



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI, & MURGOR, J.J.A)

CIVIL APPLICATION NO. 158 OF 2019

BETWEEN

DANIEL NDERI NJOGU.....APPLICANT

AND

LYDIA MUTHONI KIBAGE.....RESPONDENT

(Being an application for stay of execution and or an injunction against the judgement and decree of the Environment and Land Court at Kerogoya pending the hearing and determination of an intended appeal (Cherono, J.) dated 14th March, 2019

in

Kerogoya ELC No. 487 of 2013)

RULING OF THE COURT

[1] The notice of motion dated 5th September, 2019 is taken out by **Daniel Nderi Njogu**, (the applicant). He is seeking an order of stay of execution in regard to the Judgement of the trial court in **Kerogoya ELC No. 487 of 2013** where he was ordered to vacate from **LR No Ngariama/ Nyangeni/ 49** (the suit premises) within six (6) months. It is the applicant who had sued the respondent seeking mainly an order declaring that he is entitled to one half share of the suit premises measuring about eight (8) acres. The applicant claimed to have purchased the suit premises from one **Phares Gakuya** but had it registered in the name of his brother the late **Daniel Kibage** (deceased) who allegedly held it in trust. The respondent opposed the suit and also filed a counter-claim.

[2] Upon considering the matter, the learned trial Judge dismissed the applicant's suit and allowed the respondent's counterclaim. The applicant now intends to appeal against the said decision and according to the averments contained in his supporting affidavit sworn on the same date as the motion, he states that he has already filed **Nyeri Civil Appeal No 95 of 2019**. Explaining why there was a delay in filing the instant application, the applicant states that he was hoping the appeal would be heard and determined within a period of six (6) months which was the period he was allowed a stay of the judgment by the trial court. Since the appeal has not been heard, he decided to file the instant application seeking an order of stay/or extension of the order that was given in the High Court.

[3] The applicant further states that he occupies half of the portion of the suit premises where he has grown tea and from which he derives an income. That there is an eminent danger that unless an order of stay is granted, the respondent is likely to destroy his tea on the said land. On the appeal being arguable the applicant attached a memorandum of appeal that has raised several grounds of appeal which he states are arguable.

[4] The respondent did not file any response to this application. However, that does not lessen our duty placed on us by law while exercising judicial discretion which must always be based on cogent reasons; to avoid abuse of the court process and an injustice.

[5] That said, we have considered the instant motion which was done without appearance of counsel or parties Pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global Pandemic. The application is predicated under the provisions of **Rule 5 (2) (b)** of this Court Rules. The applicable guidelines in regard to orders sought in this regard are well settled. For the applicant to succeed, he must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that 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 that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

[6] Has the applicant demonstrated that the appeal is arguable? We think so, granted the raft of allegations made by the applicant in the memo of appeal. One that stands out is whether the applicant failed to prove his case and whether the respondent proved her counter-claim. We will therefore not interrogate the other issues raised by the applicant as just one issue is sufficient and in fact the arguable issue need not succeed at the appeal. That was held in the case of; - **Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 others [2014] eKLR: -**

“An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication. “

[8] While we are prepared to find as we have that the applicant’s intended appeal may be arguable, we are not persuaded that it will be rendered nugatory if it succeeds. This is because the suit premises is still in the name of the deceased after the court ordered the applicant to re-transfer the same. The Judge found the respondent had not taken out letters of administration and that is why judge found that the respondent was unsuited as she was not the administrator of her late husband. As matters stand, the title to the suit premises is in the name of the deceased. Moreover, the applicant did not demonstrate that there were any actions or proceedings that were being taken out by the respondent to disposes him of the portion of land he claims to be in occupation. It is for these reasons we find the applicant has not satisfied the two limbs to justify the issuance of the orders sought.

[9] In the event this application therefore fails and is dismissed with costs to the 1st respondent. It is so ordered.

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

M. K. KOOME

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR