



IN THE COURT OF APPEAL

AT NAIROBI

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

KISUMU CIVIL APPLICATION NO. 152 OF 2019

BETWEEN

MICHAEL KIPRORUS.....1ST APPLICANT

COUNTY GOVERNMENT OF KISUMU.....2ND APPLICANT

AND

SHAJANAND HOLDINGS LTD.....1ST RESPONDENT

DISTRICT LAND REGISTRAR KISUMU.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

(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 Kisumu

(Boaz N. Olao, J.) dated the 31st October, 2019 and delivered on 15th November, 2019

in ELC Cause No. 240 of 2015)

RULING OF THE COURT

1. The applicants have moved this Court under **Rule 5(2)(b)** of this Court's Rules, for orders of stay of execution pending the hearing and determination of their intended appeal from the judgment and decree of the Environment and Land Court (ELC)(Boaz Olao, J), dated 31st October, 2019. In the impugned judgment the learned Judge granted orders to the effect that the applicants be evicted from Land Parcel No. KISUMU MUNICIPALITY/BLOCK 4/154 (the suit property) and the 2nd applicant's counterclaim be dismissed with costs to the first respondent herein.
2. The application is supported by an affidavit sworn by one Arnold Omondi Guya, who describes himself as the 2nd applicant's Acting Director – Housing, City of Kisumu. The affidavit sets out the background to the motion and the grounds upon which it is anchored. It also has various annexures in support thereof.
3. In brief, it is the applicants' contention that the learned Judge's decision compromised the 2nd applicant's constitutional and statutory obligations as envisaged under **Article 186** as read together with **Schedule 4** of the Constitution of Kenya and **Section 6(5)** of the County Government Act No. 17 of 2012.
4. It is averred that the crux of the impugned judgment was the determination of the validity of two rival titles in respect of the suit property: on one hand, a certificate of lease issued to the 1st applicant on 27th April, 1999 and on the other hand, one issued to the 1st respondent on 23rd January, 2013.
5. The applicant deposes that there was no evidence on record led by either the 2nd or the 3rd respondents during trial impeaching the applicant's certificate of lease. Further, that the subject matter in this case is a matter of public interest and that there is a constitutional obligation imposed on the 2nd and the 3rd respondents under **Article 67(2)(a)**, to protect public land.

6. According to the applicants, there being no interim orders for stay issued by the trial court, there exists imminent threat of execution as a result of which the 1st applicant risks being evicted from the suit property and that the developments on the suit property stand to be demolished by the 1st respondent to the 2nd applicant's detriment.

7. Urging the Court to allow the application, counsel for the applicants submitting on the limb of arguability, contended that the learned Judge's decision was defective to the extent that it validated the 1st respondent's title over the suit property without cancelling the 1st applicant's title over the same property.

8. He faulted the trial court's findings that the 1st respondent's title was valid despite having confirmed that the 1st applicant's title was the first to be issued and that no evidence in rebuttal was produced to invalidate the same.

9. Citing **Gitwany Investments Ltd & 3 Others v. Commissioner of Lands, HCCC No. 1114 of 2002**, counsel submitted that in view of the foregoing, the trial court's judgment could be said to be *per-in curium* as it consisted of two equal equities hence the first in time prevails.

10. Counsel argued that the learned Judge failed to properly exercise his discretionary powers by failing to summon the District Land Registrar and a representative of the National Land Commission to establish the validity of the titles produced before him. (See **Nguruman Ltd v. Shompole Group Ranch & Ol Kiramatian Group Ranch, Nairobi Civil Application No. 90 of 2013**).

11. Counsel went on to fault the learned Judge for failing to interrogate the issue of fraud against the 1st respondent despite evidence being led in support of the alleged fraud. He concluded by submitting that indeed there existed legal issues on which this Court ought to pronounce itself. (See **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, Civil Application No. Nai 72 of 2001** and **Kenya Railways Corporation v. Edermann Properties Ltd., Civil Application No. Nai 176 of 2012**).

12. On the nugatory aspect, counsel reiterated that there is the looming danger of the 1st respondent repossessing the suit property and demolishing the developments thereon thus occasioning the 2nd applicant's loss. He maintained that there was risk of interference with the subject matter which would render the intended appeal nugatory.

13. Opposing the application, the 1st respondent vide a replying affidavit sworn on 23rd June, 2020 by Chandrakant Chadhadia, one of its directors maintained that the application does not meet the threshold set in law for applications under Rule 5(2) b of the rules of this Court. He deposed that the appeal is not arguable given that the applicant's contention was that the learned Judge had failed to summon the 2nd and 3rd respondents as witnesses, yet that was the applicants' responsibility as they were the ones who sought to rely on the evidence they expected those witnesses to adduce.

14. On the nugatory aspect, the respondent deposed that the 1st applicant was not being candid as he has failed to disclose to the Court that he has already been evicted from the suit premises; that the 2nd applicant tried to forcefully take back possession of the property but its inspectorate guards were repulsed by the respondent's guards.

According to the 1st respondent, there is nothing to stay as the judgment intended to be appealed from had already been executed.

15. In his written submissions, learned counsel for the respondent amplified the 1st respondent's depositions. Urging for dismissal of the application, counsel placed reliance on the case of **Charles Gichina Mwangi v. Henry Mwangi [2000] eKLR**.

16. We have considered the application, the rival affidavits and the written submissions by both counsel. The law relating to applications under **Rule 5(2)(b)** is well settled. In the case of **Attorney General v. Okiya Omtata Okoiti & Another [2019] eKLR**, this Court stated thus:-

“The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2) to grant an order of stay are now well settled. Firstly an applicant had to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant had to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.”

See also **Stanley Kangethe Kinyanjui v. Tony Ketter & Others (2013) eKLR** where this Court extensively set out the applicable principles.

17. In order for the applicants to succeed in their application, they have to satisfy this Court on the twin principles that: the intended appeal is arguable and not frivolous and; that if stay is not granted, the intended appeal, if successful, would be rendered nugatory. (See: **Judicial Commission of Inquiry into The Goldenberg Affair v. Kilach (2003) eKLR 249**).

18. At the core of the intended appeal is the ownership of the suit property. There is the question of which of the two titles can claim validity over the other. Bearing in mind that the applicant needs only demonstrate one arguable point, we are satisfied that the intended appeal is not frivolous and deserves consideration and determination by this Court. The applicant has therefore established the limb on arguability.

19. On the nugatory aspect, whether or not an appeal or intended appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. The respondent in his affidavit deposed that he has already executed the decree and therefore, there is no order to be stayed. This Court in **Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd [2008] eKLR** was faced with an application for stay of execution where the respondent had already executed the decree. In declining to grant the orders sought, the Court held thus:-

“The application before us is for an order of stay of execution of a specific decree. As the applicant concedes through its counsel on record that the decree sought to be stayed has in fact been executed, regularly or otherwise, we see nothing to stay ...

It will not be within reason for us to grant an order of stay of a decree which we know and the applicant itself concedes has been executed. The general policy of the law is that courts should not act in futility. As we stated earlier if we were to order a stay, the applicant might use the order to seek possession. An order of stay is supposed to prevent execution from taking place. Execution does not imply only the formal execution of a decree or order through the court process. A successful litigant who is able to take over possession of suit property peaceably in pursuance of a decree or order of a court competent jurisdiction is deemed to be executing decree or order. Execution through the court process is normally resorted to where peaceable means fail. The respondent having obtained possession of the suit property we opine that an order of stay is made in this matter is likely to make the applicant seek forcible re-entry, which will be undesirable and possibly lead to violence, and breakdown of law and order”

The 1st respondent’s deposition that he has taken possession is not denied. We cannot therefore stay that which has already taken place as this will create an undesirable situation where the applicants might try to forcibly take possession like they have done before.

20. In view of the above we are not persuaded that the nugatory aspect has been demonstrated. The two limbs of arguability and nugatory aspect being conjunctive, this application does not pass muster and therefore fails on that account. We dismiss it with orders that costs abide by the outcome of the appeal.

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

W. KARANJA

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JUDGE OF APPEAL

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR