



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GATEMBU & MURGOR JJ.A.)

CIVIL APPLICATION NO. 229 OF 2019

BETWEEN

SAKAYO MWIMBI.....APPLICANT

AND

KOTHOME KATUMI.....RESPONDENT

(Being an application for stay of execution from the judgment of the Environment

and Land Court at Machakos (Angote, J) dated 29th March 2019

in

Machakos ELC Appeal Number 17 Of 2017)

RULING OF THE COURT

By a notice of motion dated 8th August, 2019 and supported by an affidavit of ***the applicant, Sakayo Mwimbi*** sworn on even date, the applicant has sought orders for stay of execution of judgment of the Environment and Land Court (*Angote, J*) pending the hearing and determination of the appeal. The applicant also filed written submissions.

The motion was premised on the grounds that the Environment and Land Court had on 29th March 2019 dismissed his appeal and upheld the decision of the trial magistrate's court ordering the eviction of the applicant's family having found that the trial court was right in finding that the

respondent's father, Katumi Ivuti was the owner of the disputed parcel of land situated in Simisi sub-location, Kanziko location. The applicant's complaint was that despite his mother and his entire family having resided on the disputed parcel for many years, the respondent had, following the judgment, since constructed a perimeter fence around the land they cultivated, thereby denying his mother and the family access to the land and to their source of livelihood; that the respondent had also threatened to eject the applicant's family from residing in the disputed parcel. In his submissions the applicant argued that if his family was evicted from the disputed parcel, the appeal would be rendered nugatory, as the substratum of the appeal would be lost.

The respondent did not file any replying affidavit or written submissions in response.

In so far as applications filed under ***rule 5 (2) (b)*** of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of ***Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR***, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Turning to whether the intended appeal is arguable, the applicant included a memorandum of appeal wherein he complained that the learned

judge failed to take into account that the trial magistrate erroneously determined the dispute on documents that were not verified, and without regard for the applicant's evidence that his family had resided on the disputed parcel for more than 50 years. In considering the grounds advanced, it is our view that, in the event the learned judge failed to take into account matters that ought to have been taken into account, then we are persuaded that the appeal is arguable. See ***Kenya Breweries Ltd vs Godfrey Odoyo, Civil Appeal No. 127 of 2007.***

On whether the appeal would be rendered nugatory were it to succeed, the applicant has asserted that since the court rendered the judgment, the respondent has fenced off part of the disputed parcel, thereby denying the applicant's family access to the portion of the land which they cultivated. The respondent having done so, it would seem that the applicant no longer has access to the portion they were cultivating. But this notwithstanding, it would appear that the family still remains in occupation of the portion in which they were residing. In view of the respondent's threats to evict them from that portion, we are satisfied that should they be evicted and the appeal were to succeed, it will be rendered nugatory, as the substratum of the appeal would be lost.

Consequently, the two limbs having been satisfied, we order that the status quo be maintained with the result that the applicant and his family shall not be evicted from the portion of the disputed parcel upon which the applicant and his family reside, and in which they are in occupation, pending the hearing and determination of the appeal. Costs in the appeal.

It is so ordered

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

W. OUKO (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR