



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO, ASIKE-MAKHANDIA & SICHALE, JJ.A]

CIVIL APPLICATION NO. E. 211 OF 2020

BETWEEN

RUTH WANJIRU MUKUNGA.....APPLICANT

AND

FLORENCE WAIRIMU NDURU....1ST RESPONDENT

STEPHEN GAKURE KIMAITI2ND RESPONDENT

ISAAC MUTUKU GACHOGU.....3RD RESPONDENT

(An application for Stay of Execution of the judgment of the Environment and Land Court of Kenya at Thika (L. Gacheru, J) dated 16th July, 2020 in Thika E&LC NO. 406 of 2017)

RULING OF THE COURT

The applicant, **Ruth Wanjiru Mukunga** filed a Notice of Motion dated **30th July, 2020**, said to be brought under **Rules 5(2)(b), 20(b), 41, 42 and 47 (1),(2),(3) and (4) of the Court of Appeal Rules and all other enabling provisions of the law**. She sought *inter alia*, the following orders:

“1. ... (spent)

2. That this Honourable Court be pleased to issue orders of stay of execution restraining the 1st respondent, her agents, Assignees and or servants from executing the judgment and the decree of the trial Court in ELC No. 406 of 2017 (Formerly NRB ELC No. 533 of 2012), Judgment of the Honourable Lady Justice L. Gacheru delivered on the 16th of July, 2020, until the intended appeal is heard and determined, with the consequence that the applicant remain in the suit premises herein known as Land Parcel No. Ruiru/Kiu Block 2 /3723, which is subdivided to numbers Ruiru Block 2/10070 - 10081 which premises have been the home of the applicant for the last thirteen years, from 2007 to date.

3. That costs of this application be provided for”.

The motion was supported by the applicant’s affidavit sworn on **3rd July, 2020** in which she deponed that she is the registered owner of the suit premises which she had owned for the last 13 years (since the year 2007); that she has heavily invested on the suit land; that the 1st respondent has never lived on the suit premises; that on **16th July, 2020**, the Environment & Land Court (ELC Court) rendered its judgment in favour of the 1st respondent; that subsequent to the said judgment, the 1st respondent has embarked on acts of selling the suit land as apparently the applicant has encountered many people going to view the land with the intention of buying it; that the 1st respondent has erected a bill board on the suit land advertising the suit land for sale inspite of a temporary order of stay of execution issued by the ELC Court, which bill board, the applicant has pulled down. The applicant’s contention is that unless stay of execution is granted, she stands to suffer irreparably if the 1st respondent was to execute the said judgment.

The Motion was resisted by the 1st respondent, **Florence Wairimu Nduru**, who in a replying affidavit sworn on **17th August, 2020** deponed that the documents of title exhibited by the applicant were fraudulently obtained; that the applicant conceded as much on **21st July, 2020**;

that in the application dated **21st July, 2020** before the ELC Court, the applicant had sought to be given 90 days to enable her “... **remove her various properties and developments in there and move them to an alternative land;**” that the suit land belongs to her deceased mother and hence she has no capacity to sell it as she is yet to file for a grant of letters of administration of the estate of her late mother.

The principles that guide this Court in the determination of **Rule 5(2) (b)** applications are aptly stated in the decision of **Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR**. Firstly, the applicant has to demonstrate that he/she has an arguable appeal. Secondly, an applicant has to establish that the appeal will be rendered nugatory, in the absence of a stay order. We have considered the motion, the supporting affidavit, the applicant’s and the 1st respondent’s written submissions dated **10th August, 2020 and 18th August, 2020** respectively, the judgment of the trial court and the law.

Upon applying the said principles to the instant matter, it is doubtful whether the applicant’s title was not fret with illegalities, and hence our doubts as to whether she has an arguable appeal. Secondly, on the nugatory aspect, the 1st respondent has deponed that the suit land belonged to her late mother and she is yet to petition for letters of administration. It is therefore not possible for the 1st respondent to sell the suit land until the whole process of applying and obtaining a grant of letters of administration is commenced and completed.

In our considered view, the applicant has not established the twin principles of arguability and that the appeal (or the intended appeal) being rendered nugatory, absent stay.

The upshot of the above is that the motion of **30th July, 2020** is bereft of merit.

It is hereby dismissed with costs to the respondents.

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

W. OUKO (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

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