



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: WARSAME, MURGOR &, SICHALE JJA)

CIVIL APPLICATION NO. 169 OF 2020

BETWEEN

HENRY MULI MBATHI.....1ST APPLICANT

ROSE KATUKU MBATHI.....2ND APPLICANT

AND

NDEGWA NGANDO.....1ST RESPONDENT

EMBAKASI RANCHING CO. LIMITED.....2ND RESPONDENT

(Being an Application for Stay of Execution of the Judgment of the Environment

and Land Court at Nairobi (Hon. E.O. Obaga) dated 21st May, 2020 ELC. No. 132 of 2016)

RULING OF THE COURT

1. In a Notice of Motion dated 16th June 2020, the applicants **Henry Muli Mbathi** and **Rose Katuku Mbathi** have invoked our jurisdiction under **Rule 5(2) (b)** seeking to stay the execution of the judgment of Obaga J. delivered on 21st May 2020, pending the hearing and determination of their intended appeal.

2. The facts giving rise to this application stem from a dispute over the ownership of **plot No P-171 B**, which the applicants and the 1st respondent claim was allocated to them by the 2nd respondent, **Embakasi Ranching Company Limited**. Finding in favour of the 1st respondent, the court dismissed the applicants' counterclaim with costs and ordered the 2nd respondent to complete the transfer of the said plot to the 1st respondent. It is the case of the applicants that in the event the orders sought are not granted, they will suffer substantial loss as they in danger of losing the said property and being subjected to contempt proceedings.

3. We have considered the application and the law. For this Court to grant orders of stay of execution under **rule 5(2)(b)**, the applicants must satisfy us that the intended appeal is arguable and that unless the Court grants the orders sought, the intended appeal if successful will be rendered nugatory (*See Jaribu Holdings Ltd vs. Kenya Commercial Bank Ltd. CA No. 314 of 2007.*)

4. As to whether the appeal is arguable, the applicants have set out 9 grounds of appeal in the draft memorandum of appeal. The applicant intends to contend inter alia: that the learned trial Judge failed to appreciate the existence of documentary evidence on record that the suit property belongs to the 2nd applicant; that the learned judge erred in declaring that the suit property belonged to the 1st respondent despite the court's findings that the 1st respondent was given a letter of allocation for the suit property on 28th November 1985 and the evidence on record that the 2nd applicant had been allocated the same plot on 3rd September 1985. Considering what has been stated before us and being cautious not to make pronouncements that would predetermine the substantive appeal pending before the Court, we are satisfied that the intended appeal is not frivolous.

5. As regards the nugatory aspect of the matter, it is not in dispute that if the suit property was transferred to the 1st respondent, the intended appeal will be rendered nugatory. Taking into account the circumstances of this case which involves the sensitive issue of land ownership, we are of the view that it would be proper to preserve the substratum of the appeal and maintain status quo until the issues in dispute are heard and determined.

6. Accordingly, having satisfied the two principles, the application succeeds. The application is hereby allowed with no orders as to costs.

Dated and Delivered at Nairobi this 23rd day of October, 2020.

M. WARSAME

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR