



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 164 OF 2020

BETWEEN

JOSEPH MURAYA GACHUHI.....APPLICANT

AND

JAMES MUKURIA NJOROGE (*Suing as the Administrator*

of the Estate of the late NJOROGE THIARU).....1ST RESPONDENT

JOTETH LIMITED.....2ND RESPONDENT

COMMISSIONER OF LANDS.....3RD RESPONDENT

(Being an application for an injunction and stay of execution against the Judgment of the Environment and Land Court of Kenya at Nairobi (K. Bor, J.) dated 5th May, 2020

in

ELC No. 462 of 2012)

RULING OF THE COURT

In a Judgment delivered by the Environment and Land Court (“ELC”) at Nairobi (K. Bor, J.) on 5th May, 2020 the court found in favour of the Plaintiff (**James Mukuria Njoroge** – suing as the Administrator of the Estate of the late **Njoroge Thiaru** – the 1st respondent here) in a dispute revolving around ownership of a parcel of land **L.R. No. 13330/592**.

In the Motion before us brought under **Rules 1 (2), 5(2) (b), 42 and 47** of the **Rules of this Court** we are asked in the main:

“2. THAT pending the hearing and determination of this application the Honourable Court be pleased to issue an order of injunction thereby restraining the 1st respondent either by himself, his servant and or his agent from evicting the applicant from the suit property Land Parcel No. 13330/592 and also issue an order of a stay of execution of the Judgment and Orders issued by the High Court ELC Division (By Hon. Lady Justice K. Bor) delivered at Nairobi in ELC No. 462 of 2012 on 5th day of May, 2020 thereby ordering the cancellation of the applicant’s title Land Parcel No. 13330/592.

3. THAT pending the hearing and determination of the intended Appeal the Honourable Court be pleased to issue an order of injunction thereby restraining the 1st respondent either by himself, his servant and or his agent from evicting the applicant from the suit property Land Parcel No. 13330/592 and also issue an order of a stay of execution of the Judgment and Orders issued by the High Court ELC Division (By Hon. Lady Justice K. Bor) delivered in Nairobi in ELC No. 462 of 2012 on 5th May, 2020 thereby ordering the cancellation of the applicant’s title Land Parcel No. 13330/592.”

In grounds in support of the application and in a supporting affidavit of the applicant (**Joseph Muraya Gachuhi**) it is said that the applicant is the registered owner of the said parcel of land which he says he purchased from the 2nd respondent (**Joreth Limited**) for consideration; that the 1st respondent had filed a suit alleging to have bought the same land from **Thome Farmers No. 5 Limited**; that the Judge in the ELC case had ordered that the applicant’s title be cancelled and an order of injunction was issued against the applicant and the 2nd

respondent restraining them from dealing with the land; the applicant had lodged a Notice of Appeal; that the applicant was apprehensive that the 1st respondent would evict him from the land where he was in possession.

In a replying affidavit by **Robertson Nderitu Mwihi**, the Operations Manager of the 2nd respondent, it is deposed that the 1st respondent had filed the said suit which he lost and appealed; that prior to the institution of the said suit the applicant here was in possession of the suit property having purchased it from the 2nd respondent; that he believed that the applicant had an arguable appeal as the sale of the property to the applicant had not been disowned by the 2nd respondent. In sum he supported the application.

There was no other replying affidavit.

We have perused the record of Motion, the submissions filed by the applicant and draft Memorandum of Appeal.

The principles that apply in applications of this nature are well settled. For an applicant to succeed in such an application 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, in addition, demonstrate that absent stay the appeal would be rendered nugatory – See the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR** where those principles are summarized.

Some of the grounds taken in the draft Memorandum of Appeal are to the effect that the trial Judge erred in law and fact in allowing the plaintiff's claim and thereby ordered cancellation of a title whereas, according to the applicant, there was no ground to do so as the plaintiff did not prove fraud on the part of the 1st defendant. It is also intended to be argued that the trial Judge erred in law and fact in finding one title to be superior to another title. We note that an arguable point on appeal is not one that must succeed and on that basis we find these to be arguable grounds in the intended appeal.

On the nugatory aspect it is stated that the applicant is in possession of the land where he has put up some developments including a perimeter wall. It is better in those circumstances that the status obtaining when the suit was filed be preserved pending hearing and determination of the appeal. The Motion succeeds and is allowed. Costs of the Motion will be in the appeal.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

.....

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