



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, NAMBUYE & KANTAI J.J.A.)

CIVIL APPLICATION NO. 27 OF 2016

BETWEEN

DANIEL MAINA NJOROGE.....APPLICANT/APPELLANT

AND

JAMES NDEGWA GITITU.....RESPONDENT

(Being an application for stay of execution pending hearing and determination of intended appeal from the judgment/order of the High Court of Kenya (Hon. A. Ombwayo, J.) dated 11th February 2015

in

Nyeri HCCA No. 56 of 2011)

RULING OF THE COURT

Before us is a Notice of Motion dated 24th May, 2016 under **Rules 1(2)** and **5(2)(b)** of the Court of Appeal **Rules**, and all enabling provisions of law, substantively seeking an order of stay of execution of the decision of **Hon. A. Ombwayo, J.** dated 11th February, 2015 and delivered on 18th February, 2015 in HCCA No. 56 of 2011 pending lodgment, hearing and determination of the intended appeal of the applicant herein and an order that costs incidental to this application be costs in the intended appeal.

It is supported by grounds on its body, a supporting affidavit and further affidavit of **Daniel Maina Njoroge**, the applicant herein together with annexures thereto. It has been opposed by a replying affidavit of **James Ndegwa Gititu**, the respondent, sworn on 4th August, 2016 together with annexures thereto. It was canvassed virtually through rival pleadings of the respective parties herein and legal authorities filed by the respondent in support of his opposition to the application under consideration without oral highlighting.

The background to the application albeit in a summary form is that appellant filed a plaint in the Magistrates Court averring *inter alia* that: he was the registered proprietor of land parcel number **Nyeri/Watuka/617** (the suit property) as trustee for himself and his siblings as beneficiaries of the estate of his deceased father who was the original registered owner; and, that the respondent without any colour of right had trespassed on a portion (the suit portion) of the suit property. He, therefore sought a declaration that the respondent was a trespasser on the suit portion, an order for vacant possession and mesne profits in default the respondent be forcefully evicted therefrom, costs of the suit, interest and any other relief the Court may deem fit to grant.

In rebuttal, the respondent averred in his defence that: he was lawfully on the suit portion having acquired it lawfully for valuable consideration from one **James Karanja Njoroge, (James)**, a brother to applicant who had a clearly delineated portion of land given to him by his **(James)** deceased father, the original owner of the suit property. He settled thereon and constructed a dwelling house and toilet and was using it as of right for cultivation for subsistence crops. He prayed for dismissal of applicant's claim against him.

He was supported on his contention by **James** who testified as DW2 that he was the one who sold the suit portion to the respondent, it was what was lawfully due to him as his inheritance from his deceased father's estate and that he **(James)** was ready and willing to transfer that portion to the respondent as soon as he gets title for the suit portion. The trial court ruled in favour of the respondent a position affirmed by the High Court (**A. Ombwayo, J.**) in the judgment dated 11th February 2015.

Aggrieved, applicant filed a notice of appeal dated 19th February, 2015 lodged on 24th February, 2015 intending to appeal against the whole of the said decision. It is on the above mentioned notice of appeal that the application under consideration is anchored. Supporting the

application, applicant contends that the application is well founded as there is a threat to dispose off the substratum of the intended appeal which is the suit land on which he resides. The intended appeal which has overwhelming chances of success will be rendered nugatory if the relief sought is not granted.

In rebuttal, the respondent contends that since no appeal has been filed yet pursuant to the notice of appeal filed on 20th February, 2015, the notice of appeal should be treated as withdrawn for failure of applicant to file an appeal within sixty (60) days of the lodging of the notice of appeal. There is, therefore no basis on which the relief sought can be granted. Lastly, that the application is merely meant to frustrate execution of the decree granted in his favour by the Superior Court below.

In response to the respondent's replying affidavit, the applicant conceded that the appeal was yet to be filed but attributed the delay in filing the same to the registry's failure to supply him with a certified copy of the proceedings to capacitate him to progress his timely initiated appellate process.

Our invitation to intervene on behalf of the applicant has been invoked under the rules of this Court cited in the heading of the application. **Rule 1(2)** of the Rules of this Court enshrines the inherent power of the Court. The principles that guide the Court on the exercise of its inherent power have been crystalized by case law. See **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR**; and **Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell [2013] eKLR** wherein this Court and the Supreme Court of Kenya variously stated *inter alia* that: *inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute; and second, that inherent power is an endowment to the Court such to enable it regulate its internal conduct, and ensure that its mode or discharge of duty is conscionable, fair and just.*

The substantive provision for accessing the relief sought is **Rule 5(2)(b)** of the **Rules** of this Court. It provides:

“5(2)(b) in any civil proceedings, where a notice of appeal had 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.”

The principles of law that guide the Court in the exercise of its mandate under the said rule and which we fully adopt were aptly restated by the Court in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013]eKLR**. In summary, these are that the mandate of the Court under the said rule is original and discretionary and which discretion is wide and unfettered provided that it is just to exercise it in favour of a deserving party. See **Reuben & 9 Others v Nderitu & Another (1989) KLR 459**. The basis for this jurisdiction is demonstration of existence of a valid notice of appeal. See **Halai & Another vs. Thornton & Turpin (1963) Ltd. (1990) KLR 365**.

In light of the above threshold, we are satisfied that we are properly seized of the matter based on the existence of a valid notice of appeal on record dated 19th February, 2015 and lodged on the 24th February, 2015.

On merits of the application, the position in law it is that in order to succeed under **Rule 5(2)(b)** of this Court's **Rules** an aggrieved party must satisfy two prerequisites namely, that the intended appeal/appeal is arguable. Second, that it will be rendered nugatory should the relief sought under **Rule 5(2)(b)** of the Court's Rules be withheld and the intended appeal/appeal ultimately succeed. See the case of **Githunguri vs. Jimba Credit Corporation Limited [1988] KLR 838**.

In satisfaction of the first prerequisite under this **Rule**, the applicant relies on the annexed memorandum of appeal. He intends to argue on appeal that: the learned Judge erred in law in failing to find that the sale agreement relied upon by the respondent was null and void by operation of law; and also that **James** had no capacity to sell a portion of the suit land, firstly, without consent of all family members and, second, without being in possession of a grant of representation to the deceased's estate, the respondent was, therefore a trespasser in the circumstances.

In law 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. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this prerequisite. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

Applying the above threshold to the rival positions herein, we are satisfied that all the four grounds of appeal raised in the draft memorandum of appeal annexed to the application are arguable, their ultimate success or otherwise notwithstanding.

Turning to the second prerequisite, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See the case of **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**.

Applying this threshold to the rival position herein, it is our finding that what is in contest herein is the suit portion of land undisputedly part of the suit land sold by James to the respondent. **James** is a brother to the applicant. He gave testimony already highlighted above that the suit portion sold by him to the respondent was part of his share of entitlement from his late father's estate forming the suit property; that all he was waiting for was to get title to the suit portion and then effect its transfer in favour of the respondent. Apart from the applicant claiming that **James** needed the consent of all family members before selling the suit portion, there is no assertion that **James** was not entitled to any share of the suit property. Neither is there any assertion that he was not entitled to deal with the suit portion as deemed fit considering that the same had been delineated in his favour by their deceased father as claimed by James and not controverted by applicant.

In the circumstances highlighted above, we find no basis for applicant's assertion that the intended appeal will be rendered nugatory if successful. The position in law is that in order to succeed under the **Rule 5(2)(b)** procedures, an aggrieved party has to satisfy the twin limbs of the principle for granting relief under the said **Rule**. See the case of **David Morton Silverstein vs. Atsango Chesoni, Civil Application**

No. Nai 189 of 2001. Since applicant has satisfied only one limb of the said principle, the application herein fails. It is accordingly dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 19th day of February, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR