



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, MUSINGA, & GATEMBU, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 263 OF 2019

BETWEEN

HAMISI KUTI WASIKE.....1ST APPELLANT/APPLICANT

HADIJA SAGINA WASIKE.....2ND APPELLANT/APPLICANT

JAUSIKU AMISI KUTI.....3RD APPELLANT/APPLICANT

AND

EVANS ASAVA AMBASA.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an appeal

from the Judgment and Decree of the Environment and Land Court of Kenya

at Kakamega (N. A. Matheka, J.) delivered on 24th September 2019

in

E.L.C. Case No. 49 of 2016 (O.S.)

RULING OF THE COURT

1. This is an application for stay of execution of the judgment of *N. Matheka, J.* in Environment and Land Court (*ELC*), *Case No. 49 of 2016 (O.S.)* at Kakamega where the learned judge ordered the transfer of a parcel of land measuring 1.25 acres (*the suit land*) of land parcel No. *Butsoso/Shikoti/14610* from the applicants to the respondent.
2. The respondent had filed the aforesaid suit claiming ownership on the basis that he had bought and occupied it adversely against the applicants.
3. In the judgment that was delivered on 24th September 2019, the trial court ruled in favour of the respondent and ordered the Deputy Registrar to execute the transfer documents within 90 days in the event that the applicants declined to execute them.
4. Being aggrieved by the aforesaid decision, the applicants preferred an appeal to this Court. Pending hearing of the appeal, the applicants urged the trial court to grant stay of execution of the judgment. That application was dismissed on 6th May 2020.
5. The applicants now urge this Court by way of a notice of motion before us, to grant a stay of execution of the trial court's judgment pending appeal, contending that they have an arguable appeal. They stated, *inter alia*, that the learned judge erred in law in finding that the respondent had proved his claim of the suit land under the doctrine of adverse possession; and in her analysis of the evidence tendered by both parties.
6. The applicants also submitted that unless the orders sought are granted, the intended appeal, if successful, shall be rendered nugatory in that the suit land shall be transferred to the respondent and they may be unable to get it back if the same will have been sold or transferred to a third party.

7. The respondent opposed the application. He stated that following dismissal of the application for stay of execution, the applicants did not take any action for a period of 53 days. During the intervening period, the Deputy Registrar executed all the relevant transfer documents in his favour. There was therefore nothing pending that could be stayed. The respondent exhibited a copy of the transfer that was executed on 18th May 2020. He urged the Court to dismiss the application.

8. We have considered the application in light of the settled principles that guide this Court in determining applications under **rule 5(2)(b)** of this **Court's Rules** as summarized in **Stanley Kang'ethe Kinyanjui v Tony Ketter & 7 others [2013] eKLR**.

9. Having looked at the issues that the applicants intend to raise in their proposed appeal, we are satisfied that the intended appeal is arguable. An arguable appeal is not one that must succeed, it is one that raises at least a single issue that deserves the Court's consideration.

10. Turning to the nugatory aspect of the intended appeal, what may render the success of an appeal nugatory must be considered within the circumstances of each particular case, see **Reliance Bank Limited v Norlake Investments Ltd [2000] 1EA 227**.

11. Following dismissal of the applicants' application for stay of execution by the trial court, the Deputy Registrar executed the transfer documents on 18th May 2020, long before the applicants filed their application on 29th June 2020. However, the respondent did not disclose whether the transfer had been registered and a title deed issued in his favour.

12. Whereas this Court cannot stay that which has already been done, that is, execution of the transfer document, it would be in the interest of justice not to proceed any further with the process of registration of the transfer and issuance of the title deed over the suit land pending the appeal, if that has not yet been done.

13. In the circumstances, the order that commends itself to us is to order, which we hereby do, maintenance of the *status quo* as at the date of delivery of this ruling, pending hearing and determination of the intended appeal.

14. The costs of this application shall abide the outcome of the intended appeal.

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

M. K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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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