



REPUBLIC OF KENYA



KENYA LAW
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IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OKWENGU, SICHALE & J. MOHAMMED, JJ.A]

CIVIL APPLICATION NO. E350 OF 2020

BETWEEN

WINIFRED PENINA MUTHUBI & FRANCIS KANGERE MUTHUBI

(Suing as Personal Representatives of

the Estate of Joseph Muthubi-(Deceased).....APPLICANTS

AND

KENYA COMMERCIAL BANK LIMITED.....1ST RESPONDENT

NANAK INVESTMENTS LIMITED.....2ND RESPONDENT

JAMES AMALEMBA ATEMA.....3RD RESPONDENT

THERESA SALASYA ATEMA.....4TH RESPONDENT

SAM KOKACH.....5TH RESPONDENT

BERTHA KOKACH.....6TH RESPONDENT

JOSIAH KIPKEMBOI KIPLAGAT.....7TH RESPONDENT

JOSEPH WANJALA.....8TH RESPONDENT

CHRISTINE WANJALA.....9TH RESPONDENT

LILIAN WANJIRA.....10TH RESPONDENT

HON. DR. PAUL OTUOMA.....11TH RESPONDENT

CELINA OTUOMA.....12TH RESPONDENT

FLORENCE MWAL.....13TH RESPONDENT

NEELTJE ROSENTOK.....14 RESPONDENT

WINIE WANGARI SCHOLTE KELLINGHAUS.....15TH RESPONDENT

FRANCIS OFAFA.....16TH RESPONDENT

(Being an application for stay of the Ruling and Order of the Environment and Land Court at Nairobi (Bor, J) dated 7th October

2020.)

IN

(Nairobi ELC Case No. 142 of 2007)

RULING OF THE COURT

Before us is a motion dated 10th November 2020, filed by **Winifred Penina Muthubi and Francis Kangere Muthubi (Suing as the Personal representatives of the Estate of Joseph Muthubi- Deceased)** (the applicants), under Rules 5 (2) (b), 42 (1) and 47 (1) of the Rules of this Court in which the applicants seek the following orders

“1. Spent.

2. THAT there be a stay of proceedings and orders in Nairobi ELC Case No. 142 of 2007, pending the hearing and determination of the appeal herein by the applicants against the ruling of the honourable court delivered on 7th October 2020.

3. THAT costs of the application be provided for”.

The motion is supported on the grounds on the face of it and an affidavit sworn by **Francis Kangere** who deponed *inter alia* that on **7th October 2020, Bor, J** struck out with costs the applicants’ case against the 2nd-16th respondents and the applicants herein had filed an application in the trial court seeking to enjoin the 2nd respondent herein which application was allowed by the court; that the 2nd to 16th respondents filed a preliminary objection for dismissal of the case against them for being time barred which application was allowed by the court with the applicants being condemned to pay costs; that the 3rd to 16th respondents filed an application dated **11th March, 2019**, seeking to be enjoined as parties in the matter and that the application which was not opposed was allowed by the court. The applicants further contended that the 3rd to 16th respondents were trespassers on the property. They maintain that they have an arguable appeal with very high chances of success and that the same would be rendered nugatory unless the orders sought were granted.

It was submitted for the 2nd respondent that upon dismissal of the suit on **7th October 2020**, the 2nd respondent filed a party to party bill of costs for a total sum of Kshs 2, 118, 294/= which was yet to be taxed and the applicants had not contested any of the entries thereof and that as such, the present application was meant to stall the natural consequence of determination of Nairobi ELC No.142 of 2007-taxation of the 2nd respondent’s bill of costs

We have carefully considered the motion and the supporting affidavit, the rival submissions by the parties, the authorities cited and the law.

The applicants’ motion is brought *inter alia* under **Rule (5) (2) (b)** of this Court. **Rule 5(2) (b)** of this Court’s Rules which guides the court in applications of these nature provides:

(2) 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:

(a)...

(b) 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 principles for our consideration in the exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of stay are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR** as follows:

i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.

v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

viii. An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.

xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

A cursory perusal of the pleadings herein certainly reveals that indeed the applicant has an arguable appeal. In our view and having considered the issues raised by the applicants *inter alia* that they were condemned to pay costs on an application that had been initiated by the respondents, the intended appeal is not frivolous. Of course we are mindful that we will not make further comments lest we embarrass the bench that will handle the matter.

With regard to whether the appeal will be rendered nugatory if stay of proceedings is not granted, it is indeed not in dispute that the case against the 1st respondent was scheduled for hearing on **23rd November 2020**. The matter will therefore be heard and determined unless stay of proceedings is granted. In view of the above, we have come to the conclusion that the applicant has established the twin principles for consideration in an application under Rule 5(2) (b) and deem it fit to grant an order of stay of further proceedings and orders in ELC Case No. 142 of 2007, pending the hearing and determination of the appeal filed by the applicants against the ruling of the High Court delivered on **7th October 2020**.

The costs of this motion shall abide the outcome of the appeal.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR