



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: OUKO (P), KOOME & GATEMBU, J.J.A)**

**CIVIL APPEAL (APPLICATION) NO. 131 OF 2019**

**BETWEEN**

**KONENE NARANKAIK.....APPELLANT/APPLICANT**

**AND**

**REHEMA AHMED (Administrator Estate of**

**AHMED ABDI MURASA.....1<sup>ST</sup> RESPONDENT**

**ZAKARIAH NJENGA KAMITL.....2<sup>ND</sup> RESPONDENT**

***(Being an application for stay of execution of the Decree of the Environment and Land Court at Narok (Mohammed Kullow, J.) issued on 19<sup>th</sup> July 2019***

***in***

***Narok ELC Case No.16 of 2017 (OS)***

**\*\*\*\*\***

**RULING OF THE COURT**

1. In its judgment delivered on 19<sup>th</sup> July 2019, the Environment and Land Court found that the respondent's claim against the applicant for adverse possession in respect of the suit property known as title number Narok/Township/163 had been established on the basis that the respondent had been in possession of the property for more than 12 years. The applicant has already filed his appeal challenging that judgment. Meanwhile, in his application before us made under Rule 5(2)(b) of the Court of Appeal Rules, the applicant is seeking an order for stay of execution of that judgment.

2. The applicant is required to satisfy the Court that the intended appeal is arguable and that unless the orders sought are granted, the appeal if successful, will be rendered nugatory. As stated by the Court in ***Ishmael Kagunyi Thande vs. Housing Finance Company Limited Civil Application No. 156 of 2006 (UR)***:

***“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”***

3. To that end, the applicant has relied on his supporting affidavit sworn on 7<sup>th</sup> August 2019, a supplementary affidavit, as well as written submissions filed on his behalf by his advocates Githui & Co advocates which we have considered. He contends that the Judge failed to consider the basis upon which the respondent entered into possession of the property; and that he has a substantial investment worth in excess of Kenya Shillings 80 million that is at risk unless the orders sought are granted.

4. We have also considered the detailed replying affidavit sworn by Rehema Ahmed and the submissions by Guandaru Thuita & Company Advocates in opposition to the application. The substance of the opposition is that the applicant is not deserving of the orders sought; that the applicant defied a court order of the lower court and corruptly removed the same from the register at lands office; that the applicant has

'pumped' money into the property with the full knowledge of the contest over the title; and that in equity, the applicant should not get relief for hardship which he has created.

5. Bearing in mind, as we do, that an arguable appeal is not one that must necessarily succeed when the appeal is ultimately determined but one that is deserving of full consideration by the Court (See China Road & Bridge Corporation (K)Ltd vs. African Gas & Oil Co. Ltd & 3 others [2016] eKLR), we are satisfied that the intended appeal is indeed arguable. There is for instance the issue whether the Judge was right in concluding that all the ingredients of adverse possession are present.

6. As to whether the intended appeal will be rendered nugatory, there is, based on the photographs exhibited to the material before us, a substantial development in the form of a building which the applicant says he has constructed at a cost of Kshs.80 million and which he risks losing. The respondent concedes there is indeed such development on the property, albeit, that it was put up with the knowledge of the contest over the title. In Reliance Bank Ltd vs. Norlake Investments Ltd [2002] E.A. 227, this Court stated that:

***“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”***

7. So guided, we think the circumstances in the present case warrant the preservation of the property to enable the parties canvass the appeal. Consequently, we allow the application dated 7<sup>th</sup> August 2019 and hereby order that there will be a stay of execution of the judgment in Narok ELC Case Number 16 of 2017 pending the hearing and determination of the appeal.

8. Costs of the application shall abide the outcome of the appeal.

Orders accordingly.

***Dated and delivered at Nairobi this 18<sup>th</sup> day of December, 2020.***

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**