



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, OKWENGU & KANTAL, J.J.A)

CIVIL APPLICATION NO. NYR. 52 OF 2019 UR 41/19

BETWEEN

NTHIGA MUNYARI.....APPLICANT

AND

NJERU MUNYARI.....1<sup>ST</sup> RESPONDENT

PETER NJUE ITURO.....2<sup>ND</sup> RESPONDENT

*(Suing as the administrators of the estate of Ituro Korugari) (Being an application*

*for stay of execution or enforcement of the Judgment and decree issued by the Environment & Land Court (ELC) at Embu (Angima, J.) dated 21<sup>st</sup> February, 2019 in ELC No. 33 of 2015)*

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RULING OF THE COURT

[1] On 21<sup>st</sup> February, 2019 Angima, J. sitting in Embu issued a judgment that seems to favour the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the following terms;

*“ a. It is hereby declared that the defendant is holding Title No Gatari/Kithimu/431 or any subdivisions thereof on his own behalf and in trust of his siblings.*

*b. That the Defendant shall cause a portion of 6 acres to be excised from the suit property and transferred to his younger brother, Njeru Munyari. The excision shall, so far as practicable, take into account the portion of land currently occupied and developed by Njeru Munyari.*

*c. That in default of the defendant’s compliance, the Deputy Registrar of the court shall sign and execute all forms, mutations, documents to facilitate the transfer of 6 acres out of the suit property to Njeru Munyari.*

*d. Each party shall bear his own costs.”*

[2] Aggrieved, **Nthiga Munyari (applicant)** filed a Notice of Appeal on the 26<sup>th</sup> February, 2019 followed by the instant notice of motion dated 24<sup>th</sup> April, 2019 that seeks an order of stay of execution or enforcement of the above judgment and decree pending the hearing and determination of the appeal. The motion is predicated on the grounds that the applicant was condemned unheard by the trial court when the matter proceeded *ex parte*; that the applicant was ordered to transfer a portion of 6 acres out of **Title No Gatari/Githimu/431** (suit land) and unless an order of stay is granted the appeal will be rendered nugatory.

[3] The above grounds are elaborated further by the matters deposed to in the supporting affidavit sworn by the applicant on 23<sup>rd</sup> April, 2019. The applicant essentially expounds on the grounds stated in the application and further states that he has an arguable appeal for reasons that the trial Judge proceeded to hear the respondents *ex parte* and orders that were highly prejudicial to him were made; that this was contrary to the cardinal rules of natural justice and that the Title to the suit land is likely to be cancelled before the intended appeal is heard and determined as the Deputy Registrar was ordered to execute all forms, mutations and documents to facilitate transfer of 6 acres to the respondents.

[4] The respondents did not file a replying affidavit thus **Mr. Karigu** learned counsel for the applicant urged us to consider the application as unopposed. On his part **Njeru Munyari** the 1<sup>st</sup> respondent opposed the application on the grounds that he has always been in occupation of the suit land which is family land; that it was his late father who filed the suit and when the father died the 1<sup>st</sup> respondent took over the suit and that as regards the 6 acres, the 1<sup>st</sup> respondent had already obtained the title which was issued pursuant to the decree of the court.

[5] It is trite that two principles must be satisfied by an applicant who applies for stay of execution under **Rule 5 (2) (b)** – firstly, the applicant must establish there is an arguable appeal which is to say that it is not frivolous, and secondly, that the appeal, or intended appeal if filed, would be rendered nugatory if stay of execution applied for was not granted. See **Ishmael Kagunyi Thande vs. Housing Finance Company Limited - Civil Application No. 156 of 2006 (ur)** where these principles were restated thus:

*“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.”*

[6] Is the appeal arguable? We throw caution that an arguable point may or may not succeed in the intended appeal. The thrust of the applicant’s arguments are that he was not given a hearing because during the hearing before the trial court, his counsel applied for an adjournment which was denied despite the fact that the applicant was not present in court. Unfortunately the applicant has not given us any reasons why he failed to attend court during the hearing. The scanty record of proceedings attached to this application shows that the applicant was represented by counsel by the name **Mr. Muraguri** on the 19<sup>th</sup> June, 2018 when the suit came up for hearing. However, the applicant did not attach the full proceedings showing the reasons made in support of the application and also the reasons why the Judge declined to grant the adjournment as sought. Given the above circumstances we are unable to tell whether the Judge declined to exercise his discretion judiciously.

[7] It is also apparent that counsel for the applicant was present during the hearing of the case and he fully participated in cross examining the witnesses for the respondents, yet he failed to file any submissions on behalf of the applicant as directed by the Judge. Moreover, the applicant also did not apply to set aside the proceedings or even appeal against the order declining to allow the adjournment. For the aforesaid reasons we are not convinced that the intended appeal is arguable.

[8] Moreover, we are not satisfied that the applicant has demonstrated that the intended appeal would be rendered nugatory unless the stay sought is granted. This is because both the applicant and the respondents are brothers, they have lived on the suit land all their lives; the suit land measures 17 acres and the 1<sup>st</sup> respondent stated in court during the hearing that he has obtained title to the six (6) acres.

[9] Accordingly, the applicant has failed to establish the twin principles that would warrant us to exercise our discretion in his favour. Therefore, we find that the application lacks merit and is hereby dismissed. Costs of this application shall abide the outcome of the intended appeal.

*Dated and delivered at Nyeri this 8<sup>th</sup> day of November, 2019.*

**M. K. KOOME**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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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.

**DEPUTY REGISTRAR**