IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 48 OF 2020

BETWEEN

KIMUTAI LELEI..APPLICANT

AND

HOSEA BITTOK....................................RESPONDENT

(An application for stay of execution and an injunction against

the rulings of the Environment and Land Court (Odeny, J.) dated

***25th February, 2020 & 10th December, 2019* in E.L.C No. 414 of 2012)**

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RULING OF THE COURT

Background

1. **Kimutai Lelei** (the applicant) is calling upon us to invoke our original and discretionary jurisdiction under ***Rule 5(2)(b)*** of the ***Court of Appeal Rules*** (the Rules) and issue the following orders:

> ***i. Stay of execution of the orders of eviction made on 25th February, 2020 in Eldoret E.L.C No. 414 of 2012 pending the hearing and determination of the intended appeal.***
>
> ***ii. An injunction restraining the respondent whether by himself, his servants and/or agents from evicting the applicant or alienating or harassing him in the occupation of PIONEER/NGERIA BLOCK 1 (EATEC)/113 pending the hearing and determination of the intended appeal against the decision made on 10th December, 2019 in Eldoret E.L.C No. 414 of 201, dismissing the application seeking to set aside the ex-parte judgment.***

The application is premised on the grounds that firstly, it has been brought without undue delay; secondly, the intended appeals are arguable and; thirdly, unless the orders sought are granted the intended appeals would be rendered nugatory.

2. The question of proprietorship of **PIONEER/NGERIA BLOCK 1 (EATEC)/113** (suit property) is what pitted the parties herein against each other. On the part of the applicant, being a member of Kapsaret Bondeni Self Help Group, he was allocated the suit property after paying the requisite fees in the year 2000. He immediately took possession, moved his family therein and has since made extensive developments thereon. In or about the year 2006, **Hosea Bittok** (the respondent) started laying claim to the suit property which provoked the applicant to conduct a search. It was then that he learnt that the respondent in collusion with the management of the self-help group, had been fraudulently registered as the proprietor of the suit property. To make matters worse, on 19th March, 2008 the respondent unlawfully trespassed onto the suit property and erected a fence thereon.

3. It is those set of circumstances that caused the applicant to file suit in the Environment and Land Court (ELC) being **E.L.C No. 414 OF 2012** against the respondent. He prayed for *inter alia*, declarations that he was the lawful proprietor of the suit property and that the registration of the suit property in favour of the respondent was unlawful; an order directing the Land Registrar, Uasin Gishu District, to delete the respondent's name from the register and substitute it with his name; and a permanent injunction restraining the respondent from trespassing, taking possession or otherwise interfering with his quiet possession of the suit property.

4. Subsequently, the respondent entered appearance and by a further amended defence and counter claim, denied the applicant's allegations. His account was that the suit property was allocated to him as opposed to the applicant; that he was the absolute registered owner of the suit property; and that it was the applicant who trespassed onto the suit property on 22nd March, 2008 and took down the fence he had erected. As per the counterclaim, the applicant is unlawfully in occupation of the suit property, and the respondent seeks amongst other orders; dismissal of the applicant's suit; declarations that the respondent is the true and absolute owner of the suit property and that the continued occupation of the suit property by the applicant is unlawful; an injunction restraining the applicant from encroaching on the suit property; and an order for vacant possession.

5. The suit came up for hearing on 21st July, 2018 but was adjourned at the instance of the applicant who was ill. Ultimately, the suit came up for hearing again on 28th January, 2019 and was heard in the absence of the applicant. Judgment therein was delivered in favour of the respondent on 31st July, 2019.

6. According to the applicant, save for the adjournments which occurred on 21st July, 2018 and 29th October, 2018 he was never appraised on the status of the suit by his erstwhile advocates, **Messrs Mandere Nyandoro & Company Advocates**. It was upon instructing **Messrs Wabomba Masinde & Associates Advocates** on 23rd September, 2019 that he discovered that the suit had proceeded for hearing *ex-parte* and judgment delivered against him. He instructed his advocates to file an application to set aside the *ex-parte* judgment which they did. The said application was heard and dismissed by the ELC (Odeny J) by a ruling dated 10th December, 2019. .

7. Subsequently, the respondent filed an application on 11th December, 2019 seeking for the applicant's eviction with the assistance of the police. Aggrieved with the ruling dated 10th December, 2019 the applicant lodged a notice of appeal against the same on 20th December, 2019 and sought certified copies of proceedings.

8. Meanwhile, the application for eviction was heard by the ELC on 22nd January, 2020 and a ruling allowing the eviction was made on 25th January, 2020. Once again, the applicant was aggrieved by the said ruling and lodged a notice of appeal against the same. It is these two intended appeals against the rulings dated 10th December, 2019 and 25th February, 2020 that the applicant claims are arguable.

9. With respect to the ruling dated 10th December, 2019 the applicant deposed that the learned Judge erred in failing to find that the reason adduced for non-attendance by the applicant and/or his erstwhile advocate was excusable. His erstwhile advocate swore on oath that by the time they received the hearing notice for the hearing date scheduled for the 28th January, 2019, which was served via registered post, the said hearing had long passed. Moreover, the learned Judge erred by failing to appreciate that the lapse, if any, lay with the applicant's erstwhile advocates whose mistakes should not have been visited upon the applicant.

10. The applicant questions the validity of the *ex-parte* judgment since he believes that firstly, it was based on a further amended defence and counter claim which was filed after the expiry of the timeframe granted by the court contrary to ***Order 8 Rule 6*** of the ***Civil Procedure Rules***. Secondly, that the advocates who appeared for the respondent during the hearing were not properly on record. The applicant also believes that the learned Judge failed to do justice and set aside the *ex-parte* judgment to allow him an opportunity to be heard considering that he had been in possession of the suit property for over 20 years.

11. As for the ruling dated 25th February, 2020, the applicant deposed that the learned Judge was wrong in handling the same despite the fact that an application for execution should be determined in the first instance by the Registrar of the Court as prescribed under ***Order 49 Rule 7(1)(x)*** of the ***Civil Procedure Rules***. Further, that the learned Judge failed to appreciate that the execution proceedings were premature for the reason that the party and party costs were yet to be taxed.

12. In opposing the application, the respondent deposed that the same was incurably defective and an abuse of the court process. Elaborating further, the respondent deposed that the applicant had filed the suit way back in the year 2008 and had not taken any steps to prosecute it. After delivery of the *ex-parte* judgment on 30th July, 2019, the applicant was granted 30 days stay of execution. The application to set aside the said judgment was made on 19th September, 2019, two months after the delivery of the judgment. In his opinion, the same amounted to inordinate delay.

13. The respondent went on to depose that Messrs Kamau Lagat & Company Advocates, who represented him at the hearing, were properly on record. At no point did the applicant object to the said representation before the suit was set down for hearing thus the allegation was an afterthought. Likewise, the applicant never raised any objection with regard to the further amended defence and counter claim. In point of fact, after the said amendment the matter was set down for hearing on 29th October, 2018 with the consent of the parties. It was the respondent's contention that the orders sought by the applicant are not available for the sole reason that he had not appealed against the *ex-parte* judgment. Besides, the execution order issued by the High Court was part of the execution procedure of the *ex-parte* judgment. All in all, the applicant had not demonstrated that the intended appeals are arguable or would be rendered nugatory. Last but not least, the respondent deposed that as the successful litigant he ought to enjoy the fruits of the judgment.

Submissions by Counsel

14. The application was disposed of by way of written submissions filed on behalf of the parties. The applicant submitted that his intended appeals raise arguable matters which can be discerned from the memoranda of appeals annexed to the application. He argued that the matters ranged from the question of the jurisdiction of a Judge of the ELC exercising what he termed as 'original powers' in an application for execution as opposed to the Registrar of the court; entertaining an application for execution before the ascertainment of costs; and the right to be heard. To buttress his line of argument, the applicant relied on this Court's decision in ***Stanley Kangéthe Kinyanjui vs. Tony Keter & 5 Others*** **[2013] eKLR**.

15. He went on to state that in the event that the orders sought were not granted, the intended appeals would be rendered nugatory. Expounding further, he submitted that he was not only an innocent purchaser for value but had also been in occupation of the suit property for over 20 years and made extensive developments thereon. The applicant is apprehensive that once he is evicted the respondent is likely to sell the suit property or encumber it by way of a charge thus vesting interest to third parties which would in turn defeat his interest thereon.

He also cited this Court's decision in ***Moses Kibeigo Yator vs. Eco-Bank Kenya Limited & 2 Others*- Civil Application No. 2 of 2017 (unreported)** to urge us to grant the orders sought.

16. The respondent opposed the application and submitted that the intended appeals are not arguable. He contended that the applicant who was aggrieved with the *ex-parte* judgment dated 31st July, 2019 should have filed an appeal against the decision as opposed to seeking the review and/or setting aside of the same. In that regard, he relied on the case of ***Nyamogo & Nyamogo Advocates vs. Kogo*** **[2001] 1 E.A 173**. The respondent argued that the applicant was simply trying to make out a new case on the basis of the application for setting aside the *ex-parte* judgment. Nonetheless, the respondent contended that the High Court correctly exercised its discretion by declining to set aside the judgment which was regularly entered.

17. The respondent posited that there was nothing to be rendered nugatory since the applicant had failed to demonstrate that the intended appeals were arguable. As far as the respondent was concerned, the applicant's continued possession of the suit property, which is indicative of bad faith, amounted to contempt of court orders. He submitted that based on the principle that litigation must come to an end coupled with his entitlement to enjoy the fruits of the judgment, this Court should decline to grant the orders sought.

Determination

18. Having taken into consideration the rival submissions on behalf of the parties, the authorities cited and the law, we are conscious that our discretionary power under ***Rule 5(2)(b)*** of the ***Court of Appeal Rules*** albeit being unfettered ought to be exercised within prescribed parameters. For us to exercise our discretion thereunder, we have to be satisfied firstly, that the applicant has demonstrated that the intended appeals are arguable; and secondly, that if the orders sought are not granted, the intended appeals will be rendered nugatory, in the event that they are successful. In addition, the applicant is obliged to satisfy both of those principles and it is not enough to satisfy only one of them. See this Court's decision in ***Patel vs. Transworld Safaris Ltd*. [2004] eKLR** and ***Githinji vs. Amrit & Another*** **[2004] eKLR**.

19. Taking caution not to make determinations that would otherwise prejudice the hearing of the intended appeals, we find that whether or not the application for execution should have been heard by the learned Judge in the first instance as opposed to the Registrar; whether or not the respondent's advocates were properly on record at the hearing of the suit; whether or not the further amended defence and counter claim was properly before the ELC and could be the basis of the *ex-parte* judgment are arguable issues that warrant the consideration of this Court.

20. On the nugatory aspect, the applicant in his supporting affidavit at paragraph 29 deponed that he has been in occupation of the suit property for over 20 years and has carried out developments thereon. Further, the applicant's counsel, **Mr. Raphael Wambua Kigamwa** depones in the certificate of urgency that the court **(ELC at Eldoret E & L Case No. 414 of 2012)** issued eviction orders on 25th February, 2020. The applicant is therefore exposed to imminent danger of eviction from the suit property which will render the intended appeals nugatory.

21. From the circumstances of the application before us, we are satisfied that the applicant has satisfied the twin requirements for granting of orders under **Rule 5(2)(b)** of the **Court of Appeal Rules,** we allow the application dated 6th March, 2020 and order as follows:

> a) **An Interim order of stay of execution of the orders of eviction made on the 25th February, 2020 in Eldoret ELC NO. 414 OF 2012 be and is hereby granted as prayed for in prayer (3) of the application pending the hearing and determination of the intended appeal to this Court;**
>
> b) **An interim order for injunction do issue against the respondent restraining them whether by themselves, their servants and or agents from evicting the applicant or alienating or harassing him in the occupancy of the land parcel known as Pioneer/Ngeria Block 1(EATEC)/113 as prayed for in prayer (5) of the application pending the hearing and determination of the intended appeal; and**
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> c) **Costs of the instant application to abide by the outcome of the intended appeal.**

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

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR