



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 175 OF 2019

BETWEEN

KENYA POWER & LIGHTING CO. LTD.....APPLICANT

AND

KIGAITA NGARE UNDUTHU & 36 OTHERS.....RESPONDENTS

(An application under Rule 5(2)(b) of the Court of Appeal Rules 2010 for injunction of the ruling and orders pending the filing, hearing and determination of the intended appeal of the Environment and Land Court of Kenya at Nyahururu (Oundo, J.) dated 15th October, 2019

in

E&LC No. 21 of 2019)

RULING OF THE COURT

A dispute over the use of the respondents' land by the applicant was resolved by the magistrate's court in Nyahururu C.M.C.C. Suit No. 256 of 2006 where the court awarded to each of the respondents a sum of Ksh 300,000. The applicant's application before the Chief Magistrate for stay of execution was rejected.

Intending to appeal that decision to the Environment and Land Court, the applicant sought, in the meantime, an order of stay in that court. The learned Judge (Oundo, J.), before whom the application was placed, found no merit in it and dismissed it.

Again, dissatisfied, the applicant lodged a notice of appeal evincing an intention to appeal to this Court.

In the meantime, however, it has taken out an amended notice of motion for injunction under **Rule 5(2)(b)** arguing, in support of the two principles that have to be satisfied under the rule, that the amount in excess of Ksh 14,029,157 that it is required to pay the respondents is colossal, and if paid over to the respondents, would most likely not be recoverable from them in case the appeal was to succeed. It was further submitted that the learned Judge failed to properly apply the law and judicially exercise her discretion when she dismissed the applicant's application for stay.

We bear in mind that what has aggrieved the applicant is an interlocutory order made by the court below in its appellate jurisdiction when it refused to stay the orders of the trial court. The main appeal to that court is yet to be heard. For this reason, we shall be circumspect in determining this application and avoid any definitive determinations of factual or legal points.

The only question that falls to us to answer is whether the twin principles alluded to above have been met by the applicant. We must emphasize that it is rare for this Court to find, at this stage, that an appeal or an intended appeal is not arguable.

This application, however, presents one of such rare occasions. We are of the considered opinion that, under **Order 42 Rule 6 and 7** of the Civil Procedure Rules, the learned Judge was being invited to exercise judicial discretion to grant or refuse to grant an order of stay of execution of the decree from the judgment of the trial court.

In determining the application the learned Judge, in our view correctly set out the three conditions to be considered before an order of stay pending appeal under **Order 42 Rule (6) (2)** can granted, namely, the applicant had the onus to demonstrate that substantial loss may result to it in the absence of an order of stay; that it has brought the application for stay without undue delay; and that it has given such security as the court may order for the due performance of such decree or order.

For each condition, the learned Judge cited authority in support thereof. For instance, she relied on the following well-known decisions; **Mukuma vs. Abuoga** (1988) KLR 645, **Kenya Shell Limited vs. Kibiru** [1986] KLR 410, to arrive at the decision intended to be challenged in the appeal.

We reiterate that we do not, respectfully, think that the appeal will be arguable.

On the second limb, we have taken into consideration the amount that is due to each of the respondents, and the fact that the applicant continues to use their parcels of land even without compensation, and with that in mind, we have concluded that the applicant's appeal will not be nugatory in the absence of an order of injunction.

The applicant, having failed to meet the twin principles, this application must fail. We, accordingly, dismiss it with costs.

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

W. OUKO, (P)

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCI Arb)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR