



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & VISRAM, JJA)

CIVIL APPLICATION NO. NAI. 46 OF 2010 (UR.29/2010)

BETWEEN

**DANIEL PTIONY
SAMUEL POGHISIO**

REGINA LORIONO.....APPLICANTS

AND

CHEPORONGER NGOLESWA.....RESPONDENT

*(An application for stay of execution of the order and ruling of the High Court of Kenya at Kitale
(Ombija, J)*

dated 4th March, 2010

in

H. C. C. No. 40 of 2007)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for stay of execution pending the hearing and determination of an intended appeal.

The appeal intended herein arises from the decision of the superior court (Ombija, J) dated 4th March, 2010 whereby the superior court nullified the sub-division of land known as West Pokot/Chepkono/181 (the suit land), and condemned the applicants to a fine of Kshs.100,000/= or to serve six months imprisonment in default, for contempt of court.

Briefly, the material facts are as follows:

By a plaint dated and filed in the superior court at Kitale on 22nd March, 2007, the applicants sought a declaration that the suit land was owned by one Kapuluny Ptiony (deceased), and as his legal representatives they were entitled to an order of injunction restraining the respondent from trespassing on

the same.

The respondent's case, on the other hand, was that a decision arising out of an arbitration on 22nd March, 1990 settled the issue of the boundary dispute between the parties. However, the applicants appealed against that decision to the Minister of Lands who, on 16th March, 2005, reversed the previous decision, prompting the respondent to move to the superior court. The respondent filed an application for judicial review. The superior court granted her the required leave in H. C. Misc. C. A. No. 45 of 2005, and ordered that leave was to operate as a stay of enforcement of the Minister's decision.

Despite the order of stay, the applicants forcefully moved into the suit land, demolished structures on it, fenced it off, and proceeded to sub-divide the same into five smaller titles.

The respondent then filed an application in the superior court dated 6th November, 2007 asking that the sub-divisions be revoked; that the original title be restored; and that the applicants be held in contempt of court order, and be punished accordingly.

In a ruling dated 4th March, 2010 the superior court granted the orders sought, and held the applicants in contempt of court, fining them Kshs.100,000/= or six months imprisonment, in default. It is that ruling that is the subject of an intended appeal, and for now, the applicants seek stay of execution of those orders.

In his submissions before us, Mr. J. O. Samba, learned counsel for the applicants, argued that **Order 39 Rule 2** of the Civil Procedure Rules did not permit the court to impose a fine, and only allowed attachment of the property in the event of disobedience of the order of the court; and, secondly, that in proceeding with the sub-division of the suit land, the applicant had relied on an order of another court, in the succession matter, that had authorized the sub-division aforesaid.

On his part, Mr. P. N. Kiarie, learned counsel for the respondent, submitted that the intended appeal was not arguable because the applicant had obtained certain orders in the succession court without disclosing the orders of stay issued in the judicial review matter.

The principles applicable for the determination of applications under **rule 5 (2) (b)** of the Rules are well settled, as was observed by this Court in **Civil Application No. Nai. 157 of 2006** in ***Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd*** (unreported) in these terms:

“The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that 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 that appeal will 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)*}.”

Is this appeal arguable? Although it would not be appropriate for us at this interim stage to make any definitive statements as to the merits of this appeal, we are highly skeptical about its success. There is clear evidence that the sub-divisions of the suit land were done in violation of the court order, and we simply cannot countenance such a behaviour on the part of any person; secondly, there is no basis to the argument that **Order 39 Rule 3** does not allow the superior court to impose the punishment it did.

For those reasons, we are of the view that the intended appeal may not be arguable. Having come to that conclusion we do not find it necessary to go into the second limb of the principles set out for determining this application, namely, that the appeal will be rendered nugatory in the event a stay is not granted.

In the result, we dismiss the motion dated 8th March, 2010 with costs to the respondent.

Dated and delivered at Eldoret this 25th day of March, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR