



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, GATEMBU & MURGOR, J.J.A)

CIVIL APPLICATION NO. 56 OF 2020

BETWEEN

MESO MULTIPURPOSE SOCIETY LIMITED.....APPLICANT

AND

LUORE NYOIRO COMPANY LIMITED.....1ST RESPONDENT

AGRICULTURE FINANCE CORPORATION.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

(An application under Rule 5(2)(b) of the Court of Appeal Rules 2010 seeking order of injunction pending an appeal against the Judgment of the Environment and Land Court at Kitale (C. Yano, J) delivered on 7th May 2020

in

ELC No. 111 of 2008)

RULING OF THE COURT

1. The applicant, **Meso Multipurpose Society Limited** has moved the Court under Rule 5(2)(b) and 42 of the Court of Appeal Rules seeking an order of injunction restraining the respondents, their agents and/or servants from evicting its members from L.R. No. 7060/2 currently known as L.R. No. 7060/3 and 4 and also known as IR No. 1155 within Trans-Nzoia District pending the hearing and determination of an intended appeal against the decision of the Environment and Land Court Kitale (**Yano, J**) delivered on 7th May, 2020.
2. The learned Judge gave orders in the impugned judgment, directing that the applicant and its members do vacate and deliver vacant possession of parcels L.R. No. 7060/3 and L.R No. 7060/4 (**suit property**) within sixty (60) days of delivery of the judgment in default of which the applicant and its members would be forcefully evicted therefrom.
3. The applicant's motion before this Court, is anchored on the grounds contained on the face of the motion as well as an affidavit sworn by Francis Wafula Nyongesa, the chairman of the applicant. In brief, the applicant contends that: it entered into an agreement for purchase of the suit property with Dr. James Ouko, the previous registered owner of the suit property; that Dr. James Ouko had charged the suit property to the 2nd respondent; that the applicant paid part of the money to Dr. James Ouko and Kshs 17,000,000 to the 2nd respondent to offset the loan then outstanding; that the applicant and its members took possession of the suit property in 1989 and commenced heavy developments on the property by building permanent structures including a government primary school. The applicant faults the learned Judge of the Environment and Land Court for failing to recognize the agreement between the applicant and Dr. James Ouko and the principle of constructive trust which was applicable between the applicant and Dr. James Ouko. The applicant argued that its intended appeal is arguable and that should the Court fail to grant the injunction order sought, the applicant's members will be evicted from the suit property leading to immense loss and thereby rendering the appeal nugatory.
4. The applicant has also filed written submissions in support of the motion in which it refers to a draft memorandum of appeal wherein 19 grounds have been set and submits that its intended appeal is arguable. Among the grounds raised are: that the trial court failed to consider that the 2nd respondent admitted having received a sum of Kshs. 9,300,000 from the applicant in regard to the purchase of the suit property that was due to Dr. James Ouko; and that the applicant has been in possession of the suit property since 1989. In addition, that the learned Judge erred in failing to find that the principle of constructive trust applied to the case.

5. The applicant also reiterated that if the orders sought are not granted, the intended appeal would be rendered nugatory as its members would be evicted from the suit property which property may be disposed of thereby exposing its members to irreparable loss.

[6] It was said by this Court in **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011** that the object of rule 5(2)(b) of the Rules of this Court is the **“preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”**

7. The two ingredients that the applicant should satisfy for grant of the injunction order are whether the intended appeal is arguable and whether it shall be rendered nugatory should the intended appeal be successful. This was also reiterated by this Court in **Nelson Andai Havi vs Law Society of Kenya & 3 others [2018] eKLR**, as follows:

“It is trite that at this stage our remit does not extend to determining the merits or otherwise of the applicant’s intended appeal (see Njuguna S. Ndungu vs EACC & 3 others [2015] eKLR), it is restricted to determining on the basis of the material on record, first, whether his intended appeal is arguable, and second, whether, absent an order of injunction, that appeal will be rendered nugatory if it succeeds. (See Jaribu Holding Limited vs Kenya Commercial Bank Limited [2008] eKLR.”

8. On the arguability of the appeal, in **Stanley Kang’ethe vs Tony Keter & 5 others [2013] eKLR**, the Court restated the principles as follows:

“(vi) On whether the appeal is arguable it is sufficient if a single bonafide ground of appeal is raised. (Damji Pragji Mandavia vs Sarah Lee Household & Body Care (K) Limited C.A. No. Nai. 345 of 2004).

(vii) An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court; one which is not frivolous (Joseph Gitahi Gachiu & Another vs Pioneer Holdings (A) Limited & 2 others C.A. No. 124 of 2008).”

9. The applicant is seeking an interlocutory injunction pending appeal. It is therefore important that it satisfies the Court that, *prima facie*, it has a *bonafide* interest that ought to be protected. The applicant has contended that the 2nd respondent admitted having received at least Kshs. 9.3 million from the applicant. An issue has been raised regarding whether the learned Judge erred in failing to apply the doctrine of constructive trust as the 2nd respondent, despite receiving money from the applicant, failed to grant consent to transfer the land to the applicant. This is an issue that will be subject to interrogation during the hearing of the appeal. The issue is enough to demonstrate that intended appeal is not frivolous but raises an arguable issue.

10. On whether the appeal is likely to be rendered nugatory should the injunction sought not be granted, it is not disputed that the subject matter is land in which the applicant and its members have been in occupation from 1989 and have undertaken various developments. Should the applicant or its members be evicted from the suit property, the appeal may be rendered nugatory as the applicant and its members may not be able to recover the suit property or its developments should the property be disposed of to a third party.

11. For these reasons, we are satisfied that the applicant has met the threshold for granting orders of interlocutory injunction under Rule 5(2) (b) of the Court Rules. Accordingly, we grant the order of interlocutory injunction pending appeal as prayed in prayer 3 of the applicant’s notice of motion dated 3rd June, 2020. Costs shall abide the outcome of the appeal.

Dated and delivered at Kisumu this 18th day of December, 2020.

HANNAH OKWENGU

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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