



IN THE COURT OF APPEAL

AT NAIROBI

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

NYERI CIVIL APPLICATION NO.109 OF 2019 (UR 75/2019)

BETWEEN

THE COUNTY GOVERNMENT OF MERU.....APPLICANT

AND

ISAYA MUGAMBI M'MUKETHA.....RESPONDENT

(An application for stay of execution of the Judgment and decree of the Environment & Land Court at Chuka (P. M. Njoroge, J.) dated 3rd December, 2018

in

ELC CASE NO. 4 OF 2018)

RULING OF THE COURT

1. **Isaya Mugambi M'Muketha** (the respondent) sued The County Government of Meru (the applicant) before the Environment & Land Court at Chuka (ELC) claiming, *inter alia*, Ksh. 2,850,000 being value of his property demolished by the applicant; loss of user of the premises for 89 years, being the unexpired lease term in the sum of Ksh. 126,200,000 and other general, aggravated and exemplary damages. The applicant had demolished the respondent's building and converted the plot into a public park.
2. The respondent was successful in the suit and he was awarded Ksh 2,850,000 being value of the destroyed building; Ksh, 63,100,000 for loss of user for the term of the unexpired lease, being 89 years; Ksh. 1,000,000 as general damages; Ksh. 2,000,000 exemplary and aggravated damages plus costs of the suit.
3. Being aggrieved, the applicant filed an appeal to this Court challenging the said award on various grounds. The appeal – **Civil Appeal No. 80 of 2016** was heard by this Court sitting in Nyeri which held that the applicant was culpable and dismissed the appeal both on liability and the quantum of the award in damages. However, on the award of Ksh. 63,100,000 on loss of user, the learned Judges ordered the trial court to take further evidence and assess reasonable damages. The learned Judge (P. M. Njoroge, J) took the evidence of two witnesses and after considering the same along with the legal authorities provided by the respondent assessed the loss of user as Ksh. 109,585,488.65 and entered judgment in favour of the respondent for that amount.
4. Aggrieved by the assessment and entire judgment, the applicant appealed to this Court and in the meantime it has moved the court under certificate of urgency asking us to stay execution of the impugned judgment pending the hearing and determination of the appeal under **Rule 5(2) b** of the rules of this Court.
5. In the grounds on the face of the motion, the applicant states that it has no budgetary allocation to satisfy the decretal amount and that the appeal which has already been filed has overwhelming chances of success. On the nugatory aspect, the applicant states that the respondent will not be in a position to refund the money in the event the decretal amount is paid to the respondent and the appeal succeeds. These grounds are repeated in the affidavit in support of the motion sworn by one Irah Nkuubi on 16th July, 2019. In the memorandum of appeal annexed to the said affidavit, the applicant raises five grounds of appeal which are, insufficiency of evidence to support the claim; disregarding the applicant's evidence and that the colossal award of Ksh. 109,585,488.65 was not justified.
6. The application was opposed through the affidavit John Muchai Mugambi who describes himself as the legal representative of the respondent. He deposes that the appeal is not arguable, as the applicant's appeal is only against the judgment that enhanced the damages for

loss of user and the judgment of this Court in **Civil Appeal No. 80 of 2016** still stands. He deposes that he is entitled to enjoy the fruits of the judgment of this Court. He also deposes that there is no threat of execution and if this Court is persuaded to allow the application, then the applicant should be ordered to deposit security in court. There is nonetheless no averment to the effect that the respondent will be in a position to refund the money if the same is paid to him in the event the appeal succeeds.

7. We have considered the application along with the rival submissions and the authorities cited to us and the applicable law. It is trite law that for an applicant to succeed in an application such as the one before us, he/she needs to demonstrate that the appeal or intended appeal is arguable; and secondly that the same will be rendered nugatory in the event the appeal succeeds. (See **Stanley Kengethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR**).

8. We remind ourselves that the applicant only needs to demonstrate one ground of appeal to establish that the appeal is not frivolous. We have considered the grounds raised in the memorandum of appeal, and we are reluctant to conclude that the appeal is frivolous. We find that the issues raised call for determination by this Court. We are therefore satisfied that the appeal is arguable.

9. On the nugatory aspect, no doubt the amount in question is colossal. The respondent has not demonstrated that he is not impecunious and that he is in a position to refund the amount in question if the same is paid out to him. For this reason, we find that the nugatory aspect has also been demonstrated. We are satisfied that the application meets the required threshold. Accordingly, we allow it and grant the orders as prayed with costs in the appeal.

As the main appeal has already been determined by this Court, direct that **Civil Appeal No. 28 of 2019** be fast tracked and be heard on priority basis.

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

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR