



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. 3 OF 2018

BETWEEN

PHILIP MASANGA WANJALA.....APPLICANT

AND

SOLOMON FRANCIS NANGENDO WANYONYI..... RESPONDENT

(Being an application seeking stay of execution of the judgment/decree of the High Court of Kenya at Bungoma, (Mukunya, J.) dated 18th December, 2017

in

ENVIRONMENT AND LAND CASE NO. 2 OF 2006)

RULING OF THE COURT

[1] This is an application brought under **Rule 5 (2) (b)** of the Court of Appeal Rules for an order that the execution of the judgment and decree of the High Court dated on 18th December, 2017 be stayed pending the hearing and determination of the intended appeal. The application is supported by the affidavit of the applicant. It is opposed by the respondent on grounds filed in court on 20th September, 2018.

[2] The applicant intends to appeal against the judgment of the Environment and Land Court, Bungoma, which ordered the Land Registrar, Bungoma, to cancel the registration of the applicant as the proprietor of land **title No. Bokoli/Mukuyuni/1194 (suit land)** and reinstate the name of **Waswa Biket (deceased)**, the previous registered owner.

The plaintiff (*the respondent herein*) is the administrator of the estate of the deceased proprietor. The applicant's title was cancelled for the reason that the transfer of the land to the applicant was fraudulent.

[3] For the court to exercise its discretion in favour of the applicant, he has to satisfy the court, *inter alia*, that the intended appeal is arguable and that unless the order of stay of execution is granted, the intended appeal would, if successful, be rendered nugatory.

[4] The applicant states that the intended appeal raises weighty legal issues for determination of the court and that the appeal has high chances of success. He has annexed a draft memorandum of appeal containing four proposed grounds of appeal.

The respondent states in the grounds of opposition, *inter alia*, that no material has been placed before the court to demonstrate that the intended appeal is arguable.

[5] Briefly, this is a case where the applicant claims to have purchased the suit land from the deceased who was his worker at a consideration of Kshs.120,000/= by an agreement dated 2nd August, 1995.

However, the trial judge made findings of fact, *inter alia*, that only agreements of lease of the land by the applicant were shown; that there was no agreement of sale or evidence of payment of the purchase price; that there were no transfer documents and that there was no Land Control Board consent.

It is apparent from the draft memorandum of appeal that the intended appeal would be based on issues of fact. However, the facts upon which the judgment is based were not disproved or proved by the application at the trial.

Upon our consideration of the judgment and the proposed grounds of appeal, we are not satisfied that the intended appeal is indeed arguable.

[6] Having reached that conclusion, it is not necessary to consider whether or not the intended appeal would be rendered nugatory in the event that the application is not allowed.

[7] Lastly, the respondent has raised the issue of delay in filing the appeal and submitted that stay of execution cannot be granted in vain.

The judgment the subject of the intended appeal was delivered on 1st December, 2017, about 9 months ago. The applicant filed the notice of appeal on 22nd December, 2017 which was within the stipulated period. The applicant was required to file the appeal within sixty days from that date but no appeal has been filed to date.

The applicant's counsel disclosed before us that the applicant has obtained proceedings and judgment from the court and that he was prevented from filing the appeal by lack of money.

It is apparent from the foregoing that the time for filing the appeal may have run out and that the applicant may not file a competent appeal without seeking extension of time.

We agree that the court would be acting in vain before the applicant has applied for and secured an order extending time to file the intended appeal.

[8] For the foregoing reasons, the application is dismissed with costs to the respondent.

DATED and delivered at Eldoret this 4th day of October, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR