



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & MURGOR, JJ. A.)

CIVIL APPLICATION NO. E001 OF 2020

BETWEEN

SHIRON ANASTACIA NYAKIEKA.....APPLICANT

AND

SAMMY NYARANGI AND

BECKIE BOYANI NYARANGI (sued in their capacity as the Administrators of the estate of

JAMES ONYIEGO NYARANGI (DECEASED).....RESPONDENTS

(Being an appeal from the Ruling of the Environment and Land Court at Nairobi (S. Okong'o, J.) delivered on 5th May 2020

in

E.L.C. Case No. 689 of 2016.)

RULING OF THE COURT

1. This ruling is in respect of the applicant's application dated 20th July 2020 of stay of execution of the judgment of the Environment and Land Court (ELC), *Case No. 689 of 2016* where the Court (*Okong'o, J.*) dismissing the applicant's claim over a property known as *L.R No.13874/9 I.R 16847 (the suit property)*.

2. The applicant's suit was founded on an alleged sale agreement dated 23rd September 2004 between her and the late Margaret Nyarangi. The learned judge held, *inter alia*, that the applicant failed to prove existence of a valid sale agreement as alleged and declined to order specific performance. The applicant had conceded that the alleged agreement was an oral one. The learned judge, in dismissing the claim, held that the alleged agreement was in violation of *section 3(3)* of the *Law of Contract Act* which stipulates that:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto."

3. The applicant has now moved to this Court under *rule 5(2)(b)* of the *Court of Appeal Rules, 2010*, seeking stay of execution of the judgment.

4. The applicant contends, that the intended appeal is arguable and has annexed a draft memorandum of appeal listing nine (9) proposed

grounds of appeal, among them being that the trial court erred in failing to find that upon payment of the purchase price, constructive trust arose as between the parties exempting the transaction from the provisions of **section 3(3)** of the **Law of Contract Act**.

5. The applicant further stated that the appeal shall be rendered nugatory unless the orders sought are granted. The applicant is in occupation of the suit property since 2007 and has developed it. The learned judge, having dismissed the applicant's claim, granted the respondent's counter claim which, *inter alia*, granted them vacant possession of the suit property. Absent a stay order, the applicant shall be evicted from the suit property and the developments thereon demolished, the applicant stated.

6. The respondents opposed the application. They stated, *inter alia*, that the intended appeal is not arguable; that the applicant did not prove existence of a valid agreement; that the applicant did not seek to rely on constructive trust in her pleadings and only introduced that issue in her submissions.

7. We have considered the application, the replying affidavit, submissions and the cited case law. The principles that guide this Court in considering applications under **rule 5(2) (b)** are well settled. An applicant must demonstrate that he has an arguable appeal, and that unless the orders sought are granted, the appeal or intended appeal, if successful, shall be rendered nugatory. See **Jaribu Holdings Ltd v Kenya Commercial Bank Ltd [2008] eKLR**.

8. Having looked at the draft memorandum of appeal, we are satisfied that the intended appeal is arguable. An arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully, even if it is only but a single ground that is arguable. See **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR**.

9. On the nugatory aspect, the applicant has been in possession of the suit property since 2007 and has partially developed it. Unless the orders sought are granted, the respondents will demolish the developments made on the suit property, thus rendering the appeal nugatory, partially so, if the respondents elect to dispose of the suit property before the appeal is heard and determined.

10. In the circumstances, we allow the application dated 20th July 2020. We further order that the applicant should not undertake any further developments on the suit property pending hearing and determination of the intended appeal. The costs of the application shall be in the appeal.

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

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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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.

Signed

DEPUTY REGISTRAR