



IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPLICATION NO. NYR 132 OF 2018

BETWEEN

JACKSON KAMAU NDEGWA.....APPLICANT/APPELLANT

AND

HON. ATTORNEY GENERAL.....1ST RESPONDENT

HON. SRM. J.N. NTHUKU.....2ND RESPONDENT

HON. JAPHATHETH MWIRICHIA – D/OCPD.....3RD RESPONDENT

HON. DANIEL NYATIKE –

NKU LANDS REGISTRAR.....4TH RESPONDENT

MERCY MAKENA.....5TH RESPONDENT

VIJAY SHAH.....6TH RESPONDENT

SOPHIA MBURU.....7TH RESPONDENT

MUHATIA PLAZA AUCTIONEERS.....8TH RESPONDENT

(Being an Application for Orders of Stay against the execution of the ruling of the High Court of Kenya at Nakuru (R. Lagat-Korir, J.) dated 26th September, 2018

in

Petition No. 29 of 2017)

RULING OF THE COURT

[1] *Joseph Kamau Ndegwa*, (the applicant) filed **Petition No 368 of 2017** which was originally filed at Nairobi but was subsequently transferred to Nakuru and therefore became **Nakuru Petition No. 29 of 2017**. In it, the applicant was alleging violation of his constitutional rights and sought several declaratory orders in relation to ownership of **Land Parcel No. Nakuru Municipality/Block 12/223** (the suit land) which became a subject of attachment pursuant to an order made in **Nairobi Children's Case No. 148 of 2004** (Children's court). It would appear the court ordered the sale of the suit land, by way of public auction which the applicant claimed was his prime matrimonial home. Thereafter, the applicant instituted a claim for the suitland under **ELC No. 359 of 2013** against the 4th – 6th respondents accusing them of fraud in regard to the transfer of the suit land.

[2] Upon being served with the petition, the 1st, 2nd, 3rd and 4th respondents filed grounds of opposition stating that the petition did not disclose particulars of violation of the applicant's constitutional rights and therefore did not meet the threshold for the court to grant the

orders sought. As for the 6th respondent, he filed a replying affidavit indicating that the issues raised in the petition were the same ones raised before **ELC No. 359 of 2013**. Upon considering the petition, the learned trial Judge, **R. Lagat-Korir, J.**, vide a ruling delivered on 26th July, 2018, which is the subject of the applicant's intended appeal, struck out the petition and in doing so, she made the following key remark: -

“The Petitioner has however failed to demonstrate to the court how the respondents individually and severally have violated the various Articles of the Constitution.”

[3] The applicant was aggrieved by the aforesaid outcome. He filed a Notice of Appeal on 27th September, 2018 evincing his intention to appeal and the instant motion on notice that is dated 9th October, 2018. The motion is predicated under the provisions of **Section 3A, 3B, 4 & 5 of the Appellate Jurisdiction Act, Chapter 9, Laws of Kenya** and **Rules 5 & 47 of the Court of Appeal Rules, Judicature Act Chapter 8**. seeking *inter alia*: -

“2. THAT, pending hearing and determination of this appeal, an Order be granted staying Justice Hon. R. Lagat – Korir Ruling on 26.9.2018 until the Appeal is heard and determined.

3. THAT, HON. SRM. J.N. MUTHUKU or ANY other MAGISTRATE be refrained forthwith by an Order of this Court NOT to Proceed with the Criminal Proceedings in CMCR 1130/2013 until the Appeal is heard and determined.”

[4] The motion is supported by the grounds stated therein and matters deposed to in the applicant's affidavit sworn on 9th October, 2018. In the said grounds, the applicant faults the learned trial Judge for delaying the ruling; for failing to find that his human rights were violated for actions taken to execute the orders made in the Children's court; that his matrimonial home which was a prime property was sold clandestinely thereby depriving him of his property rights; that his life is in perpetual danger as he is being threatened by the respondents with arrest and all manner of harassments that he claimed were an infringement of his human rights. That his intended appeal is arguable and has overwhelming chances of success and unless the orders sought are granted, the appeal if successful, will be rendered nugatory.

[5] The respondents did not file any response to this application. However, that does not lessen the 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.

[6] This application was canvassed by way of written submissions without appearance by counsel or parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID-19 Global pandemic. We have considered the motion and the supporting documents which essentially invokes the jurisdiction of this Court as provided under **Rules 5(2) (b) of the Court of Appeal Rules**, that: -

“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— 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.”

The guiding principles when exercising this jurisdiction have been set out in a long line of case law. 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.)”

[7] We now wish to consider this application within the above set out principles to answer the twin issues of whether the applicant has an arguable appeal and secondly whether the appeal if successful, would be rendered nugatory if an order of stay is not granted. The order issued by the trial court, was a negative order as the court only struck out the petition and did not order any party to do anything or refrain from doing anything. The courts have on various occasions held that when a court has granted negative orders, there is nothing that can be stayed. See the case of; **Kaushik Panchatia & 3 others vs. Prime Bank Limited & another** [2020] eKLR:

“This is a negative order. We are guided by the decision in the case of Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63, the court whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopt stated *inter alia* as follows:-

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

Also in **Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya)** [2015] eKLR:-

“Following that approach of looking at the nature of the orders even before delving into the said principles in a Rule 5(2) (b)

application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in Executive Estates Limited v Kenya Posts & Anor. [2005] 1 E.A. 53 where it was stated:

“..... *The order which dismissed the suit was a negative order which is not capable of execution*”

[8] In light of the aforesaid authorities by this Court, we are of a firm view that the order made by the learned Judge is a negative one that is not capable of being stayed. On the nugatory aspect, the applicant has not demonstrated how the appeal will be rendered nugatory since he is at liberty to litigate his grievances under **ELC No. 359 of 2013** or if aggrieved by the orders issued in the Children’s matter, he can also file an appeal.

[9] We therefore find the applicant’s motion lacking in merit and it is hereby dismissed with no order as to costs.

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