



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO (P), NAMBUYE & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 52 OF 2016

BETWEEN

KAGAARI SOUTH FARMERS CO-OPERATIVE SOCIETY LIMITED & 4 OTHERS.....APPLICANTS

AND

BERNARD MUGO & 5 OTHERS.....RESPONDENTS

(Being an application for injunction/stay pending appeal from the Ruling of the

High Court of Kenya at Embu (F. Muchemi, J.) dated 25th July, 2015

in

HCCC No. 4 of 2015)

RULING OF THE COURT

In the Motion dated 5th August, 2016 the applicants pray for an injunction to restrain the respondents from enforcing the ruling of the High Court of Kenya sitting at Embu made on 25th July, 2016 pending hearing and determination of an intended appeal. The applicants further pray that proceedings in Embu HCCC No. 4 of 2015 and the execution of the said ruling be stayed pending the hearing and determination of the intended appeal. In grounds in support of the Motion and in a supporting affidavit of **James Namu Njeru**, the Chairman of the 1st applicant (**Kagaari South Farmers Co-operative Society Limited**) it is said, *inter alia*, that the applicants had raised a jurisdictional issue before the Judge of the High Court on whether that Court had jurisdiction in a dispute involving members of a cooperative society; that a ruling on that issue was slated for 2nd June, 2015 but was delivered on 1st July, 2015 in the absence of the applicants; that the Judge assumed jurisdiction wrongly as the matter lay with the Cooperative Tribunal; that because the Judge delivered a ruling in the presence of advocates for the respondents the Judge was biased; that the Judge relied on an affidavit of a stranger; and that the Judge relied on wrong case law.

We have looked at the record of the Motion.

Pleadings before the High Court are not before us.

We note the preliminary objection filed at that court on 30th April, 2015 where the applicants (as defendants) took as a preliminary point on lack of jurisdiction of that court. The Judge (**Muchemi, J.**) considered the objection and dismissed it in the ruling delivered on 1st July, 2015. Then there is a ruling delivered by the said Judge on 25th July, 2016 where it had been prayed (as discerned from the ruling) that the court grant an order compelling the respondents (the applicants here) to take delivery of coffee beans from the respondents pending hearing and determination of the suit. They also prayed for an order to compel the applicants to provide the respondents with copies of minutes and resolutions passed at an annual general meeting held on 12th March, 2015. The Judge allowed the application. There is a Notice of Appeal against both rulings but the applicants have not attached a draft Memorandum of Appeal to the application.

The principles that govern applications for stay of execution pending appeal and for injunction in this Court are well settled. For an applicant to succeed in such an application he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is to say that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] 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.

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

iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.

v) An applicant must satisfy the court on both of the twin principles.

vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.

vii) 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.

viii) 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.

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

x) Whether or not an appeal will be rendered nugatory 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.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim.”

The applicants intend to argue, on appeal, that the Judge was wrong to assume jurisdiction where the dispute involved members of a cooperative society within the meaning of the Co-operative Societies Act. We note that the 1st applicant is a cooperative society and presumably the respondents are members of that society. It is arguable whether the Judge was right to assume jurisdiction where the Cooperative Societies Act donates a jurisdiction to a tribunal to hear and determine disputes between members of a cooperative society and the society itself. As an arguable point on appeal is not one that must necessarily succeed we are satisfied that the intended appeal is arguable.

What about the nugatory aspect that an applicant must also satisfy to succeed in an application of this nature?

The complaint by the applicants is that a ruling was delivered in their absence. In the second ruling delivered on 25th July, 2016 it was ordered that the applicants take delivery of coffee beans from the respondents. Those events took place more than four years ago. We cannot stay a ruling that was already delivered.

The applicants were ordered to receive the coffee beans within 14 days of the date of the ruling (25th July, 2016) and the Judge gave a default clause. In those circumstances where orders took effect we cannot see what would be rendered nugatory in the intended appeal if we do not grant a stay of execution or injunction. The applicants have not satisfied the second limb of the principles governing applications of this nature and having failed to do so the Motion fails and is dismissed with costs to the respondents.

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