



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), NAMBUYE & KOOME J.J.A.)

CIVIL APPLICATION NO. 89A OF 2019 BETWEEN

THE DIRECTOR, KENYA WILDLIFE SERVICES.....APPLICANT

AND

MIKULULO RANCHING COMPANY LIMITED.....1ST RESPONDENT

THE DISTRICT COMMISSIONER,

MAKUENI DISTRICT2ND RESPONDENT

THE HON. ATTORNEY GENERAL3RD RESPONDENT

COUNTY GOVERNMENT OF MAKUENI.....4TH RESPONDENT

(An application for stay of execution and injunction pending the lodging, hearing and determination of an intended appeal from the decision of the Machakos Environment and Land Court (O. Angote, J.) dated 22nd February, 2019

in

ELC Case No.475 of 1995)

RULING OF THE COURT

The dispute between the applicant and the 1st respondent specifically is over the occupation and use of land located in Mikululo area which the applicant insists is part of the Chyulu Hills National Park, while the 1st respondent states the same land is part of their settlement. The portion in question measures 17,362 Ha (the suit property).

It was the applicant's case that it holds Grant No. IR 84005 for L.R No. 24362 which is the entire area of the park for a term of 999 years from 1st February, 2000.

The 1st respondent, on the other hand, contended that the suit property was Government trust land initially under the mandate of the former Masaku County Council and that its occupation by its members was authorized by that Council; that its members have been in occupation of an area measuring 42,000 acres; that vide a Gazette Notice dated 2nd May, 1995 the applicant extended the park by 76.0 square kilometers which includes the 42,000 acres that the 1st respondent's members were in occupation of; that following this gazettement, the applicant started demolishing the 1st respondents' members' homes and burning their farm produce arguing that the area was part of the park.

Aggrieved by the aforesaid applicant's action, the 1st respondent moved the High Court for an order of permanent injunction to restrain the applicant, the 2nd, 3rd and 4th respondents from evicting its members from the suit property.

In determining the dispute, the Environment and Land Court at Machakos (Angote, J) revoked the applicant's Grant for L.R No. 24362 for land measuring 73,427 Ha which is part of the Chyulu Hills National Park and in its place, directed that a Grant be issued to the applicant as depicted in Boundary Plan No. 204/51 gazetted in Legal Notice No. 13 of 26th January, 1983. The Judge also granted a prayer for a permanent injunction restraining the applicant and the 2nd, 3rd and 4th respondents from evicting the 1st respondent and its members,

families, servants and/or agents from the suit property represented in Boundary Plans No. 204/71 and 204/76 measuring a total of 17,326 Ha. The execution of those orders were stayed for a period of 30 days.

Aggrieved by the decision, the applicant has now lodged this application for orders that there be a stay of execution of the judgment and decree and; that pending the hearing and determination of the intended appeal, there be an injunction restraining the 1st respondent and its members as well as their families, servants, representatives and/or agents from entering, taking possession of, erecting temporary or permanent structures on or in any way whatsoever interfering with any portion of Chyulu Hills National Park as captured in the Grant for L.R No. 24362 being the entire piece of land measuring 73,427 Ha and particularly the portion of the park represented in Boundary Plans No. 204/71 and 204/76 measuring a total of 17326 Ha.

In urging the motion, Mr. Tugee, learned counsel for the applicant contended that the draft memorandum of appeal demonstrates a total of 10 arguable grounds that will be presented in the intended appeal. Counsel submitted that the 1st respondent's members only invaded the park only after the judgment was rendered. He also maintained that the 1st respondent and its members have no title to the portion they claim.

On the nugatory aspect of the intended appeal, it was counsel's argument that, the park is part of the larger Tsavo-Amboseli ecosystem which is a wildlife corridor, dispersal area, water catchment area and is of general public importance in conservation of wildlife, promotion of tourism and contribution to the national economy; that the enforcement of the challenged judgment will have a significant negative impact on the ecosystem of the park and is likely to lead to death of humans and wildlife as a result of human-wildlife conflict; that if the members of the 1st respondent move into the park and the appeal is ultimately successful, it will be impossible or extremely difficult to restore the park to its current state.

For that reason, it was posited that it is vital to preserve the subject matter of the intended appeal, to avoid irreparable harm to the park, the ecosystem, the wildlife and the people.

For these reasons, it was urged that unless the orders sought are granted, the appeal will be rendered nugatory and the applicant will suffer prejudice in the event that its appeal succeeds.

In opposing the motion, Ms. Kinuthia, learned counsel for the 1st respondent, submitted that the judgment was well reasoned. Counsel refuted the claims by the applicant that it will be impossible to implement the judgment as what the court did was to revoke the title deed which irregularly extended the boundaries of the park to an area already occupied by the 1st respondent's members.

In any case, counsel submitted, it is the 1st respondent's members who have been in occupation of the suit property as admitted by the applicant; that it was rightly admitted by Leonard Maingi, (the applicant's Corporation Secretary) in his affidavit in support of the motion, that injunction and *status quo* orders have previously been issued protecting the 1st respondent's members while in occupation of the suit property; that the applicant in disregard of the court orders has arrested, burned down property and without provocation harassed the 1st respondent's members. Therefore, the prayer for injunction in the instant application is irregular and unfounded and that if granted, the 1st respondent's members will be greatly prejudiced as they are likely to be arrested and forcefully evicted from their land, hence rendering them to suffer irreparable harm.

The principles for consideration in the exercise of the Court's unfettered discretion under **Rule 5(2)(b)** of the Court's Rules to grant an order of stay are now well settled. First, an applicant has to satisfy that the appeal or intended appeal is arguable.

An arguable appeal, it has been stated time without number is not necessarily one that must succeed, but one that is not frivolous. The second principle is that the applicant must demonstrate that unless an order of stay is granted, the appeal or intended appeal would be ineffective. See **Stanley Kangethe Kinyanjui V. Tony Ketter & Others** (2103) eKLR.

On the aspect of arguability of the appeal, from the draft memorandum of the appeal there are questions such as whether the suit property was trust land or unalienated Government land; whether the relevant laws were complied with in extending the park; and whether it was mandatory before extending the park to consult the 1st respondent's members. All these, in our view, are arguable issues, hence the intended appeal is not frivolous.

On the nugatory aspect, the applicant submitted that the park is part of the larger Tsavo-Amboseli ecosystem which is a wildlife corridor and dispersal area, a water catchment area and is of general public importance in conservation of wildlife promotion of tourism and contribution to the national economy; and that the execution of the decree is likely to lead to irreparable harm to the ecosystem and possible human-wildlife conflict.

The 1st respondent on the other hand maintained that its members have always been in occupation of the suit property and that if the orders sought are granted, its members will be greatly prejudiced as they are likely to be arrested and forcefully evicted from their land.

These are weighty issues of public importance. They demonstrate the need to preserve the subject matter of the suit failing which the intended appeal will be rendered nugatory and the ecosystem will have been destroyed.

The submissions have also established the imminent threat of human-wildlife conflict, which may lead to the loss of lives. The 1st respondents are most likely to be affected should this happen.

We are not able, from the pleadings, to tell specifically the area in dispute as the applicant has itself expressed the fear that human settlement and activities may extend beyond the portion occupied at the time the judgment was rendered. The order that commends itself to us is to stay the decision of the court below made on 22nd February, 2019 to the extent that, pending the hearing and determination of the intended appeal,

the 1st respondent's members shall not extend their settlement and other activities beyond where they are presently; and that they shall not destroy or encroach on the forest and other natural resources in the forest.

The applicant will, on the other hand, not evict the 1st respondent's members from the portion of the suit property in their occupation.

Costs will be in the intended appeal.

Dated and delivered at Nairobi this 6th day of December, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR