



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 99 OF 2016

BETWEEN

MATHENGE NJERU.....APPLICANT/APPELLANT

AND

JOSEPH MURIITHI NJIRU.....RESPONDENT

(An application for orders of stay of execution pending the hearing and determination of

an intended appeal from the judgment of the Environment and Land Court at Nyeri

(L.N. Waithaka, J.) dated 15th February 2016

in

ELC No. 584 of 2014)

RULING OF THE COURT

[1] The dispute that has escalated before us in the instant motion, started with **Joseph Muriithi Njeru**, (the respondent) filing before Nyeri Environment and Land Court (ELC) **Case No 584 of 2014**. In it he claimed that his older brother, **Mathenge Njeru** (the applicant) holds **Mwerua/Mukure/60** (the suit property) in trust for the applicant and the respondent equally. The respondent had claimed that the suit property which initially belonged to their father **Njeru Mumu** was transferred to the applicant to hold in trust, but the applicant failed to transfer to the respondent his half share and therefore the suit. The respondent denied the claim and alleged that he bought the suit property from the **Ambui Clan** through purchase of shares and thereafter got registered as an absolute proprietor in 1971.

[2] Upon considering the matter, the learned trial Judge (**L.N. Waithaka, J.**) vide a judgment delivered on **27th October, 2015** was inclined to rule in favor of the applicant but stated that the court was not privy to the size of the parcel of land that the father of the two parties owned, and she directed the parties to appear before the court within fourteen (14) days to address her on what their father's entitlement was pursuant to an agreement of 1943 which was used to purchase the suit property. The parties filed further submissions which the learned Judge considered and delivered another judgment on **15th February, 2016** allowing the plaintiff's claim and in doing so, she made the following key remark: -

“At the pain of contradicting myself, now that parties have clarified that there was only one parcel of land and there being no evidence capable of proving that the plaintiff's father held the suit property or a portion thereof on behalf of the defendant, I find and hold that the defendant holds half the share of the suit property in trust for the plaintiff.”

[3] The applicant was aggrieved by the aforesaid outcome. He filed a notice of appeal dated 25th February, 2016 evincing his intention to appeal and the instant motion on notice that is dated 21st December, 2016. The motion is predicated on the provisions of **Section 3A & 3B** of the **Appellate Jurisdiction Act, Chapter 9, Laws of Kenya** and **Rules 5 (2)(b)** of the **Court of Appeal Rules, 2010**. seeking *inter alia*: -

“THAT there be a stay of execution of the judgment of the trial court in ELC Case No. 584 of 2014 and the resultant decree pending the hearing and final determination of the intended appeal.”

[4] The motion is supported by the grounds stated thereunder and matters deposed to in the applicant’s affidavit sworn on 21st December, 2016. In the said grounds, the applicant faults the learned trial Judge for delivering a second judgment when the court was *functus officio* having already delivered an earlier judgment dated 27th October, 2015 where it held that the respondent is not entitled to half of the suit premises; that if stay of execution is not granted, the intended appeal will be rendered nugatory; that the respondent might transfer the suit property to third parties to defeat the applicant’s interest; that his intended appeal is arguable with great chances of success and he seeks that the court maintains the status quo pending hearing of his preferred appeal.

[5] The application was opposed by the respondent vide the replying affidavit sworn by **Joseph Muriithi Njeru** on 5th September, 2017. He first of all indicated that the application was overtaken by events as the parties entered into a consent on 9th March, 2017 which was adopted as an Order of the Court. Secondly, that the applicant had filed **Civil Application No. 100 of 2016** seeking extension of time within which to file and serve memorandum of appeal and record of appeal but the said application was dismissed. The applicant thereafter filed another application **Civil Application No. Nyeri 20 of 2017** seeking more or less the same prayers.

[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 without an order of stay. For the purposes of the instant motion, we find that the applicant filed a Notice of Appeal on 25th February, 2016 demonstrating his intention to appeal against the judgment of 15th February, 2016. In the instant motion, he has attached a draft memorandum of appeal, where he has raised some disturbing issues especially the assertion that the learned Judge issued two judgments which were contradictory when the court had become *functus officio*, an enduring principle of law that prevents the re-opening of an issue before a court that rendered a final decision. We find this is an arguable issue to be argued in the intended appeal and not a frivolous one.

[8] 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. “

[9] On the nugatory aspect, the applicant was emphatic that the respondent was likely to interfere with the suit property which we think might be a genuine concern as the parties are brothers who seem to be in occupation of the suit property. Having found the applicant has satisfied both limbs, the order that commends itself in the circumstances of this matter is one directed to both parties to maintain the prevailing *status quo* in regard to the suit property until the appeal is heard and determined.

[10] Accordingly, we find merit in the applicant’s motion and order that the *status quo* be maintained over **Mwerua/Mukure/60** pending the hearing and determination of the intended appeal. We make no order as to costs.

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

M. K. KOOME

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR