



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, GATEMBU & MURGOR, J.J.A)**

**CIVIL APPLICATION NO. 38 OF 2020**

**BETWEEN**

**DAVID KAMAU KARIUKI (*Suing as the legal representative of the  
Late Esther W. Kirii*).....APPLICANT**

**AND**

**STANLEY THEURI (*Suing as the legal representative of the  
Estate of Francis K. Mwai*).....1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR NYANDARUA...2<sup>ND</sup> RESPONDENT**

**HON. THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

***(Being application for stay of execution of the ruling and consequential orders of the Environment and Land Court (Oundo, J) delivered on 3<sup>rd</sup> December 2019 in ELC No 440 of 2017)***

**RULING OF THE COURT**

By way of a Notice of Motion dated 7<sup>th</sup> February 2020, ***the applicant David Kamau Kariuki (Suing as the legal representative of the Late Esther W. Kirii)*** sought orders for stay of execution of the orders of the Environment and Land Court and further for stay of the proceedings in that court pending the hearing and determination of this application and the intended appeal. The motion was premised on the grounds that the orders of the trial court will render the applicant's family homeless and destitute; that the trial court's order by implication directed the 1<sup>st</sup> respondent to forcefully evict the applicant and his entire family from the disputed portion; that the court failed to appreciate that the applicant's family had been living on the disputed portion for 57 years, and had constructed their home thereon.

In an affidavit in support of the motion, and in written submissions the applicant contended that the matter concerned a boundary dispute between the respondent's Land Parcel No. Nyandarua/Wanjohi/249 and the applicant's Land Parcel No. Nyandarua/Wanjohi/250; that following a land survey of the respondent's parcel for the purposes of distribution of property among the beneficiaries of the Estate of Francis K. Mwai, it was found, according to the survey map, that the applicant had encroached onto 6 acres (*the disputed portion*) of the respondent's land; that when the applicant was requested to vacate the disputed portion, a dispute ensued between the parties.

It was further deponed that in a judgment delivered on 7<sup>th</sup> May 2019, the learned judge found in favour of the respondent and ordered the applicant to vacate the disputed portion within 30 days or face eviction; that the applicant was aggrieved by the trial court's judgment and filed an application for review, which was dismissed on 3<sup>rd</sup> December 2019; that the trial judge on this occasion ordered that the applicant be forcefully evicted from the disputed portion. The applicant deponed that unless a stay of execution was granted the applicant's family would be evicted and they would be rendered homeless.

The 1<sup>st</sup> respondent ***Stanley Theuri (Suing as the legal representative of the Estate of Francis K. Mwai)*** did not file a replying affidavit but in grounds of opposition and their written submissions, it was contended that the appeal was not arguable, as the grounds sought to be canvassed were flimsy, with the main grievance being centered on the failings and deficiencies of the applicant's defence counsel. It was further contended that the intended appeal would not be rendered nugatory, as the applicant had already willingly vacated the disputed portion of land and moved onto his own parcel leaving only temporary structures to be demolished; that therefore the order for stay of execution was overtaken by events since the 1<sup>st</sup> respondent had already taken up occupation of the disputed portion. Concerning the assertion that the applicant's family would be rendered homeless, the 1<sup>st</sup> respondent dismissed it as baseless, since the applicant resided on Land

Parcel No. Nyandarua/Wanjohi/250. We were therefore urged to decline to grant the stay orders sought.

The twin principles that an applicant must satisfy in a **rule 5(2)(b)** application such as this, 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 vs Tony Keter & 5 Others [2013] eKLR***.

On the first limb whether the intended appeal is arguable, in the draft memorandum of appeal the applicant asserts that the learned judge was wrong in finding that the threshold requirements for review of the judgment dated 7<sup>th</sup> May 2019 were not met when she held that no new evidence was tendered, yet it was submitted, it was an undisputed fact that the applicant's family were living on the disputed portion for 37 years, and in so doing had acquired it through adverse possession; that consequently, the intended appeal was arguable. Given the nature of the case, we are satisfied that the intended appeal is arguable.

As to whether the appeal will be rendered nugatory in the event it was to succeed, the applicant's application is for stay of execution of the eviction orders of the court. But a review of the applicant's replying affidavit discloses that the applicant himself admits that he has already been evicted. At **paragraph 9** of his affidavit it is stated that;

***"...upon issuance of the orders directing the applicant be evicted forcefully and that the OCS Kipipiri to ensure that the order is immediately implemented the 1<sup>st</sup> respondent has gotten into the land and put up an intrusive fence that goes right through the homesteads of the applicant and his family members..."***

And **paragraph 10** reads;

***"...the said intrusive fence and constant trespass by unknown mean-looking persons on the land is occasioning them great inconvenience as the said fence blocks paths that the applicant and family have been using to and from their houses".***

In effect, it would seem that there is nothing for this Court to stay as the 1<sup>st</sup> respondent has already taken over control of the disputed portion by erecting a fence thereby prohibiting the applicant access onto it. This means that the second limb of the requirements has not been met. We would add that the same fate would befall the prayer in the application before us for stay of the proceedings in the trial court.

In sum, the motion fails and is hereby dismissed. The costs of the application shall abide by the outcome of the appeal.

***Dated and delivered at Nairobi this 7<sup>th</sup> day of August, 2020.***

**W. KARANJA**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**