



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & SICHALE, J.J.A.)

CIVIL APPLICATION NO. 118 OF 2020

BETWEEN

JOSEPHAT MULWA MUKIMA alias

JOSPHAT MULWA MUKIMA.....APPLICANT

AND

JESSE NG'ANG'A GAKOBO.....1ST RESPONDENT

CHRISTOPHER MUTURI KURIA.....2ND RESPONDENT

HENRY KURIA KINUTHIA.....3RD RESPONDENT

PIUS MATINGI.....4TH RESPONDENT

MBATHI MUTISYA.....5TH RESPONDENT

ANAH KALUKI KITHYOI.....6TH RESPONDENT

CHRISTOPHER MBATHA MUIA.....7TH RESPONDENT

AFYA INVESTMENT CO-OPERATIVE

SOCIETY LIMITED.....8TH RESPONDENT

WINNIE MUTHONI MARU

TABITHA MUGURE NJOROGE &

ROSEMARY NJAMBI NGUGI (Being trustees of

MWITHIGE SELF HELP GROUP.....9TH RESPONDENT

HAZINA HOUSING CO-OPERATIVE

SOCIETY LIMITED.....10TH RESPONDENT

SAWA SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED.....11TH RESPONDENT

THE LAND REGISTRAR, MACHAKOS.....12TH RESPONDENT

(Being an application for injunction under section 3A, 3B, 77(1) of the Appellate Jurisdiction Act Cap 9, Laws of Kenya and Rules

5(2) (b) and 47(1) and (2) of the Court of Appeal Rules, 2010 pending the lodging, hearing and determination of an intended appeal against the Ruling and Order of the Environment and Land Court of Kenya at Machakos (O.A. Angote, J.) delivered on 1st November 2019 and Judgment and Decree delivered on 24th April 2020 in E.L.C No. 11 of 2017.)

RULING OF THE COURT

1. **UPON** perusing the Notice of Motion dated 11th May 2020 brought under **sections 3A, 3B and 77** of the **Appellate Jurisdiction Act** and **rule 5(2) (b)** of the **Court of Appeal Rules**, where the applicant is seeking an order of injunction to restrain the respondents by themselves or their agents from entering, occupying, sub-dividing, placing new beacons, advertising for sale, selling or leasing a parcel of land known as **Title No. Donyosabuk/Komarock Block 1/373** (Original) and the transfers thereof registered as **Title No. Donyosabuk/Komarock Block 1/43342, 43343, 43344,43345,43346,43347,43348,43340,1059466,6018 0,60317,1700095,59614,67555,67696** (the suit properties) pending hearing and determination of an intended appeal from the judgment of **Angote. J.** delivered on 24th April 2020 and ruling delivered on 1st November 2019 and also an order to be exempted from serving the notice of appeal and the record of appeal upon the 2nd, 3rd, 9th and 12th respondents; and,

2. **UPON** perusing the affidavit of the applicant sworn on 11th May 2020 in support of the application, where the applicant states, *inter alia*, that he was the registered owner of the original parcel of land and was issued with a title deed hereto on 28th September 1993; that the title was misplaced or stolen; that he never sub-divided the original parcel of land which measured **40.5 hectares**; that he never sold any part of the land to the 1st to 7th respondents; that he still has in his possession the original title; that the 1st, 4th, 5th, 6th and 7th respondents alleged that the applicant subdivided the original land and sold portions thereof to the 8th, 10th and 11th respondents; that when he filed suit and served all the respondents with court process the 2nd, 3rd, 9th, and 12th respondents did not enter appearance or file defence; that the hearing proceeded before the trial court but the original title was not produced because it had been misplaced; that judgment was scheduled to be delivered on 28th June 2019; fortunately, on 19th April 2019 the Title Deed that had been misplaced was recovered; that he applied to re-open the case before delivery of the judgment for purpose of producing the Title Deed but the application was dismissed vide a ruling delivered on 1st November 2019; that being aggrieved by that ruling he filed a notice of appeal to this Court; that the trial court delivered its judgment on 24th April 2020 dismissing the suit with costs; that he has filed a notice of appeal against the trial court's judgment and believes that the intended appeal is arguable; and that unless the injunctive orders sought are granted the intended appeal shall be rendered nugatory in that the suit properties may be sold and transferred or otherwise dealt with in a manner that is prejudicial to him; and,

3. **UPON** perusing the 8th respondent's replying affidavit and submissions the other respondents having not filed anything, where it is contended, *inter alia*, that the 8th respondent purchased **Donyosabuk/Block 1/43342, 43345, 43347 and 43348** totaling approximately **65 acres** from various parties who had ostensibly purchased those sub-divisions from the applicant; that by the time the applicant filed the suit the 8th respondent had taken possession of the land it had purchased, fenced it off and allocated sub-plots to its members before the trial court issued an order of maintenance of the status quo pending determination of the suit; that although the intended appeal is arguable, the same, if successful, will not be rendered nugatory because the 8th respondent, being first tier Co-operative Society is financially healthy and is able to compensate the applicant; and,

4. **HAVING** considered the principles that guide this Court in its determination of **rule 5(2)(b)** applications as stated in a plethora of this Court's decision and summarized in **Stanley Kangethe Kinyanjui v Tony Keter & Others [2013] eKLR**, and noting that it is not disputed that the applicant's intended appeal is arguable, we are satisfied that the appeal shall be rendered nugatory unless the orders sought are granted since the suit may be re-sold, charged or dealt with in any other manner that may not be in the interest of the applicant, if the appeal is successful.

5. **HAVING** reached this conclusion, we hereby make the following orders:-

- (i) The order of injunction as sought in prayer 3 of the Notice of Motion dated 11th May 2020 is granted.
- (ii) The applicant is exempted from serving a notice of appeal and the record of appeal upon the 2nd, 3rd, 9th and 12th respondents.
- (iii) The costs of the application shall be in the appeal.

Dated and delivered at Nairobi this 6th day of November, 2020.

D. K. MUSINGA

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is true

copy of the original

Signed

DEPUTY REGISTRAR