



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: KOOME, SICHALE & KANTAL, JJA]**

**CIVIL APPLICATION NO. 136 OF 2019**

**BETWEEN**

**BEN NYAKUNDI.....APPLICANT**

**AND**

**RAJAB AHMEND KARUME.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

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

**THE INSURANCE TRAINING AND EDUCATION TRUST.....4<sup>TH</sup> RESPONDENT**

(Being an application for stay of the proceedings and execution pending appeal against

the ruling of the ELC (E. Obaga, J) dated 10th April, 2019

IN

**NAIROBI ELC No. 816 of 2012)**

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**RULING OF THE COURT**

The applicant, **Ben Nyakundi** filed an application dated **28th September, 2018** in which he sought to be enjoined as an interested party in **ELC Case No. 816 of 2012, (consolidated with ELC Case No. 47 of 2010)**. The application was dismissed on **10<sup>th</sup> April, 2019** by **Obaga, J**. It is this dismissal that has precipitated the amended Notice of Motion before us dated **11th July, 2019**. The substantive prayers sought in the motion are:

“

**1....**

**2. THAT this Honourable Court/Bench be pleased to grant and /or issue an order for stay of proceedings at the superior court in connection with ELC CASE NO. 816 OF 2012 as consolidated with ELC No. 47 of 2010 pending the hearing and determination of (a) this Application and (b) the intended appeal.**

**3. THAT this Honourable Court/bench be pleased to grant and /or issue an order for stay of execution of the ruling delivered on 10<sup>th</sup> April, 2019 and the consequent Order dated 25<sup>th</sup> April, 2019 pending the hearing and determination of (a) this Application and (b) the intended appeal.**

4. *THAT the costs of this application be provided for*”.

The application was supported by the affidavit of **Ben Nyakundi** sworn on **8<sup>th</sup> July, 2019**. In paragraph 8 thereof, he decried the fact that the Judge had dismissed his application to be enjoined in **ELC Case No. 816 of 2012** consolidated with **ELC No. 47 of 2010** as an interested party.

The motion was opposed by all the respondents. The 1<sup>st</sup> respondent, **Rajab Ahmed Karume** filed a replying affidavit sworn on **9<sup>th</sup> July, 2019**. He deponed that **ELC No. 816 of 2012** and **ELC No. 47 of 2010** were at the tail end of the hearings in the ELC. The affidavit in response to the motion on behalf of the 4th respondent, Insurance Training and Education Trust was sworn by **Dr. Ben Kajwang**, it's Director, on **3<sup>rd</sup> July, 2019**. In paragraph 9 thereof he deponed that there was no positive order capable of being executed arising from the ruling of **10<sup>th</sup> April, 2019**.

Then there is an affidavit dated **10<sup>th</sup> September, 2019** sworn by **Joseph Ndungu Gathondi** (the 7th respondent) on his behalf and for the 6th respondent, **Jane Wanjiru Ndumia**. There is also a supplementary affidavit by **Bochere Omariba** Advocate from the firm of **Ogeto, Otachi & Company advocates** explaining their predicament in obtaining proceedings that were not available in time in order for them to prefer an appeal on behalf of the applicant.

The 1st respondent filed undated submissions contending that the applicant does not have an arguable appeal as his claim to title over the suit property is anchored on “... ***an unsigned and unregistered title that appears to have been downloaded from google ...***” On the nugatory aspect, the 1st respondent submitted that there was nothing to stay, as the order sought to be challenged is a negative order. In the 2nd & 3rd respondents' submissions dated **4<sup>th</sup> May, 2020**, it was submitted that the proceedings in the ELC had been closed and were then at the submissions stage. The 2nd and 3rd respondents further submitted that the title allegedly acquired by the applicant had not been signed and executed so as to pass the legal test of being “***registered***”.

In the 4th respondent's submissions, it was contended that the process of allocation (if any) of the suit property was irregular/illegal. Further, that the hearings in the ELC had already been concluded.

The twin principles to be satisfied before a grant of stay of execution pending appeal is issued were summarized in this Court's decision of ***Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR***. Firstly, an applicant has to demonstrate that he/she has an arguable appeal and secondly that the appeal will be rendered nugatory absent stay. The two limbs must both be satisfied.

Having considered the application, the grounds in support thereof, the affidavits filed in reply by some of the respondents, the 1st, 2nd and 3rd respondents' as well as the 4th respondent's written submissions, it is not disputed that in the applicant's notice of motion dated **28th September, 2018**, the applicant sought to be enjoined in the **ELC case No. 816 of 2012 (consolidated with ELC No. 47 of 2010)**. This application was dismissed on **10<sup>th</sup> April, 2019**. The dismissal being a negative order, in our view, there is nothing to stay as this was not a positive order capable of being executed. (See ***Kenya Commercial Bank Limited vs. Tamarind Meadows Limited & 7 others [2016] eKLR***).

It is also doubtful whether the applicant has an arguable appeal given the fact that he placed reliance on ownership of the suit property on a title that is yet to be registered. In view of the above, we find that the applicant has failed to demonstrate that he has an arguable appeal that will be rendered nugatory, absent stay.

The upshot of the above is that we find no merit in the motion. It is hereby dismissed with costs to the respondents.

It is so ordered.

*Dated and Delivered in Nairobi this 23<sup>rd</sup> Day of October, 2020.*

**M. K. KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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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**