



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPLICATION NO. 24 OF 2016

BETWEEN

JAMES KITERIE ALFAYO..... APPLICANT

AND

MARGARET C. WAMBETE.....RESPONDENT

(Being an application for stay of execution and decree of the Environment and Land Court at Kitale (Obaga, J.) delivered on 15th September 2015

in

Environment and Land Case No. 78 of 2003)

RULING OF THE COURT

By way of a Notice of Motion dated 8th August 2016, the applicant sought the following orders;

- 1. That this Honourable Court does grant a stay of execution of the judgment and or decree made on 15th September 2015 and all other consequential orders thereof in Kitale Environment and Land Case No. 78 of 2003.*
- 2. That the Respondent her agents, servants, family members and or any other person acting through the Respondent or claiming an interest through her be restrained from evicting the applicant, his agents, servants and or family members from Plot Number 80, Kitalale Settlement Scheme Phase 1 and or destroying whether by demolition or by burning the applicant's properties being thereon and or interfering with the status quo obtaining on the said land as at 15th September 2015.*

The application was premised on grounds that the applicant was dissatisfied with the learned judge's decision and had preferred an appeal to this Court. In the meantime, the applicant was apprehensive that the respondent was likely to commence execution any time which would render the applicant's appeal nugatory. It was further contended that the applicant had lived on the suit land for many years, and that it was only proper that the status quo be maintained pending the hearing and determination of the appeal. The motion was supported by an affidavit of the applicant of the same date which reiterated the grounds

in the motion.

In a sworn replying affidavit dated 17th November 2016, the respondent deponed that the application was over taken by events as the applicant was evicted from the suit land on 26th August 2016, and that she had taken over possession.

The brief facts of the case were that the applicant claimed that he was the rightful owner of Plot Number 38 at Kitalale Settlement Scheme which was previously Plot Number 80 (*the suit land*) which he purchased from one Patrick Towett, who had purchased the land from the original allottee one, Philip Eyanae Lobelu. Plot Number 38 was later changed to Plot Number 80. He had bought 2 ½ acres out of the 5 acres. He claimed that the respondent attempted to evict him from the suit land, and he therefore sought a permanent injunction to restrain her from trespassing or disturbing his peaceful enjoyment of the suit land.

The defence's case was that after the suit land was allotted to her, she went to the suit land and found the applicant in occupation. He claimed to be the owner of the said land. The Land Registrar surveyed the suit land, and filed a report which established that the suit land and Plot Number 80 were 400 metres apart.

The learned judge found that the applicant had failed to prove that Plot Number 38 was previously Plot Number 80, and dismissed the suit with costs. The court issued an order to evict him from the suit land.

Learned counsel, **Mr. Wafula** holding brief for Mr. Katama for the applicant submitted that the trial court ordered the eviction of the applicant, and that no eviction had taken place. The applicant was still in possession and had some structures and cereals on the land. Counsel further submitted that the applicant had been in occupation for nearly 16 years, and that an eviction would render the appeal nugatory.

Mr. C.K. Yano, learned counsel for the respondent, opposed the application. Counsel relied on the respondent's replying affidavit of 17th November 2016; that execution has already been carried out and the applicant has been evicted. The respondent is not in possession of the suit land; that the applicant's structures had been demolished and the applicant and his family had moved away; that to issue the orders as prayed would be to return the applicant onto the land. Counsel argued that the appeal would not be rendered nugatory if the appeal was successful, as the land was still available and if need be could be returned.

In reply Mr. Wafula submitted that there was nothing to prove that execution had been carried out, not even a letter instructing the area Officer Commanding Police Division (OCPD) to supervise the eviction.

This application is brought under **rule 5 (2) (b)** of this Court's Rules, where the requirements to obtain the orders as sought are undoubtedly well settled. It is original and discretionary. For an applicant to succeed, twin guiding principles must be satisfied, first, that the intended appeal is arguable, and it is not frivolous and second, that unless a stay is granted, the appeal or as in this case, the intended appeal, if it eventually succeeds, will be rendered nugatory - see the cases of *Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838*, *J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982-88) 1 KAR 1688*, *Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. Nai. 98 of 2002 (unreported)* and *Al-Mahra Limited vs. Premier Foods Industries Limited – Civil Application No. Nai. 163 of 2006*.

We begin by considering whether the appeal is arguable. According to the applicant's memorandum of appeal, the grounds intended to be canvassed were whether the learned judge misinterpreted the Land Registrar's report and erred in finding that Plot Number 80 Kitalale was not the one that was previously Plot Number 38 Kitalale, and fell into further error in finding that the applicant had proved his case on a balance of probabilities. We consider that the appeal may be arguable, but it will be appreciated that an arguable appeal does not necessarily mean that the appeal is assured of success.

In respect of the question of whether the appeal will be rendered nugatory if the appeal were to succeed,

we find that the applicant has been unable to satisfy this limb. This is because the record shows that execution has already taken place. The judgment was rendered on 15th September 2015, and an eviction order issued on 17th August 2016. The eviction order was addressed to the Officer Commanding Police Station (OCS), Kitale Police Station, instructing him to... *“Evict and remove the said JAMES KITERIE ALFAYO, his servants, agents and anyone claiming through him from the said Plot No. 38 KITALE settlement scheme phase 1.”*

The respondent has deponed that the eviction took place on 26th August 2016, and took possession of the suit land. In the circumstances, we find that we have nothing to stop since the applicant is no longer on the suit land.

As such, the application lacks merit and is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Eldoret this 24th day of March, 2017.

D.K MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR