



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & ASIKE-MAKHANDIA, J.J.A.)

KISUMU CIVIL APPLICATION NO. 92 OF 2020

BETWEEN

JUANITA ADHIAMBO OTIENO (Suing on behalf of the

Estate of Solomon Ochieng Oyoko (Deceased)).....APPLICANT

AND

MARTIN OUMA OKUMU.....1ST RESPONDENT

BEATRICE SUENYIA AYODO.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

*(An application for stay of execution of the ruling and Order of
the Environment and Land Court of Kenya at Kisumu (S. M.*

Kibunja, J.) dated 27th March, 2019 in ELC Case No. 325 of 2013)

RULING OF THE COURT

1. **Juanita Adhiambo Otieno** (suing on behalf of the Estate of Solomon Ochieng) (the applicant), has moved this Court by way of Notice of Motion dated 12th August, 2020 pronounced to be premised on **Rule 5(2) b** of the Court of Appeal Rules (the Rules), seeking in the main an order that:-

“That this Honourable Court be pleased to grant stay orders pending the hearing and determination of the appeal filed as Civil Appeal No. 112 of 2019 between Juanita Adhiambo Otieno (Suing on behalf of the Estate of Solomon Ochieng Oyoko deceased) versus Martin Ouma Okumu, Beatrice Suenyia Ayodo and Hon. Attorney General.”

2. The applicant had filed before the Environment and Land Court (ELC) **Case No. 325 of 2013** against the three respondents herein claiming several reliefs among them orders of eviction against the 1st and 2nd respondents, and cancellation of the Title Deed issued by the 3rd respondent in the name of the 1st respondent in respect of Land Parcel No. **Kisumu Manyatta ‘A’/659**. The suit which was filed on 12th November, 2013 was dismissed for want of prosecution by Kibunja, J on 24th January, 2018 following an application by the 1st respondent dated 13th December, 2016.

3. Being aggrieved the applicant filed a notice of motion dated 10th April, 2018 before the same court seeking the setting aside of the order dismissing her suit and also praying that the suit be reinstated for hearing and determination on merit. The application was heard, but the learned Judge, who was not persuaded that it had merit dismissed it on 27th March, 2019 with costs to the 1st and 3rd respondents herein. The applicant has filed an appeal against the said dismissal and seeks orders that the ruling of 27th March, 2019 be set aside and the suit be reinstated for hearing. The applicant’s application before us seeks stay orders of the said ruling pending hearing of the appeal.

4. From the applicant’s affidavit in support of the application, it becomes evident that what the applicant seeks to stay is the impeding execution of a decree for Ksh. 105,285.00 which amount has been taxed as costs in favour of the 1st respondent. According to the applicant,

a certificate of costs has already been issued and execution should be stayed. The applicant deposed that the 1st respondent stands to suffer no prejudice if the application is allowed.

5. There was no replying affidavit or grounds of opposition filed in opposition of this application. As this Court has expressed often times, even in the absence of any response to an application, it is incumbent upon the applicant to satisfy the court that the application has merit and the orders sought ought to be granted. In this case, the applicant is enjoined to satisfy the requirements set for applications premised on **Rule 5(2) b** of the Court of Appeal Rules. These requirements are well settled as succinctly articulated in the case of **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] eKLR** where this Court stated *inter alia*:

“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.

6. For the applicant to be successful therefore, she must demonstrate that she has an arguable appeal and that the intended appeal is not frivolous. Upon satisfying that principle, she has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay of execution. (See: **Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999** (unreported)).

Further, in determining whether the appeal is arguable or not, it is trite that by arguable it does not mean that the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. In **Dennis Mogambi Mang’are v Attorney General & 3 Others, Civil Application No. Nai 265 of 2011 (UR 175/2011)** this Court held that:-

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

7. Does the applicant have an arguable appeal? The first observation we

make is that the orders appealed against are negative orders. Kibunja, J dismissed the application seeking to set aside his earlier Ruling dismissing the suit for want of prosecution. This Court has pronounced itself severally on staying of negative orders. For instance, In **Kanwal Sarjit Singh Dhiman v Keshavji Shah, Civil Application No. Nai 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 the 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.)”(Emphasis ours).**

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...”

8. As demonstrated above, this Court has come out clearly that orders of stay cannot issue against negative orders. There is consequently nothing to stay in this matter save for the order on costs. However, even on the issue of costs, the applicant would still need to demonstrate to the Court that she has an arguable appeal and that if the costs are paid, the appeal will be rendered nugatory. There is no such demonstration here, and even if the costs are paid to the 1st respondent, the same can still be recovered from him in the event the appeal succeeds and the court sets aside the order in payment of costs. The applicant has not demonstrated that the respondent is impecunious and hence unable to refund the money paid as costs in the event the appeal or intended appeal succeeds.

9. Ultimately, we are not persuaded that this application meets the threshold set for applications under **Rule 5(2) b** of the Court of Appeal Rules. The same is therefore dismissed with no order as to costs as it was not defended.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE - MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR