



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & OKWENGU JJA)

CIVIL APPLICATION NO. 36 OF 2020

BETWEEN

DR. EDWARD C. KUNGU.....1ST APPLICANT

GRACE WAMBUI KUNGU

(Suing as the Legal Representative of the Estate of

JANET R. KUNGU)2ND APPLICANT

AND

DAVID NDUNGU NJIHIA.....1ST RESPONDENT

GABRIEL MURIRA MUTHIORA.....2ND RESPONDENT

PATRICK MACHARIA MWANGI.....3RD RESPONDENT

SAMUEL NGUGI KARIUKI4TH RESPONDENT

HEZRON KAMAU WANGAI.....5TH RESPONDENT

LAND REGISTRAR, NYANDARUA.....6TH RESPONDENT

THE ATTORNEY GENERAL7TH RESPONDENT

Being an application for injunction pending the hearing and determination of an intended appeal from the Ruling and Order of the Environment and Land Court of Kenya at Nyahururu, (**Lady Justice Oundo**) dated 4th February, 2020

in

ELC. No. 54 of 2019

RULING OF THE COURT

1. On 4th February, 2020 the Environment and Land Court (ELC) (**Oundo, J.**) sitting in Nyahururu dismissed a motion which had been filed by the applicants, seeking orders of injunction against the 1st to 6th respondents, restraining them from, *inter alia*, interfering with the applicants’ possession and enjoyment of property known as LR No. Nyandarua/Kahuru 143 (**suit property**), or any of the suit property’s “illegal” subdivisions known as LR. No. Nyandarua/Kahuru/10002-10014 pending further orders of the court. The applicants who were aggrieved by the ruling of the ELC Court filed a notice of appeal dated 4th February, 2020.

2. By a notice of motion dated 13th February, 2020, brought under sections **3A** and **3B** of the Appellate Jurisdiction Act and **Rules 5(2(b))** and **43** of the Court Rules, the applicants have now moved to this Court seeking orders that the 1st to 6th respondents be restrained from interfering with the applicants’ possession and enjoyment of the suit property, and a further order restraining the 1st to 6th respondents from entering into, alienating, subdividing, selling, mortgaging, charging, or dealing with the suit property in any manner, pending the hearing of

the applicants' intended appeal.

3. It is now clear that an applicant seeking orders under Rule 5(2)(b) of the Court Rules must satisfy the twin principles of arguability and the nugatory aspect by demonstrating that he/she has an arguable appeal and that the intended appeal will be rendered nugatory if the interim orders sought are not granted. (**Stanley Kangethe Kinyanjui V. Tony Ketter & 5 others** (2013) eKLR.

4. The applicants maintain that they have an arguable appeal because the ELC failed to follow a binding precedent, that states the title of a *bona fide* purchaser without notice of fraud cannot be impeached except by proof of fraud or misrepresentation which the buyer is shown to have been involved in. In addition, the court in dismissing the applicants' motion misapprehended the Court's decision in **Giella vs Cassman Brown [1973] EA 358**.

5. The applicants maintained that their intended appeal would be rendered nugatory unless the orders sought are granted, because the 1st respondent has already subdivided the suit property and transferred the subdivisions to 2nd to 6th respondents who may in turn transfer the properties further and the applicants are apprehensive that they may be evicted and dispossessed of the suit property.

6. In a replying affidavit sworn by the 1st respondent **David Ndungu Njihia**, the respondents maintained that the applicants' motion was properly dismissed by the ELC, as the suit property has never been the property of **Stephen Mwangi Chege** from whom the applicants trace their ownership, and that the matter has been the subject of investigations by the Director of Public Prosecutions Nyandarua, who found that the 1st applicant was a victim of criminal activities perpetrated by the said Stephen Mwangi Chege. The respondents maintained that the applicants have not established that they have an arguable appeal nor have they demonstrated how the appeal will be rendered nugatory. They maintained that they are in possession of their respective land parcels, and if the Court was to issue the orders sought by the applicants, they will be evicted from their land before the appeal is heard on merits. Finally, the respondents maintained that the order made by the ELC was not a positive order capable of execution.

7. Due to the Corvid 19 Pandemic, hearing of the application proceeded through written submissions without the appearance of parties or their counsel. We have carefully perused and considered the application, the affidavits in support and in reply, and the written submissions that were duly filed by the parties' counsel. It is evident that the ruling made by the learned Judge involved a dispute over land ownership in respect to which there are competing claims regarding possession.

8. In their plaint the applicants have pleaded fraud and sought amongst other orders, declarations that the purported land register in respect of the suit property showing the 1st respondent as a former purported proprietor of LR No. Nyandarua/Kahuru/143, to whom it was purportedly transferred on 11th February, 1993 by David Muchene Njihia is fraudulent null and void; and a declaration that the purported title deeds held by the 1st respondent in respect of the suit property, LR No. Nyandarua /Kahura/143 and the subsequent subdivisions of the suit properties registered as Nyandarua /Kahuru/ 10002 to 10014 in the names of 2nd to 6th respondents are null and void. While in the ruling, the High Court has held that the questioned title of 1st respondent provides prima facie evidence in favour of the 1st respondent's ownership, the issue of fraud and the competing claims of ownership of the suit property are yet to be conclusively determined. The applicants have faulted the ruling of the learned judge contending that she misdirected herself on various issues. It is therefore arguable as to whether the learned Judge properly exercised her discretion in declining to grant the orders of injunction that were sought by the applicants and this suffices to show that the appeal is arguable.

9. The dismissal of the applicants' motion has left the respondents with the freedom to deal with the subdivisions of the suit property in any way that they may wish, including disposing of the properties, and this would render the applicants' intended appeal nugatory as the properties may no longer be available to the applicants were they to succeed in their intended appeal.

10. For the aforesaid reasons we are satisfied that the applicants have satisfied both the limbs of arguability, and the nugatory aspect. We find it in the interest of justice to preserve the suit property. The order that commends itself to us is an order of injunction restraining the respondents their servants or agents from alienating, subdividing, selling, mortgaging, charging, or dealing with the suit property or the subdivisions LR No Nyandarua/ Kahuru/10002–10014 pending the hearing and determination of the intended appeal which should (if not already filed) be filed within 60 days from the date hereof. Costs of the application shall abide the outcome of the appeal.

It is so ordered.

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

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR