



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), GATEMBU & KANTAI, JJA)

CIVIL APPLICATION NO. 127 OF 2019

BETWEEN

SHABAN ODUKI WANYAMA.....APPLICANT

AND

MUMIAS SUGAR COMPANY LIMITED.....1ST RESPONDENT

IDD WAMBOKO WECHULI.....2ND RESPONDENT

(Being an application for stay of execution against the Judgment of the Environment and

Land Court at Kakamega (N.A. Matheka, J.) dated 9th May, 2019 in Kakamega ELC Case No.4 of 2012)

RULING OF THE COURT

By a judgment dated 9th May, 2019, the Environment and Land Court (*Matheka, J.*), declared that property known as **L.R No. BUNYALA/NAMBACHA/725** belonged to the 2nd respondent's father who is deceased. The effect of that determination was that the applicant had no color of right to remain on the suit land, measuring 2.5 acres on account that it had been purchased by the 2nd respondent's deceased father. As a result, the Judge ordered the applicant and his family to vacate it within six (6) months of the date of that judgment.

Naturally, this aggrieved the applicant who has challenged it on appeal to this Court. In the meantime, he has filed this application pursuant to **Rule 5(2)(b)** of this Court's Rules seeking that we stay the execution of the decree of the impugned judgment, contending that he has an arguable appeal, demonstrated in his memorandum of appeal, according to which the learned Judge erred for: finding that the 2nd respondent's deceased father purchased 2.5 acres from the applicant's father in the absence of any evidence of sale, written or even oral, but merely on account of an application to the Land Control Board for consent to transfer, when that application itself was not signed by the applicant's deceased father; disregarding critical evidence demonstrating that his deceased father, during his lifetime, had denied selling the 2.5 acres to the 2nd respondent's deceased father and had by a letter dated 27th November, 1983 demanded that the 2nd respondent's deceased father vacates the suit property and; applying provisions of **section 26** of the Land Registration Act, 2012 retrospectively, yet the dispute dates back to the period between 1971 and 1983, way before the enactment of the Act; and that the application of the Act was contrary to the provisions of Part XII of the said Act.

In conclusion, the appellant is apprehensive that unless his prayer for stay of execution is granted, he and his family shall forcefully be evicted from the suit property; and further that, should he be evicted, the appeal will serve no purpose as it will have been rendered nugatory. In addition, his investment on the property in form of permanent structures will be wasted through demolition and will be incapable of restoration if the appeal succeeds.

According to the 2nd respondent, the application has been brought to frustrate and delay him from enjoying the fruits of the judgment; that the appeal has no chance of success as his late father indeed purchased the suit land, which his family has been utilizing since 1971; that the applicant is a litigious person who keeps filing and losing cases in the courts; and that the application has not satisfied the usual two principles.

By **Rule 5(2)(b)** of this Court's Rules, the application will succeed only if the Court is convinced that the appeal the applicant intends to proffer or has lodged raises arguable and not frivolous point or points and again only if the appeal will serve no purpose if it was to succeed after the event which is intended to be prevented from happening will have occurred. See **William Lerikan Konchellah & another vs.**

We have set out above some of the grounds contained in the applicant's Memorandum of Appeal, and believe they are not idle. For instance, the question whether there was evidence of sale of 2.5 acres from **L.R No. BUNYALA/NAMBACHA/213** by the applicant's deceased father to the 2nd respondent's deceased father; whether there was consent of the Land Control Board; whether the provisions of the Land Registration Act, 2012 were applied retrospectively, are matters that ought to be argued and resolved in the intended appeal.

The effect of the impugned judgment is to give the 2nd respondent the go ahead to evict the applicant and his entire family who are in possession of the suit property. The eviction is likely to be accompanied by the demolition of the applicant's family's permanent structures. Should this happen, the intended appeal will be rendered otiose.

In the end, the applicant, having satisfied the twin principles, we grant the prayers of stay of execution and order that, pending the hearing and determination of the appeal, the applicant, his family and agents shall not be evicted from the suit property.

Costs shall be in the appeal.

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

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCI Arb)

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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