



REPUBLIC OF KENYA



KENYA LAW
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**Ndiema v Rugara (Civil Appeal (Application) E301 of 2022)
[2023] KECA 180 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 180 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E301 OF 2022
F SICHALE, LA ACHODE & PM GACHOKA, JJA
FEBRUARY 17, 2023**

BETWEEN

PHIEDDIPPIEDS CHIMSEN NDIEMA APPELLANT

AND

PATRICK WAHOME RUGARA RESPONDENT

*(Being an application for stay of execution of the Judgment and Decree
of the Environment and Lands Court at Nairobi by Hon. Wabwoto,
J. delivered on 5th May 2022 In Nairobi ELC Case No. 466 OF 2016)*

RULING

1. The Appellant filed a notice of motion application on August 30, 2022, brought under Section 1A, 3A and 63 (a) of the [Civil Procedure Act](#), Order 42 rule 6(1) and Order 51 Rule 1 of the [Civil Procedure Rules](#). In it, he seeks a stay of the execution of judgment and orders delivered by Hon Justice EK Wabwoto on May 5, 2022 in Nairobi ELC 466 of 2016.
2. This application is premised on the grounds that the Appellant has lodged an appeal against the Judgement entered in favor of the Respondent and that there is a chance that the Respondent may execute the Judgement, exposing the Appellant to irreparable loss of ownership of property, thus rendering the appeal nugatory.
3. The Application is supported by an affidavit of even date, sworn by the Appellant, in which he reiterates the grounds of appeal and deposes that the Respondent would suffer no prejudice if the Application were allowed.
4. In rebuttal, Patrick Wahome the Respondent, filed a replying affidavit sworn on November 4, 2022. He avers that he bought the property known as Plot No 204/ Title No Ruiru/Kiu Block 2(Githunguri)/4866 (herein after referred to as ‘the suit property’) in the year 2014. He developed it and has subsequently been living in it with his family since the year 2015. He avers that through the



Judgment, the Appellant's title was canceled and a fresh title deed was issued to the Respondent on June 9, 2022. He urges that the Appellant's application has been overtaken by events and is therefore, not arguable.

5. The Appellant filed a supplementary affidavit sworn on November 8, 2022 in which he deposes that the Respondent built a perimeter wall around the suit property and subsequently constructed a house, against orders barring him from constructing on the suit property. He avers that the Respondent moved hastily to secure a new title for the property immediately after the judgment, in an effort to defeat his intended appeal.
6. The application was canvassed by way of written submissions. M/S JM Onyancha and Associates Advocates counsel for the Appellant, filed submissions dated November 14, 2022. Counsel submits that the Appellant is the rightful owner of the suit property, having bought it in 2006 from a shareholder of Githunguri Ranching Scheme and holding a title to the property. He submits that the Respondent fraudulently manipulated trustee documents in order to claim ownership of the suit property.
7. Counsel urges that the intended appeal is arguable and therefore the preservative orders are necessary since the trial Court did not consider the Appellant's evidence when it issued its judgment. Counsel thus contends that the Appellant risks losing rights over the property if preservation orders are not granted. To fortify these submissions counsel cited the following cases; Civil Appeal No E0003 of 2022, *Nicholus Stephen Okaka and Another v. Alfred Waga Wesonga* and Civil Appeal No. E052 of 2021, *Michael Ntouthi Mitheu v Abraham Kivondo Musau*, where preservative orders were granted pending appeal in similar circumstances.
8. In reply, Kibanya and Kamau Advocates, Counsel for the Respondent filed submissions dated November 22, 2022. Citing Rule 5 (2) (b) of the *Court of Appeal Rules*, counsel submits that this Court has no jurisdiction to entertain this application. That under Rule 5 (2) (b), the Court can only stay judgment when a notice of appeal has been lodged in accordance with Rule 75. He asserts that the Appellant having failed to lodge a notice of appeal in the Superior Court, there is no existing appeal. Counsel cites the case of *DEN v PNN* (2014) eKLR, in support of this assertion.
9. Secondly, counsel argues that the Appellant's application is fatally defective for being brought under the wrong premise of law. Counsel asserts that the *Civil Procedure Act* and Rules under which the application is brought, do not apply to the Court of Appeal and that therefore, the Appellant has failed to lay the basis in law for his claims.
10. Relying on the case of *Kenya Industrial Estate Limited & Another v Matilda Tenge Mwachita* (2021) eKLR, counsel contends that the Appellant has no arguable appeal. Counsel asserts that the Appellant has not submitted any evidence relating to a sale agreement, or how he acquired the suit property. That it was for this very reason of the Appellant's failure to provide any documentary evidence in support of the title he held, that the trial Court found in the Respondent's favour.
11. It was also counsel's submission that the Appellant's intended appeal will not be rendered nugatory since the decree of the trial Court had resulted into a new title deed which was then issued to the Respondent, hence the orders sought had been overtaken by events. Further, that he had been in possession of the property and therefore, the Appellant's position would not change either way. Counsel also urged that in any case, it was not impossible to compensate the Appellant or reverse registration if the Appeal was to be held in his favor.



12. This Court has carefully considered the Application, the affidavits in support and opposition and the respective submissions. Before delving into the issues raised and the merits of the application, we must address the legal premise upon which this application is based.
13. The Appellant bases his application on several provisions being, Sections 1A, 3A and 63 (a) of the Civil Procedure Act and Order 42 Rule 6 (1) and Order 51 Rule 1 of the Civil Procedure Rule. Considering the issues raised in this application, it appears the Appellant is misdirected on the law applicable in filing for a stay of execution before this Court. The correct basis of law is Rule 5 (2) (b) of the Court of Appeal Rules, which provides as follows;
- “Institution of an appeal shall not operate to suspend any sentence or to stay an execution, but the Court may..... In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
14. To begin with, we will examine the issue of jurisdiction raised by the Respondent. The jurisdiction of this Court as it relates to the merits of this application is anchored on Rule 5 (2) (b) Court of Appeal Rules and is original and unfettered. It is invoked by filing a notice of appeal. The above provision gives this Court the basis to provide interim relief to an aggrieved party who has either appealed or intends to appeal. Where no such appeal or intention exists, this Court would have no jurisdiction to meddle in the affairs of the Superior Court.
15. This rule was aptly elucidated in the case of Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 others [2010] eKLR as follows:

“At the stage of determining an application under Rule 5 (2) (b) there may, or there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out, the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court. Accordingly, the hearing of the motion under Rule 5 (2)

- (b) cannot constitute the hearing of the appeal itself which may not even have been filed. Due to that position, no conclusive findings can be made when hearing a motion under the Rule and even if the Court were to find and hold that an applicant has not shown an arguable appeal, such a finding cannot stop an appellant or an intending appellant from pressing on with the appeal. It has been repeatedly said that an arguable appeal does not connote an appeal that will or must succeed.”

What gives the Court the jurisdiction to hear and determine the motion, therefore, is the filing of the notice of appeal. However, it is not, automatic that once the notice of appeal is filed, the Court must give preservative orders.



16. Over the years the Court has developed certain guidelines on which it may, or may not grant preservative orders when sought. In *Githunguri V. Jimba Credit Corporation Limited* (No.2) [1988] KLR 838 the guiding principles were laid out as follows:

- “ 1. . That the jurisdiction of the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules to grant either a stay of execution, an injunction or a stay of further proceedings arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with Rule 74.
2. The rule conferred an original independent discretion on the Court and the Court had to decide denovo on the suitability or otherwise of the relief sought.
3. The general principles on which the Court would base its unfettered discretion were, first that the appeal should not be frivolous or the applicant must show that he has an arguable appeal and, secondly that the Court should ensure that the appeal, if successful should not be nugatory”

17. From the record before this Court, it is apparent that the Appellant has not filed any notice of appeal or made any application for filing the same. There is however a memorandum of appeal on record which this Court believes again, the Appellant misled himself to believe it is the appropriate instrument of appeal. This however does not satisfy the rules of filing a civil appeal in the Court of Appeal. Furthermore, the Appellant is represented by counsel who, we are certain is well-versed in the Court of Appeal practices.

18. Following the basis and rules set out in the above-mentioned cases, it is apparent that for this Court to exercise its jurisdiction under Rule 5(2)(b), there must be lodged a notice of appeal upon which the question of stay would arise. Therefore, the Appellant’s failure to file the notice of appeal ties this Court’s hands in the exercise of this discretionary power.

19. The Upshot of the above analysis is that the Appellant has not laid a proper basis upon which the orders sought can be granted. To this end, it would be futile for this Court to engage in the exercise of determining whether or not the orders sought are merited, since the jurisdiction of the Court has not been properly invoked. Consequently, we decline to grant the orders sought in the Notice of Motion application dated August 30, 2022 and it is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL.

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

