



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, WARSAME, & MOHAMMED, JJA)

CIVIL APPLICATION NO. 146 OF 2020

BETWEEN

ACTON MUSII KHALAMBUKHA.....1ST APPLICANT

SABETI KHALAMBUKHA.....2ND APPLICANT

AND

PATRICK MALONGO LIDOVOLO.....RESPONDENT

(Being an application for stay of execution of the judgement and/or orders in the Environment and Land Court of Kenya at Kakamega (Matheka, L. J) dated 24th June 2020) in **ELC NO.78 of 2017** pending the hearing and determination of an application filed in the Court in Kisumu in Civil Application No. 131 of 2020, E26 of 2020 and the intended appeal).

RULING OF THE COURT

1. On 24th June 2020, the Environment and Land Court (Matheka, J.) in ELC No. 78 of 2017 delivered a judgment in favour of the respondent in a claim involving the unlawful occupation of Land Parcel No. Tiriki/ Shamakhoko/1442 (the suit property) wherein the court found that the respondent is the registered owner of the suit property. The trial court further issued orders;

“That, the applicants herein vacate the suit parcel land 90 days from the date of the judgement, that the applicants are compelled to exhume the bodies of Lucie Asang’asa and Flora Ayega (deceased) from the suit property and further that the applicants are restrained from accessing the suit parcel of land”.

2. Dissatisfied, the applicants moved the trial court for leave to file an appeal against the judgement delivered on 24th June,2020 which the trial court in a ruling dated 26th October,2020 found unmeritous and dismissed the same with costs. The applicants are aggrieved with the judgement delivered on 24th June 2020 and have filed the present application brought before us pursuant to **Rule 5(2) (b) of the Court of Appeal Rules** seeking orders for;

a. An injunction restraining or staying the execution of the trial court’s judgement delivered 24th June 2020 pending the hearing and determination of the application herein;

b. Stay of execution of the orders of the trial court’s judgement delivered on 24th June 2020 pending the hearing and determination of an application field in this Court in Civil Application No. 131 of 2020 and E26 of 2020 for leave to file an intended appeal out of time.

3. In support of the application, it was deponed that on 12th Novmber, 2020 vide Kakamega ELC No. 78 of 2017 the respondent has filed an application seeking to enforce the judgement of the trial court. The application was coming up for ruling on 15th December 2020. It was further submitted that the respondent would not suffer prejudice as opposed to the applicants who reside and use the suit parcel as a source of their livelihood and stand to suffer public shame as their relatives stand being exhumed from the suit parcel of land. The orders sought are meant to preserve the substratum of their intended appeal filed out of time.

4. The applicants relied on the decision of this Court in **Oliver Collins Wanyama v. Engineers Board of Kenya [2019] eKLR** which quoted the decision **Equity Bank Limited v. West Link Mbo Limited [2013] eKLR** that the law is trite when dealing with 5 (2) (b) applications. The Court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar

court under **Rule 6(1) of order 42** of the Civil Procedure Rules and refused, the Court in dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction (*Githunguri v. Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838*). **Rule 5 (2) (b)** is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.

5. The applicants further relied on *Oliver Collins Wanyama v. Engineers Board of Kenya [2019] eKLR* in stating that this Court in applications brought under Rule 5(2) (b) exercises jurisdiction similar to that of a court of first instance hence can grant and has on many occasions granted an injunction pending the hearing and determination of an appeal or intended appeal primarily in order to preserve the subject matter of the intended appeal, or where it would facilitate a proportionate resolution of the dispute. Indeed for many applicants whose actions have been dismissed by the courts below, the refuge is to apply especially for an injunction under **5 (2) (b) of the Court of Appeal Rules**.

6. During the hearing, on the one hand it was argued that the right of appeal should be safeguarded as the appeal would be rendered nugatory in the event the orders sought are declined. On the other hand, the respondent opposed the application while contending that the application is incompetent on the grounds that no appeal lies before the Court as no notice of appeal was filed. As such the respondent urged this Court to dismiss the application with costs.

7. The principles for granting orders under **Rule 5 (2) (b) of the Court of Appeal Rules** are trite. For an applicant to succeed, he/she must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory (See. *Ishmael Kagunyi Thande v. Housing Finance Company Limited Civil Application No. 156 of 2006 (UR)*).

8. Suffice to say, that the twin principles merely guide the Court in the exercise of its jurisdiction, under rule 5(2) (b) which is not only original but also discretionary. The rule provides as follows;

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

...

b. In any civil proceedings, where a notice of appeal has 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.”

9. Hence the issue for determination is whether the prayers sought for stay are properly before this Court. On the one hand the Court is invited to exercise its wide and inherent discretion in granting the reliefs available under **Rule 5(2) (b)** of the **Court of Appeal Rules** yet on the other hand no notice of appeal was filed. An application under **Rule 5(2) (b)** presupposes that such stay of execution of judgments or proceedings are only applicable when a Notice of Appeal has been filed, under **Rule 75** and is pending in this Court. (See. *Jennifer Koinante Kitarpei v. Alice Wahito Ndegwa & Another [2014] eKLR*). The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75 and such an order can only be efficacious when anchored on a valid notice of appeal. (See. *Moroo Polymers Limited v Wilfred Kasyoki Willis [2019] eKLR and Halai & Another v. Thornton & Turpin (1963) Ltd. (1990) KLR 365.*). The upshot is that this application has no merit and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

HANNAH OKWENG’U

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR