



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 183 OF 2019

BETWEEN

JOSHUA NGATU.....APPLICANT

AND

JANE MPINDA.....1ST RESPONDENT

REHEMA RAIBUNI.....2ND RESPONDENT

MARY ALIMA RAIBUNI.....3RD RESPONDENT

SALPRO KENYA LIMITED..... 4TH RESPONDENT

(Being an application for stay of the Ruling of the High Court of Kenya (Lucy N. Mbugua, J.) dated 13th November, 2019

in

Meru ELC Case No. 15 of 2018)

RULING OF THE COURT

Before us, is a Notice of Motion dated 10th December, 2019, substantively brought under **Rules 5(2) (b)** of the **Court of Appeal Rules 2010** and all other enabling provisions of the law, seeking an order to stay the execution of the Ruling of **Mbugua, J** delivered on 13th November, 2019 in Environment and Land Court (ELC) Case No. 15 of 2015 and all consequential orders, together with an attendant order that costs of the application be provided for. It is supported by grounds on its body and a supporting affidavit of **Joshua Ngatu**, the Applicant together with annexures thereto. It has been opposed by replying affidavits sworn by **Jane Mpinda**, the 1st Respondent on 9th January, 2020 on her own behalf and on behalf of the 2nd and 3rd Respondents and another sworn on 7th October, 2020 by **Ashok Kumar Hariya** on behalf of the 4th Respondent.

The application was canvassed through rival pleadings, the 1st, 2nd and 3rd Respondents' written submissions and legal authorities.

In summary, the Applicant contends that he was dissatisfied with the Ruling of Honourable **Lucy N. Mbugua, Judge** delivered at Meru on 13th November, 2019 in the ELC case No. 15 of 2018. He timeously filed a notice of appeal dated 26th November, 2019. He is apprehensive that if the stay order sought is not granted, him and his family stand to be evicted from the land they have lived on throughout their lives and rendered destitutes; hence his plea that in the peculiar circumstances of this application, ends of justice would demand that orders sought be granted especially when in his opinion the intended appeal is arguable with overwhelming prospects of success. He is also willing and ready to abide by any conditions that may be set by the Court as deemed fit.

In rebuttal, the 1st, 2nd and 3rd Respondents both in their averments in the replying affidavit and written submissions contend that soon after the Applicant informally sought stay of execution of the said dismissal order which was declined by the learned Judge citing the negativity of the order issued, which was incapable of being stayed, the Applicant on 3rd July, 2019 filed a substantive application seeking stay of the dismissal orders made on 20th February, 2019, and which was also dismissed by the trial court on 11th November, 2019 reiterating the stand taken earlier by the court that the orders of 20th February 2019 being negative in nature, there was nothing to stay.

It is against the above uncontested brief background that the 1st, 2nd and 3rd Respondents' submit that the Applicant's application does not

meet the threshold for granting relief under the **Rule 5(2) (b)** of this Court's **Rules**. Further, the Applicant failed to annex a draft Memorandum of Appeal to demonstrate the arguability of the intended appeal. Neither is there demonstration from the supporting documents put forth by the Applicant as to how the intended appeal is arguable with high prospects of success in the absence of demonstration of existence of supportive factual base. Neither is there any demonstration to show that if the relief sought is not granted, the intended appeal will be rendered nugatory. Further, that there is also no way that the intended appeal will be rendered nugatory as there is no threat of disposal of the substratum of the intended appeal. There is also nothing to stay as the decree has already been executed.

The 4th Respondent on the other hand contends in his averments that the Applicant stands nonsuited on his application under consideration for failure, firstly, to lodge the notice of appeal within fourteen days as stipulated in **Rule 75(2)** which requires a notice of appeal to be filed within fourteen (14) days of the date of the intended impugned decision and cause it to be served on the opposite party within seven days of such lodging pursuant to **Rule 77(1)** of the Rules of the Court.

Further, that the application is also a nonstarter for purportedly seeking to stay a negative order. There was no rebuttal by the Applicant of the Respondents' averments in the two sets of replying affidavits and the 1st, 2nd and 3rd Respondents' written submissions.

Our invitation to intervene on behalf of the Applicant has been invoked substantively under **Rule 5(2) (b)** of the rules of this Court. The principles that guide the Court in the exercise of its mandate under the said rule have now been crystalized by numerous decisions of this court. We take it from the case of **Stanley Kengethe Kinyanjui vs. Tonny Ketter & 5 Others [2013] eKLR**. These require the Applicant to satisfy the Court, firstly, that, he has an arguable appeal which in law need not ultimately succeed but one that would not only invite a response from the opposite party but would also warrant a merit interrogation by this Court. Second, also to demonstrate that the intended appeal will be rendered nugatory if the relief sought is not granted.

We have applied the above threshold to the rival position herein. We find nothing on record to satisfy both limbs as neither a draft Memorandum of Appeal setting out the grounds of appeal Applicant intends to raise on appeal nor facts from which such grounds can be discerned. We therefore rule that this first prerequisite has not been satisfied.

Likewise, the second prerequisite has not also been satisfied as the Applicant failed to controvert 1st, 2nd and 3rd Respondents' contention that there is no threat of dispossession of the substratum of the intended appeal. Second that the decree has been executed. There is therefore nothing to stay in the circumstances. Thirdly, the order sought to be stayed is a negative order. It does not therefore attract the nature of the relief Applicant seeks before us.

The upshot of the above assessment and reasoning is that we find no merit in the application. It is accordingly dismissed with costs to Respondents.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. Ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR