



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & SICHALE, J.J.A)

ELDORET CIVIL APPEAL (APPLICATION) NO. 70 OF 2020

BETWEEN

SULTAN HASHAM LALJI.....APPELLANT

AND

SIMBA HILLS FARM LIMITED.....1ST RESPONDENT

ABDULAZIZ KANJI.....2ND RESPONDENT

MADATALLY SIDI.....3RD RESPONDENT

JAMES KIMOSBEI TUWEI.....4TH RESPONDENT

ISSAC CHEPSIROR.....5TH RESPONDENT

SYLVESTER BIWOTT.....6TH RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya

at Eldoret (Odeny, J.) dated 4th March, 2020

In

ELC No. 71 of 2017)

RULING OF THE COURT

By the motion dated 25th June 2020 brought under **Rule 5(2)(b)** of our rules, the applicant seeks, principally, an order of stay of execution of the judgment of the Environment and Land Court (Odeny, J.) issued on 4th March 2020, pending the hearing and determination of an appeal.

The motion is supported by the affidavit of **Sultan Hasham Lalji** sworn on 25th June 2020, and is predicated on grounds on its face to the effect that the applicant does have an arguable appeal and, unless this Court grants the stay sought, the said appeal will be rendered nugatory. In particular, he is the registered proprietor of the piece of land known as **L.R No. 8304**, Eldoret North in Moiben measuring **1680 acres**, which the learned Judge ordered transferred to the 1st respondent, an order he is aggrieved by as being erroneously made. Such transfer if effected would see the suit property transferred to third parties, charged or otherwise disposed of to his great prejudice thereby rendering the appeal nugatory.

In answer to the application the first respondent has contended that the intended appeal is not arguable and that the said judgment has been fully executed in that the transfer has been effected and title issued to it, it in a possession as a *bona fide* purchaser, and damages would be adequate compensation.

We have considered the rival contentions as well as the many authorities cited by respective counsel for the parties. It is trite that an applicant for relief under **Rule 5(2)(b)** needs to demonstrate that he has an arguable appeal. This merely means an appeal that raises at least one *bona fide* issue worthy of the Court's consideration on appeal or, put another way, the appeal should not be frivolous. It does not, however, mean

an appeal that must necessarily succeed. The second matter which the applicant must show is that the appeal would be rendered nugatory without the Court's intervention in the interim. An appeal would be rendered nugatory if damage of a great/or irreversible character, prejudicial or probably destructive of the substratum of the appeal, would have occurred in the intervening period. A full discussion of these principles and the notable jurisprudence on them is found in this Court's decision in **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 2 OTHERS [2013] eKLR.**

We are satisfied that the already filed appeal is arguable. We cannot dismiss all of the grounds contained in the memorandum of appeal as frivolous or bogus. There is in particular the issue whether the entire 1680 acres should have been amenable to transfer to the 1st respondent, and the question of whether the applicant's counterclaim should have been dismissed in its entirety.

Regarding the nugatory aspect, it is not in dispute that prior to the judgment challenged on appeal, the applicant was the registered proprietor of the suit property. The subject matter is land and it is contended that unless orders of stay to preserve the same are granted, it could be transferred to third parties and therefore taken beyond the reach of the applicant.

We are persuaded that taking all the circumstances of this case into consideration, it would be in the interests of justice that orders do issue to preserve the subject matter and that the *status quo ante* be preserved pending the hearing and determination of the appeal. The application is accordingly allowed.

We direct that the appeal be processed and fast-tracked for hearing on priority.

The costs shall abide the outcome of the appeal.

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

D.K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR