



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. 105 OF 2020**

**BETWEEN**

**CHRISTOPHER NYAMOHANGA.....APPLICANT**

**AND**

**PETER MASAKWI MOGORI (*Suing as the Personal***

*representative of the estate of PAULO WANGKIO alias*

**PAUL WANKIO GETARI- DECEASED).....1ST RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED.....2ND RESPONDENT**

**AGRICULTURAL FINANCE CORPORATION.....3RD RESPONDENT**

*(An application under Rule 5(2) (b) of the Court of Appeal Rules for stay of execution of the Judgment of the Environment and Land Court of Kenya at Migori (Ongondo, J.) delivered on 15th July, 2020*

*in*

**ELRC No. 418 of 2017)**

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**RULING OF THE COURT**

In the Motion brought under **rules 1 (2), 5(2) (b)** of the **rules of this Court** and **Sections 3A and 3B** of the **Appellate Jurisdiction Act** it is prayed in the main that pending hearing and determination of the application and of an intended appeal we stay execution of the order made by the Environment and Land Court (“**ELRC**”) on 10th August, 2020. In grounds in support of the Motion and in a supporting affidavit of the applicant, **Christopher Nyamohanga** it is said that the Judge erred in fact and law by granting orders against the applicant which were contrary to **Section 77(3)** of the **Registered Land Act (repealed)** and **Section 99** of the **Land Act, 2012** and that the orders were in excess of jurisdiction and violation of the applicant’s rights; that the Judge erred in reaching conclusions of fact that were not supported by the evidence; that fraud was not proved to the required standard; that the Judge erred by holding that the suit was not time barred; that the Judge erred in annulling his title (**Number Bugumbe/Mabera/298**); that the Judge erred in holding that the applicant was not an innocent purchaser of the land. The applicant states at paragraphs 14 and 15 of the supporting affidavit:

***“14. THAT I verily believe that in the present case, I face the very imminent risk of suffering substantial hardship and colossal loss that were this Honourable Court not moved to certify the application as urgent and grant the orders prayed, the land risks being transferred to a third party and subsequently out of jurisdiction of this Honourable Court.***

***15. THAT I am now 80 years old and of frail health, I have filed my Record of Appeal contemporaneously with the application and I am ready to prosecute the application and the appeal at the earliest date convenient to the court.”***

We have considered the Motion and the affidavit in support.

What we are essentially being asked to do is to stay execution of the Judgment of ELRC where the suit by the 1st respondent (**Peter Masakwi Mogori**) succeeded while the applicant's counter-claim failed and was dismissed.

For an applicant to succeed in an application of this nature he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. He must, in addition, show that the appeal will be rendered nugatory absent stay.

From the record the land Title No. Bugumbe/Mabera/298 was charged to the 2nd respondent (**Kenya Commercial Bank Limited**) as security for a loan. That land was offered for sale by the bank at a public auction and the applicant successfully bid for it and was later registered as owner of the land. That ownership was challenged in the suit in ELRC and was annulled.

The applicant takes various issues in the appeal (Kisumu CA No. 105 of 2020). One of the grounds of appeal is whether the Judge erred in fact and law by granting orders against the applicant which were contrary to **Section 77(3)** of the repealed **Registered Land Act** and **Section 99** of the **Land Act, 2012**. Another ground taken is whether the Judge acted in excess of jurisdiction. The applicant also takes as a ground of appeal whether a title obtained after land is sold in exercise of a statutory power of sale is impeachable. These we find to be arguable points in the appeal.

On the nugatory aspect the applicant, who is of advanced age, states that he faces imminent risk of suffering substantial hardship as the land could be transferred to a third party. We note that if the land is transferred to a third party it would be beyond the applicant's reach and the appeal could be rendered nugatory.

The applicant has satisfied both limbs of an application brought under **rule 5(2) (b)** of the **rules of this Court** and we in the event allow the Motion. Costs will abide **Kisumu Civil Appeal No. 105 of 2020**.

**Dated and delivered at Nairobi this 20th day of November, 2020.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**