



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), OKWENGU & SICHALE JJ.A)**

**CIVIL APPLICATION NO. 172 OF 2019 (UR 159/2019)**

**BETWEEN**

**AFRISON EXPORT IMPORT LIMITED.....1<sup>st</sup> APPLICANT**

**HUELANDS LIMITED.....2<sup>nd</sup> APPLICANT**

**AND**

**DR. PATRICK MARAI MUNGAI.....1<sup>ST</sup> RESPONDENT**

**BISHOP JOHN ITHONDEKE.....2<sup>ND</sup> RESPONDENT**

**REV. MARK MUGEKENYI.....3<sup>RD</sup> RESPONDENT**

**DR SHEM NZIOKI (suing as officials of**

**GOSPEL EVANGELISTIC CHURCH OF KENYA).....4<sup>TH</sup> RESPONDENT**

***(An application for stay of execution pending hearing and determination of appeal from the***

***judgment of the Environment and Land Court at Nairobi (Mutungi, J)***

***delivered on 17th May 2019 In ELC case No. 228 of 2012)***

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**RULING OF THE COURT**

Following an originating summons filed in the Environment & Land Court by officials of the Gospel Evangelist Church of Kenya (the respondents) against **Afrison Export Import Limited** and **Huelands Limited** (the applicants), the learned Judge (**Mutungi, J**) delivered judgment dated 17th May, 2019 in favour of the respondents and issued orders as follows:

(i) A declaration that the plaintiff is entitled to be registered forthwith as owners of 1.8 acres out of LR No. 7879/4 which the plaintiff has been in adverse possession since 1993 to date for more than 12 (twelve) years immediately preceding the presentation of this suit and, on which they have lived openly and continuously as of right and in adverse possession and without any interruption from the Defendants or its predecessors in the above title and that the Defendants' title to parcel

LR No. 7879/4 has been extinguished in favour of the plaintiff under Section 37 and 38 of the Limitation of Actions Act laws of Kenya.

(ii) That LR No. 7879/4 be subdivided and 1.8 acres be excised from LR No. 7879/4 and be vested/transferred in the plaintiff.

(iii) An order for permanent injunction be issued restraining the Defendants, their employees, servants, agents, or any person claiming through him from evicting the plaintiff from the parcel of land measuring 1.8 acres within LR No. 7879/4 (suit land) or from fencing the suit land or interfering with the plaintiff possession of the same or alienating, transferring, disposing

**and/or dealing with the suit land any manner whatsoever.**

[2] The applicants who are dissatisfied with the ruling of 17th May 2019, have lodged a notice of appeal, and have moved the Court under a certificate of urgency for orders under Rule 5(2)(b) of the Court Rules to stay execution of the judgment and all consequential orders pending the hearing and determination of their intended appeal. The motion was supported by two affidavits, one sworn by Duncan Anzala, the applicants' advocate, and another sworn by Francis Mburu Mungai a director of the applicants. The grounds upon which the motion is anchored is that the applicants have a good appeal with high chances of success, and that if the orders of stay are not granted, there is a real likelihood that the respondents will use the decree to have the disputed land subdivided, and transferred to them, and the applicants appeal would thereby be rendered nugatory.

[3] In support of the motion the applicants filed written submissions that were duly highlighted by **Mr. Kingara**, learned Counsel who argued the appeal on their behalf. Relying on **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011**; and **Jim Wachira Kabiru vs Susan Wangui Karanja & 2 others [2015] eKLR**, the applicants urged the Court to issue the orders of stay of execution in order to preserve the subject matter of the appeal. In regard to the arguability of the appeal, the applicants identified several arguable issues such as the legal standing of Gospel Evangelistic Church of Kenya, that is whether it is a legally registered organization in regard to which a suit could be lodged on its behalf; whether the learned judge determined the suit on unpleaded facts; and whether the respondent's claim to adverse possession could be sustained given that the respondents had recognized the applicant's title and they did not demonstrate that they dispossessed the applicants of the property.

[4] The respondent opposed the applicants' motion through a replying affidavit sworn by **Dr Patrick Mungai** in which it was maintained that the applicants' intended appeal does not raise any arguable issues, and that in any case the decree had already been registered and the land vested in 1st respondent and therefore there was nothing to stay. The respondents also filed written submissions which were duly highlighted by **Mr Gichigi** who represented them in this matter. They argue that none of the grounds raised by the applicants have any substance, and that the appeal was only intended to prevent the respondents from enjoying the fruits of their judgment. The Court was urged to dismiss the motion as the applicants had not satisfied the requirement for granting an order of stay of execution.

[5] We have considered the motion before us. We note that the Official Receiver and Provisional Liquidator of Continental Credit

Finance Limited, who was joined as an interested party in **ELC case No. 228 of 2012**, was not joined as a party in this application. Nevertheless, learned Counsel **Mr. Njewa**, who purported to act for them appeared during the hearing of the application as a party affected. Although no response had been filed by the affected party, Counsel submitted that they were supporting the application to the extent that it is admitted that Continental Credit Finance has a mortgage over the suit property.

[6] As this application is brought under **Rule 5(2)(b)** of the Court of Appeal Rules, the applicant must satisfy the two requirements that have been laid down by this Court. (See **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd [2002]1EA 227**; **Ishmael Kagunyi Thande vs. Housing Finance Kenya Ltd., Civil Appl No. Nai 157 of 2006 (Unreported)**; **Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31**). The two requirements are first, that the applicants have an appeal which is arguable and not frivolous; and secondly, that the appeal would be rendered nugatory if an order of stay of execution is not issued. In order to succeed the applicants, have to satisfy both requirements (see **Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001**).

[7] Regarding the issue whether the intended appeal is arguable and not frivolous, the applicants have identified three arguable issues that they intend to canvass in the appeal. At this stage it is premature to consider whether the grounds of appeal anchored on these issues will succeed. It suffices that the issues raised are arguable and not frivolous. Indeed, only one arguable issue would be sufficient to justify that the appeal is arguable.

[8] On the question whether the intended appeal would be rendered nugatory unless the order of stay of execution is granted, it is evident that the subject of the intended appeal is ownership of 1.8 acres out of LR No. 7879/4. The decree includes an order for subdivision and vesting of the land in the respondents. The applicants' apprehension that the execution of the decree may render their intended appeal nugatory, is therefore not unfounded as there would be nothing to prevent the respondents from dealing with the property in a manner that may be adverse to the applicants' intended appeal.

[9] In his replying affidavit **Dr Patrick Marai Mungai** deponed at paragraph 15 that there was nothing to stay as the decree has already been registered and the property vested in the respondents, however he did not produce anything to confirm this, and therefore we take this averment with a pinch of salt.

[10] The upshot of the above is that the applicants have satisfied the requirements for grant of orders under Rule 5(2)(b) of the Court Rules. Accordingly, we grant the motion and order:

(i) that there shall be an order of stay of execution of the entire judgment delivered by Mutungi, J on 17th May, 2019 pending the hearing and determination of the intended appeal

(ii) The appeal shall be filed and served within 90 days from the date hereof.

(iii) The costs of this application shall be in the appeal.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of November, 2019. W. OUKO, P**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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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*

**DEPUTY REGISTRAR**