



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & MAKHANDIA, J.J.A)

NYERI CIVIL APPLICATION NO. 156 OF 2019

BETWEEN

ISAAC MURIGI MUIRURI (Suing as the administrator
of the Estate of MUIRURI NJIRI (Deceased).....APPLICANT

AND

FRANCIS KARUME.....1ST RESPONDENT

ANDREW NG'ANG'A.....2ND RESPONDENT

STANLEY MUTURI GATHERI.....3RD RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and determination of the appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Murang'a (J.G. Kemei, J.) dated and delivered on 25th July, 2019

in

ELC Cause No. 438 of 2017

RULING OF THE COURT

1. The applicant is the administrator of the estate of his late father Muiruri Njiri (deceased). On behalf of his late father's estate, he moved the Land and Environment Court (ELC) in **ELC No. 438 of 2017** claiming an overriding interest in land parcel No LOC1/THUITA/160 (suit property) which he said his late father had bought from the 1st and 2nd respondents' father between 1980 and 1990 as manifested in the sale agreements exhibited before the ELC, dated 23rd March, 1980 and 24th July, 1990. On the other hand, he testified that he was born on the suit land in 1963 and has lived there since then.
2. In their joint statement of defence, the respondents herein who are the legal administrators of the estate of Wanganga Wan'gombe (their late father) denied the applicant's claim and asserted that neither the applicant nor his late father had any known legal claim over the suit property. They also admitted in court that they had sold the suit property to Stanley Muturi Gatheri (the 3rd respondent) before confirmation of the Grant and the suit property had already been transferred to him.
3. After hearing the parties, the learned Judge (Kemei, J.) gave judgment in favour of the respondents granting orders, *inter alia*, that the applicant by himself or other persons claiming through him vacate the suit land within 90 days of the date of the judgment and in default, eviction to ensue.
4. Aggrieved, vide a motion on notice dated 25th September, 2019 pronounced to be brought under **Order 42 Rule 4 and 6** and many other provisions of the Civil Procedure Act, the applicant comes before this Court seeking orders of stay of execution pending the hearing and determination of the intended appeal from the said judgment. The application is premised on among other grounds that the learned Judge erred in law and fact by: raising and determining issues not raised in the pleadings hence reaching an erroneous conclusion; failing to order a site visit to the suit land which was relevant to the suit hence arriving at an erroneous finding; failing to consider the uncontested and uncontroverted evidence led by the applicant hence reaching a wrong conclusion; anchoring her decision on legal technicalities hence reaching an erroneous finding and; disregarding the applicant's evidence on record and submissions hence occasioning a great injustice to the applicant.

5. The application is supported by the applicant's own affidavit sworn on 25th September, 2019 with several annexures. The salient paragraphs are as follows:

“4. THAT I together with my siblings have been brought up on the suit land and developed the same and also buried our loved ones on the suit land.

...

7. THAT if the orders I am praying for are not granted the Respondent will proceed with the execution of the judgment and evict me together with my siblings to our detriment.

8. THAT unless the Respondents are restrained by the order of this honourable court, we shall stand to irreparable loss and damage(sic) as we completely depend on the said land as our only source of livelihood.

9. THAT ... I believe to be true that the learned judge erred in law and in fact by failing to order a site visit to the suit land which was most relevant in this case and proceeded judgment on them thereby reaching an erroneous conclusion of law occasioning a serious miscarriage of justice to the Appellant herein.

10. THAT ...I verily believe to be true that I have a good appeal with a high likelihood of success and that failure to get the stay would render the appeal nugatory.”

6. During the plenary hearing, parties were represented by counsel. The application was canvassed through written submissions in absence on counsel as a result of the Covid 19 pandemic which has placed on hold physical hearings.

7. Urging the Court to allow the application the applicant citing **Article 50** of the constitution, submitted that he had a right to appeal and to be heard on the instant application. Placing reliance on **Salome Alice Akinyi v. Aridempta Veronica Ooko & Another (2019) eKLR** he submitted that a decree-holder's right to enjoy the fruits of the decree must be weighed against the unsuccessful party's right to access justice.

8. Counsel further reiterated the averments in his supporting affidavit. In sum, he submitted that the application met the required threshold in law and ought to be allowed.

9. The 1st and 2nd respondents did not file any replying affidavits in opposition of the application. On his part, the 3rd respondent, in a replying affidavit sworn on 15th June, 2020 received by the court after the application had been heard, deposes that he is the registered owner of the suit property. He maintains that he bought the suit property and he should not be stopped from enjoying the fruits of his judgment. He conceded that the applicant lives on the suit property with his family but maintained that the application is only meant to delay the matter.

10. There is no deposition to the effect that the applicant's appeal is not arguable or that if the stay order sought is allowed, the intended appeal will not be rendered nugatory. The respondent's only concern appears to be that the applicant has not offered to deposit security for costs.

11. In his submissions filed on the same date, the respondent makes no reference to **Rule 5(2)b** of the Rules of this Court and pegs his parameters for opposing the application on **Order 42** of the Civil Procedure Rules, which is not applicable before this Court.

12. Incidentally, even the submissions by the applicant have the same problem and instead of applying the standards prescribed under **Rule 5(2)b** of the Rules of this Court, counsel relies wholly on **Article 50** and **159(2)** of the Constitution which in our considered view are totally misplaced in an application of this nature.

13. We observe that the submissions by both parties were filed by counsel who are deemed to be qualified and it is unfortunate that they did not bother to do some little research in a matter as important as this to ensure the submissions filed were compliant and competent. Indeed, the application itself was no better as it was based on all manner of other provisions of the law except the ones that are applicable.

14. We have agonised as to whether to dismiss this application for being pegged on irrelevant omnibus provisions of the law. However, in view of the gravity of the matter, we feel that we should consider the same as if it was premised on the proper rules. For the application to succeed, an applicant such as the one before us needs to demonstrate that he has an arguable appeal and that if the orders sought are not granted, the appeal will be rendered nugatory See **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] eKLR**.

15. On the limb of arguability, whether the appeal is arguable, it is sufficient if a single *bonafide* arguable ground of appeal is raised. See **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004 (UR)**. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. **Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008. (2009) eKLR**.

16. We have considered the application and we have seen the annexures to the application which clearly show that the applicant lives on the suit property, a fact that is admitted by the 3rd respondent. The buildings appear old, and so are the trees in the compound. We have also seen photographs of grave sites which the applicant says are the interment sites for his late father and other relatives. If the stay orders sought are not granted, these houses will be demolished and the applicant and his family will be rendered destitute before their appeal is considered.

17. We have also seen the memorandum of appeal annexed to the application. The appeal is in our view not frivolous and deserves to take its

place before the bench that will consider its merits. The law also enjoins us to balance the interests of both parties. In this case, the applicant has lived on the suit property for decades; the respondent had not taken possession and appears to have purchased the land without confirming its status on the ground. We hold the view that if the applicant and his family are thrown out into the streets, in the event their appeal succeeds, they will have suffered momentous injustice.

18. For the foregoing reasons, we are satisfied that the twin principles of arguability and nugatory aspect have been demonstrated. We allow the application and order that execution of the impugned judgment be stayed until the appeal herein is heard and determined. Costs of the application to abide the outcome of the appeal.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

ASIKE - MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR