



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPLICATION NO. 47 OF 2015**

**BETWEEN**

**SAMUEL KIPTUI NGEYWA..... APPLICANT**

**AND**

**PATRICK KWALIA MOIKUT.....1<sup>ST</sup> RESPONDENT**

**PHILIP LOCHOK EKAI.....2<sup>ND</sup> RESPONDENT**

**MATAYO NDILA CHEPROT.....3<sup>RD</sup> RESPONDENT**

(An Application for stay of execution pending the hearing and determination of Civil Appeal No. 33 of 2015 from the Ruling and Order of the High Court of Kenya at Kitale (Obaga, J.) dated 9<sup>th</sup> February, 2015

**in**

**ELC CIVIL SUIT NO. 148 OF 2013)**

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**RULING OF THE COURT**

1. This is an application under Rule 5(2) (b) of the Rules of this Court by the applicant, Samuel Kiptui Ngeywa. He seeks an order to restrain the respondents from evicting him or interfering with his stay on Plot No. 5 Kitalele Settlement Scheme Phase 1 (the property) pending the hearing and determination of his appeal from the ruling and order given by the Environment and Land Court at Kitale (E. Obaga, J) on 9<sup>th</sup> February 2015. In that ruling, that court dismissed the applicant's suit, as well as his application for interlocutory injunction, in ELCC No. 148 of 2013 on grounds that the same was res judicata. The Environment and Land Court held that the matters that the applicant was raising for adjudication in ELCC No. 148 of 2013 were directly and substantially in issue, and had already been adjudicated upon in HCCC No. 96 of 1999, a former suit between the same parties. According to the applicant, that decision by the Environment and Land Court was erroneous. He hopes to have that error corrected by this Court once his appeal, being Civil Appeal No. 33 of 2015, is heard and determined.

2. During the hearing of the application before us, learned counsel for the applicant Mr. D. N.

Kamunda referred us to the motion and to the supporting affidavit sworn by Samuel Kiptui Ngeiywa; he emphasized that the applicant's appeal is arguable; that if we do not intervene by granting the orders sought, the applicant will be evicted from the property where he resides with his family; that if the applicant is evicted from the property the intended appeal will be nugatory. According to Mr. Kamunda, the institution of ELCC No. 148 of 2013 by the applicant was necessitated by an order made by Obaga, J in HCCC No. 96 of 1999 where the applicant was a third party, and the subsequent order made on 9<sup>th</sup> February 2015 in ELCC No. 148 of 2013 by the same judge is contradictory. Furthermore, counsel argued, one of the parties in ELCC No. 148 of 2013 was not a party to the former suit and in those circumstances, the decision by the learned Judge that ELCC No. 148 of 2013 is res-judicata cannot be correct.

3. Mr. W. Simiyu, learned counsel for the second and third respondents strenuously opposed the application and referred us to the replying affidavit of Matayo Ndila Cheprot in which the background to the present application is well explained. He submitted that the applicant has not demonstrated that he has an arguable appeal; that the applicant has not offered any security as a condition for the grant of the orders that he seeks; that the applicant is guilty of inordinate delay in presenting this application; that there is already a determination by a competent court regarding the ownership of the property and the decision by the learned Judge that ELCC No. 148 of 2013 is res judicata is undoubtedly correct.

4. We have considered the application, the affidavits and the submissions by learned counsel. The principles upon which this Court exercises its discretion in considering an application under Rule (5)(2)(b) of the Rules of the Court are settled. In **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011** Githinji JA stated that:

***“It is trite law that in dealing with 5 (2)(b) applications the Court exercises discretion as a court of first instance... It is clear that 5(2)(b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”***

5. Earlier, in **Ishmael Kagunyi Thande v HFCK Civil Application No. Nai 157 of 2006** this Court stated that:

***“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] These principles are now well settled. For an application 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. Applying those principles to the present case, there can be no doubt that the ownership of the property has been the subject of controversy at different fora. Even before that issue arose in Kitale HCCC No. 96 of 1999, it would seem that it was the subject of a dispute before the Saboti Land Disputes Tribunal which gave an award that was subsequently given effect in the Magistrate's court before, as one party asserts, it was set aside by the High Court.

7. The applicant says that had his suit not been dismissed in limine by the impugned order made on 9<sup>th</sup> February 2015, he would have been able to demonstrate, in the fullness of time upon trial, that he purchased the property from the first respondent in the year 2000 and paid the full purchase price; that the property was allotted to him by the Provincial Land Adjudication and Settlement Officer; that he is an innocent purchaser for value of the property and has developed the same with a permanent residential house of four bedrooms and other structures; that the third respondent has threatened to evict him on basis that he bought the property from the second respondent; that in those circumstances he would have been able to demonstrate his entitlement to a permanent injunction to restrain the respondents from interfering with his possession of the property and a declaration that he is the owner of the property.

8. The respondents however contest that the applicant is entitled to those reliefs. They asserted, and the Judge agreed in the impugned decision, that the issue of ownership was finally resolved in favour of the third respondent in HCCC 96 of 1999 and an order for mandatory injunction issued in that suit for the applicant and his family to remove themselves from the property. From their quiver of defences, they also contend that the applicant's action is founded on a void agreement for want of consent of the Land Control Board and that the applicant's action was in any event barred under the Limitation of Actions Act.
9. Suffice to say, that whether the impugned decision by the Judge in ELCC No. 148 of 2013 on res judicata is correct or not is a matter that will be determined in due course by this Court in Civil Appeal No. 33 of 2015 whose record of appeal is already filed. As we have not heard the appeal, we are unable to say at this point whether the appeal will succeed. What we are able to say at this point, however, is that we do not think that the intended appeal is frivolous. We think it is arguable whether ELCC No. 148 of 2013 is indeed res judicata. We bear in mind that an arguable point is not one that will necessarily succeed. [See **Joseph Gitahi Gachau and another vs. Pioneer Holdings Ltd and others Civil Application No. 124 of 2008**].
10. As to whether the intended appeal will be rendered nugatory unless we grant the orders sought, we think it will. The applicant has deposed, and that has not been controverted, that he has put up a permanent house on the property and that he resides there with his family. We think the circumstances in this case require that matters be held in situ pending the hearing and determination of Civil Appeal No. 33 of 2015. We accordingly allow prayer 3 of the applicant's motion dated 26<sup>th</sup> September 2015. We further direct that Civil Appeal No. 33 of 2015 be fixed for hearing on a priority basis. The costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Eldoret this 29th day of October, 2015.**

**D.K. MARAGA**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**