IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, OKWENGU & KANTAI, JJ.A.)

CIVIL APPLICATION NO. 98 OF 2019

BETWEEN

JOEL KIPRONO MUTAI ……..…… APPLICANT

AND

THE COUNTY GOVERNMENT OF KERICHO …...……..….. 1ST RESPONDENT

THE CHIEF OFFICER ROADS

COUNTY GOVERNMENT OF KERICHO ……..…….. 2ND RESPONDENT

(An application for stay of the ruling and order of the High Court of Kenya at Kericho (Onyango, J.) dated 22nd May, 2019

in

E.L.C. No. 1 of 2019)

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RULING OF THE COURT

In the petition filed at the Environment and Land Court, Kericho, it is alleged that there has been violation of various Articles of the Constitution of Kenya, 2010. The applicant, **Kiprono Mutai**, sets out various reliefs sought; the court is asked to declare that the actions of the respondents, **The County Government of Kericho (1st respondent)** and **The Chief Officer, Roads, County Government of Kericho (2nd respondent),** on the applicant's land known as **Kericho/Chemoiben/186** contravened **Articles 2, 3, 10, 28, 29, 31, 40 , 42, 47(2), 60(1) (b) and 69** of the said **Constitution**; that the applicant should be compensated for loss of 38 trees aged 41 years at Kshs.3,800,000; cost of landscaping at Kshs.868,200; loss of 135 tea bushes at Kshs.35,952; cost of re-fencing at Kshs.1,341,846; cost of 110 iron sheets at Kshs.100,000 and cost of engaging 3 security officers for 3 months at Khs.10,000 per month. Contemporaneous with the petition was a Notice of Motion where various orders of injunction were sought. The Motion which was opposed by the respondents was heard by **Onyango, J,** who in a ruling delivered on 22nd May, 2019 made the following determination:

> ***"Having said that, the opening of the village road is meant for the benefit of the public including the applicant and he has expressly stated at paragraph 24 of his supporting affidavit that he is not opposed to the opening of the said road. His main concern is the manner in which it has been carried out. It has also been stated by the County Surveyor that a notice was issued to all the land owners who border the road but the Applicant failed to heed the notice by cutting his trees and instead waited for the Respondent to commence their work. That being the case, the balance of convenience tilts in favour of the Respondents who should be allowed to complete the road for the benefit of the public. If any more trees need to be cut in order to open up the remaining portion of the road the Petitioner should be given 60 days' notice to remove them. I therefore decline to exercise my discretion in favour of the applicant and disallow the application."***

The petition has not been heard and we should thus only speak to those matters that will assist in determining the application before us.

The Motion on notice before us is brought under various provisions of law including **rule 5(2) (b)** of the Rules of this Court where we are asked in the main to order an injunction to stop the respondents from trespassing or causing destruction over the applicant's property Kericho/Chemoiben/186 **"….in the intended opening up of Kipkero-Menet-Chemosot road….".** We are also asked to stay execution of the ruling made on 22nd May, 2019 pending appeal. In grounds in support of the Motion it is said that the judge erred by leaving the applicant without a remedy for trespass and destruction of his property; that the judge erred in finding that the balance of convenience tilted

in favour of the respondents **"…. Yet prove (sic) of irreparable loss and prima facie case was established on the applicant's side…"** and that the judge erred in making final findings at interlocutory stage. It is also said that, absent stay, the intended appeal will be rendered nugatory; that damages could not compensate the applicant and that the respondents would not suffer prejudice if orders were granted by this Court. Those grounds and other matters are deponed in the applicant's affidavit sworn at Kericho on 25th June, 2019.

The County Surveyor of the 1st respondent, in a replying affidavit says that the Motion is defective; that the expansion of a public road would not amount to a trespass on the applicant's land as the expansion utilizes public land; that the land had been set aside for road expansion since 1945; that the applicant is a trespasser on public land; that the respondent had engaged the public in the relevant area including the applicant to sensitize on the need to expand the road, among other averments.

Mr. Gilbert Kemboi, learned counsel for the applicant, teamed up with **Mr. Cosmas Koech** in presenting the motion when it came up for hearing before us on 8th August, 2019. Counsel submitted that the respondents, in expanding or opening up the Kipkero-Menet –Chemosot road, had cut down the applicant's trees and intended to cut down another 18 trees; that although the applicant was not opposed to expansion of the road he was opposed to acts of trespass on his land; that the respondents' acts of trespass would affect the applicant's boarding school, Sunshine School, with over 400 students, whose welfare and best interests it was also the court's duty to protect.

Mr. Robert Lemayan, learned counsel for the respondents, in opposing the Motion submitted that the judge had ordered the respondents to give a notice to the applicant if there was need to bring down more trees – no notice had been issued. According to counsel, expansion of the road had commenced and school fence had been demolished; the applicant had quantified his losses and opening up the road was for the public interest.

The principles that govern applications for stay of execution pending appeal in this Court are now well known. For an applicant to succeed in such an application he must, firstly, demonstrate that there is an arguable appeal which is the same as saying that the appeal, or intended appeal, is not frivolous. Secondly the applicant must demonstrate that, absent stay, the appeal, or intended appeal, as the case may be would be rendered nugatory. These principles governing applications for stay pending appeal were well summarized by this Court in the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR** as follows:

> ***"i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court***
>
> ***ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***
>
> ***iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.***
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> ***iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.***
>
> ***v) An applicant must satisfy the court on both of the twin principles.***
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> ***vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.***
>
> ***vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.***
>
> ***viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.***
>
> ***ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***
>
> ***x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."***

We have perused the draft Memorandum of Appeal in the record of the Motion. It is said that the judge left the applicant without a remedy when his property was being destroyed; that the applicant had proved that he was suffering irreparable loss; that the judge erred in finding that balance of convenience titled in favour of the respondents and that the judge erred in making what the respondents consider final findings. These, to our mind, are not arguable points in the intended appeal. The applicant freely admitted before the judge that he was not opposed to expansion of a public road. In the petition before the Environment and Land Court the applicant has quantified his claim giving that court clear guidance on how to compensate him should he prove the losses he has set out in the petition.

It is alleged that the security of Sunshine School will be compromised by the respondents' actions. Firstly, the fence has already been brought down and its value quantified in the petition, and secondly, we did not see any complaint by the school at all regarding bringing down of the fence or whether that posed a security issue either on the school or the students. The applicant has therefore not demonstrated that absent a stay his intended appeal will be rendered nugatory.

The application has no merit and we dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 22nd day of November, 2019.

M.K. KOOME

…….…..……..

JUDGE OF APPEAL

HANNAH OKWENGU

…….…….

JUDGE OF APPEAL

S. ole KANTAI

……..……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR