



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 39 OF 2020

BETWEEN

SEVENTH DAY ADVENTIST CHURCH E.A LTD

[NAIROBI EAST S.D.A. CHURCH].....APPLICANT

AND

STRATHMORE EDUCATIONAL TRUST

REGISTERED TRUSTEES KENYA.....1ST RESPONDENT

RAILWAYS CORPORATION.....2ND RESPONDENT

STELLA MBAI.....3RD RESPONDENT

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

Decree of the Environment and Land Court at Nairobi (Okongo. J.)

delivered on 30th September, 2019 in Nairobi ELC Case No. 303 of 2011)

RULING OF THE COURT

1. In its Application dated 14th February 2020, the applicant Seventh-Day Adventist Church East Africa Limited, seeks an order under Rule 5(2)(b) of the Court of Appeal Rules to stay execution of the judgment and decree of the Environment and Land Court (ELC) in Case Number 303 of 2011 delivered on 30th September 2019. In that judgment the ELC dismissed the applicant's suit against the respondents, allowed the 1st and 3rd respondents' counterclaims and ordered eviction of the applicant from parcels of land owned by those respondents.
2. The background in brief is that the applicant and the 2nd respondent entered into an agreement under which the 2nd respondent agreed to sell to the applicant a piece of land, then un-surveyed, measuring one acre and referred to as GL2/12A in a sub-division scheme. The applicant built a church and other facilities thereon.
3. The applicant expressed an interest in purchasing an additional 3 acres of land adjacent to the parcel referred to above. In the meantime, the applicant contended, it was authorized by the 2nd respondent's estate manager to use the additional 3 acres. The applicant asserted that by its conduct and acquiescence, the 2nd respondent induced it to believe that it had acquired the additional 3 acres. However, the additional 3 acres of land claimed by the applicant was part of land sold by the 2nd respondent to the 1st and 3rd respondents.
4. In its suit before the ELC, the applicant sought an order to compel the 2nd respondent to transfer to it all of the said property including the additional 3 acres on the basis that it had purchased it. In the same suit, the applicant sought a permanent injunction to restrain the 1st and 3rd respondents from trespassing on the said property.

5. The ELC found as fact that the applicant had purchased from the 2nd respondent only one acre, namely parcel registered as LR No. 209/19706 and that it “did not place any convincing evidence before the court showing that it received less than the 1 acre piece of land which it purchased from the 2nd [respondent] after the survey” and that to the extent that the purported agreement for the purchase of an additional 3 acres was based on a purported oral contract, the same “was contrary to the provisions of section 3(3) of the Law of Contract Act Chapter 23 of Kenya and as such unenforceable.” The Judge stated:

“In my view, even if the plaintiff was authorized to occupy additional land measuring 3 acres pending consideration of its application to be allotted the land, that without more did not entitle him (sic) to claim the land in respect of which it had no agreement with the 2nd defendant in (sic) for which it had not made any payment.”

6. The result is that the ELC dismissed the applicant’s suit and allowed the 1st and 3rd respondents counterclaims for the eviction of the applicant from their properties. The applicant was also condemned to pay special and general damages for destruction of property and trespass respectively. The applicant intends to challenge that judgment on appeal to this Court and has, In the meantime lodged a notice of appeal on 1st October 2019.

7. Pending determination of its appeal, the applicant seeks an order to stay execution. In support of the application, Phillip Meli, an elder of the applicant deposes that the applicant, by application dated 9th October 2019, applied to the ELC for an order of stay of execution of the judgment which was conditionally granted in a ruling given by that court on 5th December 2019 by allowing it to continue using the contested property as parking on condition that it deposited into court Kshs.1,000,000.00. Despite that ruling, the applicant asserts, “the 1st respondent fenced off the entire area that was being used for the parking by the applicant”.

8. Whereas this Court has original jurisdiction under Rule (5)(2)(b) of the Court of Appeal Rules to entertain the application upon filing of a notice of appeal, we do not think, in the present circumstances where the applicant has already obtained orders staying execution of the judgment, this Court should again grant other orders of the same kind. If, as the applicant states, the stay of execution orders granted by the ELC have been violated, the solution is certainly not to seek fresh orders from this Court.

9. Furthermore, to succeed in the present application, the applicant is required to satisfy this Court that the intended appeal is arguable and that unless the orders sought are granted, the appeal if successful, will be rendered nugatory. As stated by the Court in **Ishmael Kagunyi Thande vs. Housing Finance Company Limited Civil Application No. 156 of 2006 (UR)**:

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

10. Although an arguable appeal is not one that will necessarily succeed, the applicant has not, at this stage, demonstrated, as required, that the intended appeal is arguable considering that the applicant appears to concede that there was no written agreement for the alleged purchase of the additional 3 acres in respect of which title is held by the 2nd respondent. It has also not been demonstrated how the intended appeal will be rendered nugatory if we decline the application.

11. All in all, the application is devoid of merit and is accordingly dismissed with costs to the respondents.

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

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR