



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, KIAGE & SICHALE JJ.A]

CIVIL APPLICATION NO. 293 OF 2019

BETWEEN

JACKSON BARCHURO..... 1ST APPELLANT/APPLICANT

DANIEL RUTTO.....2ND APPELLANT/APPLICANT

VS

WILLIAM MACHARIA MAINA.....1ST RESPONDENT

JOHN MUTHUI MAINA.....2ND RESPONDENT

AND

KIBIWOTT YATOR KURYASES & 8 OTHERS.... INTERESTED PARTIES

(An application for stay of execution of the decision of the Environment and Land Court of Kenya at Eldoret (*M. A. ODENY, J.*) dated 4th July, 2018 in **ELC Cause No. 172 OF 2014**)

RULING OF THE COURT

The applicants have moved this Court for orders of stay of execution of the Judgment and Decree of the Environment & Land Court (ELC) Cause No. 172 of 2014, pending the hearing and determination of an intended appeal to this Court against the Judgment and Decree of the ELC at Eldoret made on **4th July 2018**.

In the Judgment subject of the intended appeal, the learned Judge of the ELC found in favour of the respondents and proceeded to direct the applicants to vacate the suit property within 30 days, failing which eviction would be effected.

Being aggrieved by the Judgment of the learned judge, the applicants filed an application for stay of execution of the decree before the trial Court which was dismissed on grounds that the said Court lacked jurisdiction to hear that application. The applicants have averred that they have established their homes on land parcel No. CHERENGANY /KAPCHEROP/171, which they claim, they stand to be evicted from if the decree issued by the ELC stays in place. The applicants maintain that their appeal shall be rendered nugatory if stay is not granted as they have extensively developed the parcel of land that is the subject of their intended appeal, and the respondents hold a decree calling for their eviction from the parcel of land in dispute.

The respondents responded to the application through a Replying affidavit sworn by the 1st respondent wherein he deposed (in the main) that the application had been brought long after the ruling of the ELC dismissing the initial application for stay had been delivered; that the applicants had not provided security and that the Memorandum of Appeal does not raise arguable points.

This being an application under **Rule 5(2)(b)** of this Court's Rules for an order of stay, an applicant must satisfy the Court that the appeal is arguable and not frivolous, and secondly, that, if the stay order is not granted, the appeal would be rendered nugatory if it eventually succeeds. As was as stated by this Court in *National Bank of Kenya Limited v Leonard G. Kamweti [2015] eKLR*:

“The object of the provisions of rule 5(2)(b) of this Court's Rules to, inter alia, stay proceedings, is to preserve the substratum

of the appeal so that the appeal is not rendered nugatory should it, once heard, succeed. The dual limbs of arguability of appeal and the nugatory aspect must be shown to co-exist in default of which an order under rule 5(2)(b) of the Court of Appeal rules shall be declined”.

On the first limb, the applicants have demonstrated from the application that they intend to canvass in the appeal, the issue of whether or not the learned Judge rightfully allowed the plaint without according them a hearing. This Court finds that the applicants have met the first limb of the requirements of **rule 5(2)(b) Court of Appeal Rules**, as the burden is to show, even a single arguable point – see **Kenya Railways Corporation vs. Ederman Properties Ltd, C A No. Nai. 176 of 2012**, and by arguable is not meant an appeal that must succeed but one that raises an issue or issues which merit consideration – see **Kenya Tea Growers Association & Another V Kenya Planters & Agricultural Workers Union C A No. 72 of 2001**.

As to the nugatory aspect, the the following quotation is instructive:

“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”, as stated in Stanley Kangethe Kinyanjui V Tony Ketter & 5 Others, C A No. 31 of 2012.

If execution of the decree being appealed against was to proceed and eventually the appeal succeeds to the effect that the applicants were not accorded fair hearing then the success of that appeal would amount to naught, thereby being rendered nugatory as it were, the applicants would have already been evicted from their homes, an act which no damages can reasonably compensate.

As a result, this Court finds that the applicants have satisfied the two limbs of **rule 5(2)(b)** of this Court’s rules and accordingly, the order sought in prayer (2) of the Notice of Motion under consideration is hereby allowed.

The costs of this motion shall be in the intended appeal.

It is so ordered

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

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR