



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WARSAME, SICHALE & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 82 OF 2020

BETWEEN

LAWRENCE MUSANGO OKETCH.....1ST APPLICANT

PETER OPIYO.....2ND APPLICANT

JOYCE WANJAWA3RD APPLICANT

AND

KAREN ENTERPRISES LIMITED.....RESPONDENT

(An application for stay of the Ruling of the Environment and Land Court at Kisumu (A.O. Omwayo, J.) dated 12th May, 2020 *in* **ELC Case No. 17 of 2019**)

RULING OF THE COURT

In the Motion brought under **rule 5 (2) (b)** of the **rules of this Court** it is prayed in the main that there be a stay of all further proceedings in **Kisumu ELC Case No. 17 of 2019** and the implementation of the ruling by Ombwayo, J. given on 12th May, 2020 and all consequential orders flowing therefrom pending hearing of the application and of an intended appeal. It is also prayed that there be a temporary injunction restraining the respondent from interfering with the applicants' possession of the suit property **I.R. 67384** being **L.R. No. 16345** until the application and the intended appeal are heard.

We are also asked to order the OCS, Kondele Police Station to effect those orders upon the respondent. In grounds in support of the Motion and in a lengthy supporting affidavit of **Lawrence Musango Okech** who is the 1st applicant it is said amongst other things that unless we stay proceedings in the said ELC Case No. 17 of 2019 the defendant in that case (the respondent here) is likely to fix the case for hearing and that Judgment may issue before the intended appeal is heard and that may render the intended appeal nugatory and occasion loss and prejudice to the applicant. It is also said that the respondent is likely to interfere with the applicants' possession of the suit property and that the subject matter must be preserved pending hearing and determination of the appeal.

The applicant states that the intended appeal is arguable because the Judge erred in law and fact in declining to enjoin as a party one Michael Odera Otom who is said to be an administrator of an estate of the late Thomas Agula Otom and had a beneficial interest in the suit property; that the Judge erred in law and fact by holding that it was necessary to amend the pleadings and by holding that allowing the application for joinder may embarrass the court as the subject matter was the same and the parties the same save the 1st defendant in a case No. 894 of 2015; that the Judge misapprehended **Order 1 rule 10 (2) Civil Procedure Rules** and also erred by delving into substantive issues in the other **Case No. 894 of 2015**.

The Motion is opposed through an affidavit in reply sworn by Dr. Christopher Walter Obura, a director of the respondent. He depones that the ruling of the trial court is sound and, further, that to the extent that the application seeks for a stay of the order given by that court it is incompetent as a negative order dismissing the applicants' application is incapable of being stayed. Dr. Obura depones at paragraphs 5 and 6 of the affidavit in reply:

“5. THAT I do verily believe that given that the applicants are unrestrained trespassers in unlawful occupation of the suit property, they stand to suffer no prejudice whatsoever by the continued hearing of the suit in which they are entitled to canvas their respective defences, wherefore it would be greatly prejudicial to the respondent if the orders sought are granted as they would halt the process of the suit and thereby infringe upon the respondent’s constitutional rights to access justice, to

a fair trial and to the protection of its property.

6. THAT as the applicants have chosen not to seek before the superior court any injunctive orders against the respondent and given that whether or not there should issue an injunction is a matter still live before the superior court I do verily believe that by seeking an injunction before this court purportedly pending appeal the applicants are abusing the process of this court.”

We have considered the Motion, the supporting affidavit and the affidavit in reply and we have also considered the record of the Motion and the ruling delivered on 12th May, 2020.

The principles that govern applications for stay of execution pending appeal or applications for injunction are well known. For an applicant to succeed in an application like this one he must, firstly, show that the appeal, or intended appeal, as the case may be is arguable which is to say that it is not frivolous. If the appeal is arguable the applicant must, in addition, show that the appeal will be rendered nugatory absent stay – See *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR*.

The Judge in the ruling in the case intended to be appealed was asked to allow an amendment of the defence to allow a party to be enjoined to the suit. He considered the application and in declining to grant the application he said:

“I have considered the application and the reply by the respondent and I have called for the file number 894 of 2015 between Michael Odero Otom and the plaintiff respondent and do find that allowing the application by the 1st defendant is likely to put this court in an embarrassment as the subject matter is the same and the parties are the same save that the 1st defendant is not a party in 894 of 2015. This is a matter that if not properly administered will lead to prejudice and abuse of court process. Parties to take a mention date for purposes of directions. Application is declined costs in the cause. Orders accordingly.”

Although applications to amend pleadings should ordinarily be freely allowed to enable all issues in controversy to be brought before the trial court for determination, we note that in the case before the trial Judge, the Judge found that allowing the amendment may embarrass the court because there was another pending case. The applicants had not brought those facts before the court. Upon a full consideration of the Motion before us we do not see any arguable point in the intended appeal. In the premises and in the absence of any arguable point in the intended appeal, we need not delve into whether the intended appeal would be rendered nugatory. The application has no merit and we dismiss it with costs to the respondent.

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

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR