



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 22 OF 2020

BETWEEN

THE CHAIRMAN OF THE COMMITTEE

MASENO SCHOOL FOR THE DEAF.....1ST APPLICANT

THE SECRETARY OF THE COMMITTEE

MASENO SCHOOL FOR THE DEAF.....2ND APPLICANT

AND

LYSTON PAUL NGOYA MUSUMBA.....RESPONDENT

(Being an application for stay pending the hearing and determination of an intended appeal against the Judgment of the Environment and Land Court of Kenya at Kisumu (Kibunja, J.) dated 16th May, 2018

in

ELC No. 819 of 2015)

RULING OF THE COURT

In the Motion brought under **rule 5 (2) (b)** of the **Rules of this Court** we are asked in the main to stay execution of the Judgment and decree of the Environment and Land Court (“**ELC**”) dated 16th May, 2018 pending the hearing and determination of the application and of an intended appeal. It is said in grounds in support of the Motion and in a supporting affidavit of **Barrack Aguda Odhiambo**, the Head Teacher of the 1st applicant (Maseno School for the Deaf) that, in the said Judgment, parties were directed to engage the services of the County Land Registrar and Surveyor to confirm ground boundary of disputed parcels of land; that the applicants were further ordered to vacate the respondent’s parcel of land in which they were in occupation within 90 days after the said confirmation, in default eviction order would issue; that the applicants were restricted from using the respondent’s land after vacating the same; that the applicants were aggrieved by the decision and had preferred an appeal which they say has high chances of success and that, if the orders sought are not granted the appeal will be rendered nugatory.

The respondent, **Lyston Paul Ngoya Musumba**, in a replying affidavit, depones that the trial court had found that the applicants had encroached on his parcel of land and it was necessary that the County Surveyor and Registrar fix beacons to identify the lands and mark boundaries; that costs awarded to him had been agreed and been substantially paid; at paragraphs 9 and 10 of replying affidavit:

“9. THAT I wish to add further that no appeal will be rendered nugatory by payment of costs. The subject matter is land and in which the applicants herein has possession despite the court ruling that they do vacate and thus the applicant have not demonstrated how payment of costs or the survey and demarcation will render the appeal nugatory.

10. THAT in response to paragraphs 8 and 9 of the supporting affidavit I would like to reiterate that there is no threat of execution since the boundaries have not been confirmed and the copy of the summons annexure BAO-5 refer to exercise that was supposed to be done on 4th December 2018 but was never done due to hostility by the applicants and therefore they do not warrant the issuance of stay orders.”

The respondent further says that no prejudice would be suffered by the applicants if the boundary is determined as the parties would be confirmed to their rightful parcels of land and that the application has been brought after unexplained delay.

The principles that apply in an application of this nature are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be is arguable, which is the same as saying that it is not frivolous. The applicant must, secondly, show that the appeal would be rendered nugatory absent stay – See the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR* where a good summary of those principles is set out.

In the case before ELC at Kisumu the respondent averred that he was the registered owner of a parcel of land known as Maseno Block 2/217 (L.R. No. 9341/114) situate at Maseno Townhill measuring 0.1571 hectares. He further averred that the applicants had moved into his land and refused to vacate even after being required to do so.

The applicants in their defence claimed ownership of the same land.

The trial Judge (Kibunja, J.) found for the respondent ordering the parties to engage the County Land Registrar and Surveyor to confirm the ground boundary between the respondent's said land and a parcel of land 9341/109 (belonging to the applicants).

The Judge further ordered that upon the boundary being confirmed the applicants vacate from the respondent's portion of land that they may be found to be occupying within a specified period of time.

The nature of the dispute between the parties was whether the applicants had encroached into the respondent's land. The Judge ordered that government officials be engaged to confirm the location of boundaries between two adjacent parcels of land. That exercise, to our mind, would establish with certainty whether the applicants had encroached into the respondent's land and, if so, fix beacons appropriately. We cannot, in those premises, see any arguable point in the intended appeal. Being of that mind we need not consider whether the intended appeal would be rendered nugatory.

The Motion fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR