



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 66 OF 2020

BETWEEN

TOBIAS ONYANGO KICHULA.....1ST APPLICANT

MARY KICHULA.....2ND APPLICANT

AND

SAMUEL OLER KICHULA (*suing as the administrator of*

*the estate of the late PHILEMON KICHULA PONDO*.....1ST RESPONDENT

LUCAS OKOTH KICHULA.....2ND RESPONDENT

ELISHA OCHIENG KICULA.....3RD RESPONDENT

PROF. EDWARD AKONG'O OYUGI.....4TH RESPONDENT

THE ESTATE OF PHILIMON KICHULA PONDO.....5TH RESPONDENT

MIGORI MUNICIPAL COUNCIL.....6TH RESPONDENT

*(Being an application of stay of execution of the judgment*

*of the High Court of Kenya at Migori (A.C. Mrima, J.)*

*dated 15th October, 2019 in Misc. Civil Appl. No. 274 of 2018 (O.S.))*

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RULING OF THE COURT

We are asked in the Motion dated 22nd June, 2020 brought under **Sections 3A and 3B** of **The Appellate Jurisdiction Act** and **Rule 5(2) (b)** of the **Rules of this Court** to stay execution of the Judgment of the High Court of Kenya at Migori (**Mrima, J.**) dated 15th October, 2019 pending hearing of the Motion and hearing of an intended appeal. In grounds in support of the Motion and in a Supporting Affidavit of **Mary Kichula** (the 2nd applicant) it is said that the respondents took out an Originating Summons in High Court of Kenya at Migori being **HC Misc. Civil Application No. 274 of 2018** claiming a plot Number 82, Migori Municipality which was registered in the name of her late husband **Philimon Kichula Pondo**; that she had challenged the claim as she had a right to inherit the plot; that the matter should have been heard by the Environment and Land Court, not the High Court; that Judgment was entered for the respondents who then demanded rentals from tenants on the plot. The applicant deposes at paragraph 13 of her affidavit on arguability of the intended appeal:

***“THAT one of the issues that was framed was on the jurisdiction of the court to have handled this issue and delivered a judgment. I am apprehensive that the appellate court will find otherwise and redeem our property that is now hanging in the balance.”***

When we heard the application. There was no replying affidavit by the respondents.

The principles that guide the court in considering an application of this nature are now well known. For an applicant to succeed in such an application he must, firstly, demonstrate that the appeal, or the intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. An applicant who succeeds on that limb must, in addition, demonstrate that the appeal would be rendered nugatory in the absence of stay – See *Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR* where the said principles were summarized 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.”***

From the record what we understand the applicants to be saying is that the subject before the Court involved a parcel of land. The applicants raise the issue whether it was right for the suit (Originating Summons) to be taken before the High Court at Migori instead of the Environment and Land Court. That is an issue of jurisdiction and we find it to be an arguable point in the intended appeal.

On the nugatory aspect Mrima, J. ordered the transfer of Plot No. 82 Migori Municipality from Philimon Kichula Pondo (the 2nd applicant’s late husband) to Tobias Onyango Kichula (1st applicant) and the title be revoked and/or nullified. The Judge further ordered the County Government of Migori to rectify its records and register the plot in the name of the 4th respondent Prof. Edward Akong’o Oyugi. If these orders are effected the plot will be beyond the applicants’ reach and may be disposed or otherwise be interfered with and would make the intended appeal nugatory. The applicants have satisfied both limbs in an application of this nature. We allow it. There will be a stay of execution of the Judgment of the High Court at Migori dated 15th October, 2019 pending hearing and determination of the intended appeal. Costs of the Motion will be in the appeal.

**Dated and delivered at Nairobi this 5th day of February, 2021.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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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**