



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, J. MOHAMMED & KANTAI, JJA)

CIVIL APPLICATION NO. 56 OF 2020

BETWEEN

SUSAN NJERI NJOROGI and

PETER MUCHIRI as personal representatives of the Estate of

FRANCIS NJOROGI MWANIKI (Deceased).....APPLICANTS

AND

GEOFFREY THIONG'O KAMAU.....RESPONDENT

(Being an application for stay of execution of decree pending the hearing and

determination of the appeal against the judgment of the Environment and Land Court

at Nairobi (Bor, J.) delivered on 9th December 2018 in ELC Civil Case No. 154 of 2010 (OS)

RULING OF THE COURT

1. The applicants by their application dated 26th January 2020 seek an order of stay of execution of the judgment of the Environment and Land Court (*Bor, J.*) given on 6th December 2018 in ELC Case No. 154 of 2010. By that judgment, the Environment and Land Court (ELC) decreed that the respondent is entitled to be registered as the proprietor of an acre out of the property known as Loc. 16/Ndonyo Chege 305. The applicants were directed by the court to execute a transfer to convey the same to the respondent and in default the Deputy Registrar of the ELC was authorized to sign all necessary documents on behalf the applicants.

2. In the supporting affidavit, Peter Muchiri Njoroge deposes that the suit property is ancestral land; that in granting judgment in favour of the respondent, the ELC failed to have regard to legal principles on adverse possession; and that the applicants are apprehensive that once the property is transferred to the respondent as ordered by the ELC, the respondent could transfer it to third parties thereby rendering the intended appeal nugatory.

3. In his replying affidavit sworn on 7th April 2020, the respondent states that the judgment was delivered in 2018 and the applicants are guilty of inordinate delay; that the grounds of appeal are very weak and baseless and have low possibility of success; that the apprehension that he will transfer the property to third parties is misplaced and is based on mere speculation.

4. We have considered the application, the affidavits and the submissions by Macharia Waiganjo & Nyakoe advocates and by Kimandu & Ndegwa Company Advocates for the applicants and respondent respectively. In an application of this nature, the applicant is required to demonstrate that the intended appeal is arguable and that if we decline to grant the orders sought, the intended appeal, if successful, will be rendered nugatory. As stated by the Court in *Ishmael Kagunyi Thande vs. Housing Finance Company of Kenya Limited, Civil Application No. 157 of 2006 [2007]eKLR*:

“The jurisdiction of the Court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the Court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show 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.”

5. As to arguability of the intended appeal, we bear in mind that an arguable appeal is not one that must necessarily succeed. We are satisfied that the grounds of appeal in the intended appeal to which we have referred are not frivolous. The intended appeal is arguable.

6. On the second limb, we take the view that the intended appeal, if successful, will be rendered nugatory if we decline the orders sought as the property may be out of reach should it be disposed of in the meantime. We also note from the record of application that by an order made on 21st November 2019 and issued on 9th December 2019, the ELC granted the applicants an order of “*stay of execution of obtaining orders of stay of execution in the court of appeal*” for 60 days which have since lapsed.

7. The result is that we allow the application dated 26th January 2020 with the result that the judgment of the ELC given on 6th December 2018 in ELC Case No. 154 of 2010 (O.S) is hereby stayed pending the hearing and determination of the appeal. The costs of the application will abide the outcome of the appeal.

Orders accordingly.

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

S. GATEMBU KAIRU, (FCI Arb)

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

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