



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, OKWENGU & KANTAI, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 5 OF 2021

BETWEEN

ALMER FARM LIMITED.....APPELLANT

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

BETTY RONO

(Sued as the Executrix of estate of the late DAVID RONO).....3RD RESPONDENT

(Being an application for injunction against the Judgment of the Environment

and Land Court of Kenya at Kitale (M. Njoroge, J.) dated 1st December, 2020

in

ELC Cause No. 4 of 2019)

RULING OF THE COURT

In a Judgment delivered on 1st December, 2020 **Mwangi Njoroge, J.**, sitting at the Environment and Land Court at Kitale (ELC) struck out a Motion that had been taken before him by the applicant, **Almer Farm Limited**. The dispute involved a parcel of land where the 1st respondent (the National Land Commission) had, after a hearing, found that a certain acreage of the land be excised from the larger parcel and be allocated to the 3rd respondent (**Betty Rono** – sued as the executrix of the estate of the late **David Rono**). The Judge found in pertinent part that the 1st respondent's decision made pursuant to **Regulation 29** of the **National Land Commission (Investigation of Historical Injustices) Regulations** had been gazetted on 1st March, 2019. That regulation required a person aggrieved by a decision of the 1st respondent to file an appeal to court within 28 days. The Judge found that the Motion filed before him was not the appeal contemplated by the said regulation and in the end, as we have said above, the Motion was struck out.

The applicant has approached us in the Motion said to be brought under **rules 5 (2) (b), 41, 42 and 47** of the **Court of Appeal Rules** praying, in the main, that we issue a conservatory order restraining the 2nd respondent (the Chief Land Registrar) or any other Land Registrar from acting on the determination of 7th February, 2019 or interfering with the applicant's title **L.R. No. 8940** pending hearing and determination of **Eldoret Civil Appeal No. E015 of 2021**; that we issue an injunction restraining the 3rd respondent from interfering with the said parcel of land pending hearing and determination of the said appeal; that we issue a temporary injunction staying the 1st respondent's decision dated 7th February, 2019 and the orders contained in **Gazette Notice Vol. CXXI-No. 27** published on **1st March, 2019** pending hearing and determination of the pending appeal. In grounds in support of the Motion and in a supporting affidavit of **Abraham Kiptanui** it is said amongst other things that the pending appeal will be rendered nugatory unless conservative orders are issued to preserve the subject matter of litigation; that the respondents will not be prejudiced by an order of stay. It is further stated that the Judge erred in misinterpreting the provisions of the National Land Commission (Investigation of Historical Injustices) Regulations; that the Judge was wrong to find that judicial review was not the appeal contemplated by the said regulations; that the Motion should not have been struck out; that the Judge erred in finding the dispute was not a commercial dispute but rather a land dispute; that the Judge erred in making orders that violated the Constitution and due administration of justice. The other facts stated in the affidavit are that the land in question measures approximately 1198 acres with shareholding of more than 306 people and that the 1st respondent determined that 400 acres be excised and be allocated to the 3rd respondent.

In a replying affidavit the 3rd respondent depones that the land in question was purchased by three people including her late husband; that the applicant was incorporated by the others without involving her husband and the land transferred to it; that upon purchase of the land the intention was to share it amongst the three purchasers. She further says that her family resides on the land and would be prejudiced by orders in favour of the applicant; that her home was invaded during the hearing of the case in the Kitale Court and we should dismiss the application.

The applicant and the 3rd respondent filed written submissions which we have perused.

The principles that govern an application of this nature are well known. For an applicant to succeed it must, firstly, demonstrate that the appeal is an arguable one which is the same as saying that it is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – these principles were well summarized in the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2103] eKLR**

We have at the beginning of this ruling summarized the facts that were before the ELC at Kitale. The Judge found, rightly, we think, that the applicant had submitted to the jurisdiction of the 1st respondent. Proceedings were conducted and a decision reached which was duly gazette pursuant to the laws creating the 1st respondent. The applicant, if dissatisfied with the said decision was required to follow the procedure laid out in the said law if it desired to file an appeal. There is considerable authority for the statement that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed – **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**.

The applicant who was aggrieved was required to file an appeal within the timeline prescribed in law. It did not do so but instead, contrary to procedure, it applied for judicial review. That was not the procedure prescribed by the National Land Commission (Investigation of Historical Injustices) Regulations.

We cannot see any arguable point in the appeal and being of that view we need not address the nugatory aspect of the matter. The Motion fails and is dismissed with costs to the 3rd respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR



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