



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 23 OF 2018

BETWEEN

LUCIA ABAJA OTIENO.....1<sup>ST</sup> APPELLANT

JANET APEL OTIENO.....2<sup>ND</sup> APPELLANT

MILICCANT ACHIENG OMBEWA .....3<sup>RD</sup> APPELLANT

*(Defendants in Bondo PM ELC No. 61 of 2018)*

AND

FILGONA OMOGO OKOTH (suing as administratrix of the estate of the late

Zedekiah Otieno Okoth.....RESPONDENT/APPLICANT

*(Plaintiff in Bondo PM ELC No. 61 of 2018)*

*(An application for stay of execution of the judgment and decree pending the hearing and determination of the intended appeal from the judgment and decree of the High court of Kenya at Siaya, dated 5<sup>th</sup> November, 2018 delivered by R.E. Aburili J).*

RULING

1. By a notice of motion dated 19<sup>th</sup> November, 2018, brought under certificate of urgency, the respondent herein **Filgona Omogo Okoth** seeks from this court orders:

a. *that the application be certified as urgent and the same be heard exparte at the first instance;*

b. *that the Honourable court be pleased to grant interim orders of stay of execution of the decree herein pending hearing and determination of this application;*

c. *that this honourable court be pleased to order stay of execution of the decree herein pending the hearing and determination of the appeal filed herein;*

d. *that costs of this application be provided for.*

2. The application is brought under Order 21 Rule 8, Order 22 Rule 22 of the Civil Procedure Rules, and Order 51 Rule 1 of the Civil Procedure Rules. And Article 159 of the Constitution as well as sections 1A, 3, 3A of the Civil Procedure Act and all other enabling laws.

3. The application is predicated on four grounds namely:- that the appeal filed herein shall be rendered nugatory; that the losses that the applicant is likely to suffer are irreparable; that the application has been brought without unreasonable delay; and that this application is brought in good faith.

4. The said application is further supported by an affidavit sworn by the applicant **Filgona Omogo Okoth** on 19<sup>th</sup> November, 2018.

5. In the said affidavit, the applicant deposes that she is aware that judgment in this appeal was delivered on 5<sup>th</sup> November, 2018 to the effect that the appellants could go ahead and bury the body of the deceased Charles Ombewa into Parcel No. South Sakwa/ Barkowino/2473

and that she was dissatisfied with the said judgement and wishes to appeal against the same before the court of appeal hence she has filed a Notice of Appeal annexed to that effect; that if the orders sought are not granted then the appeal as filed shall be rendered nugatory. Further, that the appeal has high chances of success and that she may incur huge expenses of exhuming the body of the deceased if the orders herein are not issued and the appeal succeeds. In addition, she reiterates that she has brought the application without unreasonable delay.

6. The applicant has also attached copy of Notice of Appeal marked FOO1 dated 16<sup>th</sup> November, 2018 and filed in court on 19<sup>th</sup> November, 2018.

7. The application is not opposed. On 20<sup>th</sup> November, 2018 this court directed the applicant's counsel to serve the Respondents' Counsel for interpartes hearing today. However, despite service of the ordered upon the firm of Muwamu advocates and upon the respondents as shown by the affidavit of service on record sworn by **Henry Ogalo Ondeje** process Server, there was no appearance hence the court allowed the applicant's counsel Mr Odhiambo to proceed exparte.

8. Mr Odhiambo Advocate reiterated what is contained in his client's application and grounds and affidavit and urged the court to grant the orders sought, as the application is unopposed.

9. However, before the court can grant orders as prayed, it must be sure that the orders sought are merited with or without any opposition hence this ruling.

10. The intended appeal is a second appeal from the judgment and decree of this court to the Court of Appeal. In the judgment made on 5<sup>th</sup> November, 2018, this court reversed the judgment of the lower court made by Hon Obiero Principal Magistrate in Bondo PM Case No. 61 of 2018.

11. This court did in the said Judgment of 5<sup>th</sup> November, 2018 dismiss the Respondent's/applicant's suit in the lower court, which suit was for an injunction to restrain the appellants herein from burying the deceased Charles Ombewa on Parcel No. South Sakwa/Barkowino/2473.

12. Rule 75 (2) of the Appellate Jurisdiction Rules provides that Notice of Appeal shall be filed within 14 days of the date of judgment or order or decision sought to be appealed against. The Notice of Appeal herein was filed within 14 days.

13. Under Order 22 Rule 22 of the Civil Procedure Rules, this court has power to stay execution of decree upon sufficient cause being shown. This court would therefore not delve into the merits of the intended appeal but will consider some of the grounds that the Court of Appeal considers in applications before it for stay of execution of decree of the High Court as was settled in the case of **MULTIMEDIA UNIVERSITY & ANOTHER –VS- PROFESSOR GITILE N. NAITULI** (2014) eKLR where the Court of Appeal whilst considering an application under **Rule 5 (2) (b)** expressed itself as follows:

*“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR as follows:*

*i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.*

*v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.*

*vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.*

*vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.*

*viii. An applicant must satisfy the Court on both the twin principles.*

*ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.*

*x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.*

*xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.*

*xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*

*xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”*

14. In the instant case, the decree sought to be stayed is a decision that dismissed a suit for an injunction in the lower court. That decision was a negative decision or decree and therefore the question is whether a negative decree can be stayed. In the case of **NAIROBI METROPOLITAN PSV SACCOS UNION LIMITED & 25 OTHERS VS COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS [2014] eKLR, GEORGE OLE SANGUI & 12 OTHERS VS KEDONG RANCH LIMITED [2015] eKLR** the Court of Appeal made it clear that a negative order is not capable of being stayed, save for costs.

15. Further, in the case of **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES VS ORANGA & OTHERS [1976] KLR 63** the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order stated:-

*“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. An execution can only be in respect of costs.....”*

*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.*”

16. Similarly in **REPUBLIC VS KENYA WILDLIFE SERVICE & 2 OTHERS (CA NO. NAI 12 OF 2007)** the Court of Appeal held as follows:

*“It would appear to us that we have no jurisdiction to grant any order for injunction or stay on the terms sought or at all, for the reason that Aluoch J. neither granted or refused the application for stay. 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”*

17. See also **STANBIC BANK KENYA LTD VS KENYA REVENUE AUTHORITY [2000] eKLR (C.A. No. 294/2007) SHIMMERS PLAZA LIMITED VS NATIONAL BANK OF KENYA LTD [2013] eKLR (CA 38 of 2013) and KENYA HOTEL PROPERTIES LIMITED VS WILLSDEN INVESTMENTS LTD [2011] eKLR (CA No. Nai 131 of 2010).**

18. In the motion before me, what the applicant is seeking is stay of dismissal of the suit in the trial court which was a negative order which, by parity of a long line of decisions of the Court of Appeal as set out hereinabove, is incapable of being stayed.

19. The applicant in her prayers sought an order of injunction against the appellants herein. The appellants did not have any counterclaim. This court in its decision of 5<sup>th</sup> November, 2018 stated clearly allowed the appeal and ordered that the judgment of the trial court granting a permanent injunction to the respondent against the appellants is hereby set aside and substituted with an order dismissing the respondent's suit in the lower court. In the case of **NAIROBI METROPOLITAN PSV SACCOS UNION AND 25 OTHERS VS COUNTY GOVERNMENT OF NAIROBI & 3 OTHERS** (supra) the Court of Appeal stated:

*“In granting orders sought in application for stay or grant of an injunction as the case may be this court exercises original jurisdiction...”* The Court proceeded to cite the case of **EQUITY BANK LIMITED VS WEST LINK MBO LIMITED CA NO. NAI 78 OF 2011** wherein Githinji JA stated:

*“It is trite law 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 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.”*

20. The Court of Appeal in **Daniel Lomagul Kandeji & 2 others v Kamanga Holdings Limited & 40 others [2017] eKLR** stated, after citing the above plethora of cases:

*“Having come to the conclusion that we are properly seized of the application seeking an injunctive relief, the next issue is to determine whether the applicants have demonstrated that they are deserving of this relief. In **LAKE TANNERS LIMITED & 2 OTHERS VS ORIENTAL COMMERCIAL BANK LIMITED [2010] eKLR (CA No. 64 of 2010)** it was held that the purpose of an injunction pending appeal is to preserve the status quo. In the motion before us it is common ground that titles have been issued in respect of parcels of land hived off from land allegedly belonging to the Group Ranch. An injunctive relief would therefore serve no purpose.*

*In view of the above, we have come to the conclusion that the motion dated 26<sup>th</sup> January, 2017 cannot succeed and is for dismissal. It is accordingly dismissed with costs to the respondents.”*

21. In the instant case, the judgment of this court was delivered on 5<sup>th</sup> November 2018 and in determining the appeal, the court exercised its jurisdiction in line with section 78 of the Civil Procedure Act as the first appellate court. The court dismissed the suit for injunction as sought against the appellants by the respondent. There was no counterclaim by the appellants as it is the applicant herein who wanted to bar them from burying the body of Charles Ombewa on the suit land.

22. Besides the issue of negative order, this court observes that the respondent was in court with her advocates when the judgment was delivered but only returned to court for stay on the 14<sup>th</sup> day after delivery of judgment. In the certificate of urgency, the applicant only states

that the respondents are likely to bury the deceased any time. There is no affidavit on record to demonstrate that the deceased has not been buried as the said body has been lying in the mortuary since June 2018. In other words, the applicant has not demonstrated that the deceased Charles Ombewa's body is still lying in the mortuary pending burial. She has not stated what arrangements have been put in place to inter the deceased and if so, when that is planned for. In my view, the applicant has withheld material information from this court after taking her time before returning to court for stay which delay in my view is inordinate that disentitles the applicant of the discretionary power to grant stay of execution of decree. And even if this court were to stay execution, what order would it stay since there was no decree for any other thing to be done other than dismissal of the respondent/applicant's suit for an injunction in the lower court. The application dated 19<sup>th</sup> November, 2018 is an afterthought. It is not merited. The same is hereby dismissed with no orders as to costs.

**Dated, signed and delivered at Siaya this 21<sup>st</sup> day of November, 2018.**

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Mr Odhiambo Advocate for the applicant/ Respondent

N/A for the Respondents/appellants

CA: Brenda and Modestar