IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 251 OF 2011 (UR 164/2011)

BETWEEN

PETER KAMONDIA NJUGUNA.....APPELLANT

AND

PAUL NG'ANG'A GACHIE.....RESPONDENT

(An Application for stay of execution for Judgment and Decree in High Court of Kenya at Nairobi

(Ang'awa, J.) dated 13th October, 2011

in

HIGH COURT CIVIL APPEAL NO. 327 OF 2007)

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RULING OF THE COURT

1. By his notice of motion application dated 3rd November 2011 the applicant Peter Kamondia Njuguna seeks to stay execution of a judgment delivered on 13th October 2011 by which the High Court (M. A. Angawa J) dismissed the applicant's appeal against the decision of the District Land Registrar, Kiambu that determined a boundary dispute between the parties under Section 21 of the now repealed Registered Land Act Cap 300 of the Laws of Kenya.

2. Based on the limited information available from the record of the application before us, the Senior Resident Magistrate's Court at Kiambu in civil suit number 76 of 1982 ordered the sub-division of a property measuring one and half acres approximately known as Title Number Kiambaa/Kanunga/486. The applicant was to get one acre of that property while his sister one Veronica Mumbi Njuguna was to get half an acre. Title Number Kiambaa/Kanunga/486 was accordingly sub divided. The applicant's one-acre portion became Title Number Kiambaa/Kanunga/788 and his sister's half-acre portion became Title Number Kiambaa/Kanunga/789. The applicant does not appear to have cooperated with his sister to give effect to the subdivision as the necessary documentation to give effect to the subdivision was executed by the Executive Officer of the court.

3. Veronica Mumbi Njuguna subsequently sold her parcel to Paul Nganga Gachie, the respondent in this application. It would appear that the applicant refused to recognize the respondent and indeed denied the

respondent access to the property. The respondent could also not ascertain on the ground where the boundary between the applicant's parcel and the parcel he had purchased from the applicant's sister was located, and turned to the District Land Registrar to determine the boundary under section 21 of the then Registered Land Act. After hearing the parties, the District Land Registrar in a ruling dated 12th April 2007 ordered the District Surveyor to mark the common boundary between the two parcels.

4. Dissatisfied with the ruling of the District Land Registrar, the applicant appealed to the High Court in Civil Appeal No. 327 of 2007. That is the appeal that was dismissed by the High Court in the judgment delivered on 13th October 2011 from which the applicant has given notice of his intention to appeal. It is that judgment that the applicant has asked us to stay.

5. In his affidavit sworn on 3rd November 2011 and his further affidavit sworn on 18th February 2015 both in support of the application the applicant requests for stay of execution on the basis that he has information that the respondent is "*intending to act and execute the said decree causing irreparable damages…as the same shall enact an irreparable and irreversible damage and validate a title No. Kiambaa/Kanunga/789 that has been void in view of section 6 of Cap 300 Laws of Kenya…*" and that he lives in fear as the respondent may execute the decree.

6. At the hearing of the application before us, the applicant who appeared in person reiterated his prayers in his application and stated that the respondent is in occupation of Title Number Kiambaa/Kanunga/789, and requested the Court to hear his appeal. The respondent, though served with notice of hearing was absent during the hearing of the application.

7. We have considered the application, the affidavits in support and the representations made by the applicant before us. The object behind empowering the court to make orders of stay of execution or to grant injunctions under rule 5(2)(b) of the Rules of the Court is to preserve the subject matter of the appeal so that the appeal if successful is not rendered nugatory. As stated by Githinji JA in **Equity Bank Limited vs. West Link Mbo Limited Civil Application No Nai 78 of 2011 (Ur. 53/2011)**,:

> ***"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 rule 5(2)(b) is a procedural innovation designed to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."***

8. The principles on which this Court determines applications such as the present application are well known. For instance, in the case of **Ishmael Kagunyi Thande v HFCK Civil Application Nai No. 157 of 2006** this Court stated:

> ***"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 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."***

9. It is therefore incumbent on the applicant to demonstrate that the intended appeal is arguable and that if we decline to grant the orders sought the whole purpose of the appeal will be lost.

10. The judgment that is the subject of the intended appeal, as we have demonstrated above, dismissed the applicant's appeal from the decision of the District Land Registrar. The judgment of the High Court did not require the applicant or the respondent to do or refrain from doing anything at all save to the extent that the court ordered the applicant to pay the respondents costs. There is therefore nothing for us to order to be stayed.

11. In **Kanwal Sarjit Singh Dhiman v Keshavji Shah Civil Application Nai No. 320 of 2006 [2008] eKLR** this Court stated:

"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By an order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences v Oranga & others [1976] KLR 63 at page 66 paragraph C)."

12. In **Western College of Arts & Applied Sciences v Oranga & others (supra)** Law VP said:

"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for stay, to enforce or restrain by injunction."

13. We have recently re-affirmed the position in the case of **Marangu v Rucha & Another v Attorney General & 10 others [2014] eKLR (Civil Application NO. 180 of 2013 (Ur 127/2013)** where the Court stated:

"The above, in our view, does not constitute an order directing any party to do or restrain from doing anything. We can do no better than to reproduce a statement made recently by this Court in F&S Scientific Ltd v Kenya Revenue Authority & another, Civil Application No. 260 of 2012. The Court said:-

"Asking for "stay of implementation" of a decision by the respondent is tantamount to asking for either stay of execution or an injunction. To begin with, in law it is not possible to grant an order of stay of "execution" or "implementation" where the action has been dismissed." this is the view of this Court as expressed in many decisions. For instance, in the case of Republic v Kenya Wildlife Services & 2 others, Civil Application No. Nai 12 of 2007 the Court said in part:-

"The Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the Superior Court which can be the subject matter of the application for injunction or stay…"

14. The result is that the applicant's notice of motion dated 3rd November 2011 has no merits and it is dismissed. As the respondent did not file any response to the application and did not attend the hearing, we make no orders as to costs.

15. When the appellant appeared before us, he informed us that the appeal is filed and is ready for hearing. Noting as we did that the applicant is an elderly person, the President of the Court may be pleased to consider scheduling the applicant's appeal for hearing on a priority basis.

Dated and delivered at Nairobi this 17th day of April, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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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