



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 114 OF 2019

BETWEEN

HON. BENSON MUTURA.....APPLICANT

AND

COUNTY SECRETARY

COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

COUNTY CLERK,

COUNTY GOVERNMENT OF NAIROBI.....2ND RESPONDENT

LAPFUND.....3RD RESPONDENT

NAIROBI COUNTY GOVERNMENT.....4TH RESPONDENT

AND

MARIAKANI ESTATE WELFARE ASSOCIATION.....1ST INTERESTED PARTY

AGGREY OWITI.....2ND INTERESTED PARTY

(An Application for injunction pending the hearing and determination of an intended appeal from the Judgment and Orders of the High Court of Kenya at Nairobi (Weldon Korir, J.) dated 30th April, 2020 2020

in

HC Petition No. 199 of 2018)

RULING OF THE COURT

Hon. Benson Mutura (applicant) has moved this Court pursuant to **Rule 5(2) b** Court of Appeal Rules for two prayers in the main as against the 3rd respondent (LAPFUND) as follows:-

“3. THAT this Honourable Court be pleased to issue orders restraining the 3rd respondent by themselves, their officers, servants, agents or anyone acting on its behalf from taking over possession and/or management of Mariakani developed on LR No. 209/6612 pending the hearing and determination of this Application.

4. THAT in the alterative, this Honourable Court be pleased to direct that proceeds of rent from Mariakani Estate be paid into a joint escrow account in the names of the parties’ advocates herein pending further directions of the Court.”

The application follows the dismissal of High Court Petition No. 199 of 2019 by Korir, J on 30th April, 2020. In the Petition, the applicant

was contesting a decision by the County Secretary, County Government of Nairobi to transfer ownership of Mariakani Estate, developed on property known as L.R NO. 209/6612 to the 3rd respondent.

According to the applicant, sometime in the year 2012 the Nairobi County Government (4th respondent) and LAPFUND (3rd respondent) entered into an agreement where the County Government was to transfer to the 3rd respondent several of the properties owned by its predecessor, the City Council of Nairobi. The agreed swap was meant to offset some statutory debts owed to the 3rd respondent. The decision was duly approved by the defunct City Council of Nairobi and it was actually effected. The applicant questions that agreement mainly on the ground that the agreement did not mention Mariakani Estate but listed several other Estates, and on several other procedural grounds.

The applicant contends that the tenants are afraid of being evicted from their houses for non-payment of rent if ownership of the property changes. Before the High Court, the applicant sought orders that the transfer of Mariakani Estate to the 3rd respondent was null and void and consequently, the Title for the property in favour of the 3rd respondent ought to be declared null and void.

The petition was opposed by the 3rd respondent which maintained that the transfer was above board and there was no cause for apprehension as no tenant would be evicted if they continued to pay rent. The 3rd respondent urged for dismissal of the petition terming it an abuse of the court process saying that the petition was *res judicata*, as a similar claim had been made in Nairobi ELC Case No. 218 of 2015 where parties had entered a consent over the same issues.

Having analysed the issues raised in the petition, the learned Judge in a well-reasoned judgment found that the issues raised in the petition were the same issues raised in ELC No. 218 of 2015. The issues had been resolved by consent of all the parties and an application to set aside the consent had been dismissed on 13th December, 2018. The learned Judge went further to find that the applicant herein was actually a party to ELC No. 215 of 2015 as he was a member of the 1st Interested Party in that suit. The court consequently found the matter *res judicata* and dismissed it, terming the petition an abuse of the court process.

The applicant has now moved this Court through the present motion in a bid to circumvent the said dismissal. We say “circumvent” because the applicant is now seeking the substantive orders of injunction which the High Court did not even address, the matter having been dismissed for being *res judicata*.

There were no replying affidavits filed in this matter, or even submissions from the respondents, despite service of the application and hearing notices on counsel for the respondents as demonstrated through an affidavit of service sworn by Tobias Onyango Olum on 2nd June, 2020. Be that as it may, however, we are able to dispose of this application on the material before us.

For this application to succeed, the applicant must demonstrate that his appeal is arguable, that is to say that the same is not frivolous and is deserving of consideration by this Court; and secondly that the appeal will be rendered nugatory absent stay. See **Reliance Bank Ltd v. Norlake Investments Limited [2002] 1 E.A.** The applicant does not need to establish or demonstrate a multiplicity of arguable points as one of those will suffice.

Has he demonstrated that the appeal is arguable? As mentioned earlier, the petition from which the intended appeal arises was dismissed. The dismissal was on grounds that the petition was *res judicata*. The High Court did not therefore even consider the issues of injunction or deposit of rent in a joint account which the applicant now wants this court to grant. From the petition, it is clear that those issues were dealt with in ELC No. 218 of 2015 which petition is not subject of this appeal. The said petition was compromised by consent of the parties who included the applicant herein. An application to set aside the consent was dismissed. We hold the view that in the circumstances, the issues raised in this appeal are not arguable, they having not been determined in Petition No. 199 of 2018, which is the subject of this appeal. The sum total of the above is that the applicant has failed to demonstrate that his intended appeal is arguable.

Having failed on the 1st limb, on arguability, we need not discuss the limb on nugatory aspect. It may be of some consolation to the applicant however to know that in the event his appeal succeeds, the property in question can always be retransferred to 4th respondent and the appeal bears no risk of being rendered nugatory in the event it succeeds.

Our conclusion therefore is that this application fails. We dismiss it with no order as to costs, it having not been defended.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR