



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: ASIKE-MAKHANDIA, GATEMBU & SICHALE, JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. 80 OF 2020**

**BETWEEN**

**OLALUI GROUP RANCH.....APPELLANT/APPLICANT**

**AND**

**HON. GIDEON KONCHELLA.....1<sup>ST</sup> RESPONDENT**

**BENJAMIN OLE TINA.....2<sup>ND</sup> RESPONDENT**

**JOHN ORETU OLE KANCHUEL.....3<sup>RD</sup> RESPONDENT**

**LEPERS OLE KIPKURO.....4<sup>TH</sup> RESPONDENT**

**JOHN K. OLE SOSIO.....5<sup>TH</sup> RESPONDENT**

**MATHEW OLE TWALA.....6<sup>TH</sup> RESPONDENT**

**CHRISTOPHER OLE KIRUI.....7<sup>TH</sup> RESPONDENT**

**LETUI OLE KANCHUEL.....8<sup>TH</sup> RESPONDENT**

**SARANKEL OLE MUNTET.....9<sup>TH</sup> RESPONDENT**

**JOHN OLE MUNTET.....10<sup>TH</sup> RESPONDENT**

**MATHEW B. KONGONYE.....11<sup>TH</sup> RESPONDENT**

**COUNTY COUNCIL OF NAROK.....12<sup>TH</sup> RESPONDENT**

*(Being an application for injunction against the respondents and their agents and/or servants pending the hearing and determination of the intended appeal against the Judgment and Decree of the Environment and Land Court at Narok (M. Kullow, J.) delivered on 30<sup>th</sup> July 2020*

*in*

*ELC Case No. 335 of 2017)*

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**RULING OF THE COURT**

1. In its application dated 17<sup>th</sup> August 2020 presented to the Court under Article 159(2)(d) of the Constitution and Rule 5(2)(b) of the Court of Appeal Rules, the applicant, Olalui Group Ranch, seeks an order that pending the hearing and determination of its appeal from the

judgment of the Environment and Land Court (ELC) at Narok delivered on 30<sup>th</sup> July 2020, this Court be pleased to issue an order of injunction restraining the respondents from trespassing, entering upon, occupying, surveying, distributing, alienating, invading, disposing, transferring, evicting the applicant and its members, or in any manner dealing with land parcels known as Narok/Trans-Mara/Olalui/2 to Narok/Trans-Mara/Olalui/14.

2. Based on the affidavit sworn by the Chairperson of the applicant, Michael Lekishon Ole Risa, in support of the application and the written submissions by Ms. Gordon Ogola, Kipkoech & Co, Advocates, the applicant's case before the ELC was that its property Narok/Trans-Mara/Olalui/1 was illegally subdivided into parcels Narok/Trans-Mara/Olalui/2 to 14 and the same wrongfully registered in the names of the respondents; that the applicant's members and their families, who are in occupation of the property are approximately 600 people; that their suit seeking to assert their rights over the property was dismissed by the ELC in the impugned judgment delivered on 30<sup>th</sup> July 2020; that as a result the applicant's members and their families who reside on the property are at risk of being evicted and being rendered homeless in which event the intended appeal, if successful, will be rendered nugatory. Exhibited to the supporting affidavit are photographs depicting what the deponent deposes are the numerous dwelling houses and farms of the members of the applicant situate on the suit property said to be at risk of eviction.

3. In his replying affidavit in opposition to the application, Hon. Gideon Konchella, the 1<sup>st</sup> respondent deposes that he is the registered proprietor of Narok/Trans-Mara/Olalui/2; that the applicant is not deserving of the orders it is seeking because: it was not a party to the suit before the ELC; it does not have an arguable appeal; that the ELC merely dismissed the suit without making any positive orders capable of either being enjoined or stayed or executed; that the ELC was right in holding that the land was legally, lawfully and properly adjudicated and allocated to the respondents; that apart from the fact that the exhibited photographs "have no relation" to the application, they are products of violation of court orders that restrained parties from taking adverse actions on the property, and if there are houses constructed on the property, that was in violation of the court orders and the same are therefore illegal structures; that the members of the applicant are trespassers on the property and should give way to the registered proprietors.

4. Our attention has also been drawn by the registry to an application subsequently filed by the applicants dated 26<sup>th</sup> November 2020 seeking leave for admission out of time of a further affidavit dated 4<sup>th</sup> November 2020 sworn by Michael Lekishon Ole Risa in which he deposes that contrary to the claims by the respondent, the applicant was indeed a party to the suit before the ELC.

5. We have considered the application, the affidavits and submissions. It is incumbent on the applicant 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."***

6. As to whether the intended appeal is arguable, we bear in mind 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**). In that regard, the applicant states that at the hearing of the appeal, it will demonstrate that the Judge did not properly evaluate the evidence, for had he done so, he would have come to the conclusion that no adjudication was undertaken with respect to the property and that there was fraud on the part of the respondents in obtaining the title deed when no adjudication had in fact taken place. This issues to our mind are not idle. We are thus satisfied that the intended appeal is indeed arguable.

7. As to whether the intended appeal will be rendered nugatory, there is material showing, on the face of it, that the property is indeed occupied by many families, who the respondents assert are trespassers. In our view, to refuse to grant an order of injunction to restrain their eviction would cause hardship which would be disproportionate to the hardship the respondents might experience while waiting for the hearing and disposal of the appeal. See **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] E.A. 227**.

8. Both prerequisites for the exercise of the Court's discretion under Rule 5(2)(b) of the Court of Appeal Rules having been fulfilled, we allow the application dated dated 17<sup>th</sup> August 2020 and order that the respondents are hereby restrained by order of injunction from entering upon, occupying, surveying, distributing, alienating, invading, disposing, transferring, evicting the applicant and its members, or in any manner dealing with land parcels known as Narok/Trans-Mara/Olalui/2 to Narok/Trans-Mara/Olalui/14 pending the hearing and determination of the appeal.

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

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

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**