exempt a party from following the commands of the Law. The notice of appeal was filed out of time, and this is evident from the copy that was attached to this application as it bears the date of 1st October, 2019. The judgement sought to be appealed from was delivered on 29th May, 2019. Obviously there is no valid notice of appeal on record upon which interim orders of stay can be granted.

8. Secondly and perhaps more importantly, the order sought to be stayed was a negative order in that the applicant's suit was dismissed. An order of dismissal is not capable of execution being negative in its effect except for costs. See *Kantai, JA in Cooperative Bank Limited vs. Banking Insurance & Finance Union Kenya Nairobi Application no. 133 of 2017* where the learned Judge stated that:

“An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with...the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order.”

That was also the position taken in *Executive Estates Limited vs. Kenya Posts & Anor. [2005] 1 E.A. 53* where it was stated that: -

“... The order which dismissed the suit was a negative order which is not capable of execution.” (emphasize provided)

9. We agree with the above reasoning as in this case the order sought to be stayed is a negative one and there being no valid notice of appeal, we find that this application has no merit. We accordingly order it dismissed but we make no order as to costs noting the circumstances of this matter and more so because both parties were unrepresented.

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

M. K. KOOME

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR