



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, J.J.A)

CIVIL APPLICATION NO. 28 OF 2016

BETWEEN

MICHAEL ODERA OTOM (Suing as the administrator

of the estate of THOMAS OTOM AGULO.....APPLICANT

AND

COMMISSIONER FOR LANDS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RAILWAY HOUSING

CO-OPERATIVE SOCIETY LIMITED.....3RD RESPONDENT

(Application for an injunction and stay of proceeding in the High Court of Kenya at Kisumu pending the hearing and determination of an intended appeal from the decision of S.M. Kibunja, J. dated 9th March 2016)

RULING OF THE COURT

By a notice of motion dated 12th July 2016 *the applicant, Michael Odera Otom*, (suing as the administrator of the estate of Thomas Otom Agulo) seeks an interim order of injunction to restrain the respondents, their servants, agents or anyone from claiming title, encroaching or trespassing or disposing or occupying the land parcel known as I.R. 96243 L.R. No. Kisumu Municipality 15300 (*the subject land parcel*) pending the hearing and determination of this application and the intended appeal.

Also sought is an order for a grant of stay of any and all proceedings arising from the ruling of S.M. Kibunja, J. dated 9th March 2016 in *Environment and Land Case No. 207 of 2013* at Kisumu pending the hearing and determination of the appeal; and for that costs of the application be provided for.

The application was supported by an affidavit sworn by Michael Odera Otom who had on 3rd March 2008 obtained Letters of Administration ad litem in respect of the estate of Thomas Otom Agulo.

In the affidavit, Michael Otom averred that his father, Thomas Otom Agulo (deceased) was the proprietor of the subject land parcel which is situated between the Kibos Kisumu Road and the Kibos Railway line

within the Kisumu Municipality and measuring 25 Hectares; that the deceased acquired ownership and occupation of the subject land parcel under African Customary Law, which land he inherited from his fore fathers as unregistered land; that at the time of adjudication the subject land parcel was unlawfully and fraudulently registered in the name of the 3rd respondent.

The applicant further averred that the subject land parcel was located in the Kasule and Nyalunya sub locations, which was not government land and had not been gazetted as such. Additionally, it had not been compulsorily acquired by the government, as no compensation had been paid to the applicant in accordance with the law.

The applicant further deponed that soon after he instituted the suit against the respondents, that is *Environment and Land Court Case No. 207 of 2013*, disputing the 3rd respondent's unlawful registration as the owner of the land, the 3rd respondent filed an application requiring the applicant to deposit Kshs. 1,500,000/- as security for costs failing which the suit would be dismissed with costs; that upon hearing the application, the High Court, in a ruling dated 9th March 2016, ordered the applicant to deposit an amount of Kshs. 500,000/- as security for costs failing which the suit would be dismissed.

The applicant complains that contrary to **Articles 48 and 50** of the Constitution, that ruling denied him access to justice and the right to a fair hearing.

In a replying affidavit sworn by **Evans Orangi Bobonko**, the Chairman of the 3rd respondent, it was deponed that, the applicant had failed to file a draft memorandum of appeal and as such had failed to demonstrate that the intended appeal was arguable; that the application was bad in law and intended to delay the expeditious disposal of the matter pending before the High Court.

When the parties appeared before us, **Mr. Mwamu**, learned counsel for the applicant, submitted that the orders herein were sought against the 3rd respondent who had made the application for security for costs and not against the 1st and 2nd respondents. It was counsel's submission that the order that the applicant deposits security for costs prior to the suit being heard and determined was unconstitutional in that the applicant was being denied his right to be heard for no other reason than his impecuniosity. Counsel cited **Moses Wachira vs Neils Bruels & 2 others [2015] eKLR.**

Ms. Odhiambo, learned counsel for the 3rd respondent, argued that the ruling of the High Court was lawful and based on sound reasoning. It was counsel's submissions that **Order 26 rule 1** of the **Civil Procedure Rules** made provision for an order of security for costs. That the applicant had not shown that he was unable to deposit the security as ordered, and since he had failed to make the deposit, the 3rd respondent was at liberty to seek to have the suit in the High Court dismissed.

The issue for our consideration is whether the applicant is entitled to the grant an injunction and the stay of proceedings under **rule 5(2) (b)** of this Court's Rules. The principles guiding this Court's exercise of its discretionary jurisdiction under **rule 5(2)(b)** of this Court's Rules are now well settled. For the applicant to succeed, he must satisfy two guiding principles, firstly that, the intended appeal is arguable, in that it is not frivolous, and secondly that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory. See **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088 and Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported).**

Regarding the first requirement on whether the applicant has established an arguable appeal, though no memorandum of appeal was attached to the application, it is discernable from the application and the averments in the affidavit in support that two fundamental constitutional issues arise for determination in the applicant's intended appeal. One, whether an order for security of costs denies a party access to justice and fair hearing contrary **Articles 48 and 50** of the Constitution. Secondly, whether the learned judge erred in ordering the payment of security for costs on the basis that the applicant had not demonstrated that he was incapable of raising the amount ordered. In our opinion these are not frivolous matters as they

go to the heart of the right to access justice and fair hearing. We take the view that these are issues that should be determined on their merits.

Turning to the second requirement of whether the appeal would be rendered nugatory if the appeal were to succeed, it is provided in the order that should the applicant fail to deposit the amount ordered, the 3rd respondent would “...***be at liberty to move the court for a dismissal order.***” The consequences are that failure to pay the security deposit would lead to the striking out of the applicant’s suit and thus render the intended appeal otiose.

On this basis, we consider that it would be prudent to forestall the execution of the orders of the High Court arising from the ruling dated 9th March 2016, and order an injunction and stay of the proceedings until determination of the intended appeal so as to preserve its very foundation.

Accordingly, we order an injunction and stay of the proceedings as prayed in the notice of motion dated 12th July 2016. The costs of this application shall be in the intended appeal.

Dated and Delivered at Kisumu this 11th day of October, 2016

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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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