



**IN THE COURT OF APPEAL**

**IN NAIROBI**

**CORAM: OKWENGU, WARSAME, & J. MOHAMMED, JJ.A**

**CIVIL APPLICATION NO. 93 OF 2020**

**BETWEEN**

**EDWIN K. TOO.....APPLICANT**

**AND**

**PAUL K. SITIENI.....RESPONDENT**

(Being an application for stay pending the hearing and determination of the intended appeal against the ruling of the High Court of Kenya at Eldoret (**Ombwayo, J.**) delivered on 13th November, 2019).

in

*E & L Appeal Case No. 6 of 2014*

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**RULING OF THE COURT**

**Background**

1) By a notice of motion dated 28th April, 2020, **Edwin K. Too** (the applicant) urges this Court to exercise its discretion under **Rule 5(2)(b)** of the **Court of Appeal Rules** (this Court's Rules) and grant him orders in the main:

a) that pending hearing and determination of the appeal, this Court be pleased to issue an order staying the enforcement of the ruling of the High Court (**Ombwayo, J.**) read by **Kibunja, J.** on 13th November, 2019;

b) that pending the hearing and determination of the appeal, this Court be pleased to issue an order stopping the respondent from evicting the applicant from **Nandi/Arwos/1062** (the suit property);

c) that pending hearing and determination of the appeal, this Court be pleased to issue an order stopping the respondent from uprooting the tea estate planted by the applicant and/or fencing the applicant's homestead erected on the suit property;

d) that pending the hearing and determination of the appeal, this Court be pleased to issue an order stopping the respondent from selling, mortgaging, leasing, ploughing or alienating the suit property.

e) that in the event that all or any of the above prayers are granted, the Officer Commanding Police Station (OCS) Kapsabet Police Station to ensure compliance; and

f) that costs be in the cause.

2) The grounds upon which the notice of motion is based is that the applicant who is the respondent's nephew, bought a 2 acre portion of the suit property from the respondent for Kshs 500,000/, which he paid in instalments. The respondent granted the applicant vacant possession whereupon the applicant built his homestead, developed the land, built permanent houses, planted tea crops and blue gum trees and has lived thereon to date.

3) It was the applicant's further claim that the respondent obtained the title in respect of the suit property in 2010 following succession proceedings and failed to transfer the 2 acre portion of the suit property to the applicant whereupon the applicant filed **Civil Suit No 222 of 2010** in the Senior Resident Magistrate's Court in Kapsabet. By a judgment delivered on 25th June, 2014, the applicant's suit was dismissed. Aggrieved by that decision, the applicant appealed to the High Court in Eldoret in **E&LC Appeal No 6 of 2014** whereupon his erstwhile advocates conceded to a consent judgment on 15th March, 2017. The applicant claimed not to have been a party to the consent judgment and on 13th November, 2019 filed an application to set aside the said consent which application was dismissed.

4) Undeterred, the applicant filed a notice of appeal and the instant application. In the written submissions filed by **Nchoe, Jaoko & Company Advocates**, learned counsel for the applicant submitted that the intended appeal is arguable on the grounds *inter alia* whether the impugned consent judgment was entered into without the applicant's instructions.

5) On the nugatory aspect, counsel submitted that eviction of the applicant from the suit property was imminent and was scheduled to take place between 19th February, 2020 and 9th April, 2020 but was interrupted by the Covid-19 pandemic; that the applicant and his entire family have occupied the 2 acre portion of the suit property from 25th January, 2008 to date; and that the applicant will be prejudiced by the imminent eviction from the 2 acre portion of the suit property.

6) The application was opposed by way of written submissions filed by **Kipkosgei Choge and Company Advocates**, learned counsel for the respondent. Counsel submitted that the intended appeal is not arguable; that the instant application is supported by half - truths and outright lies; that there is nothing to stay as the applicant does not reside on the respondent's land; that on 19th February, 2020, when the County Surveyor, Nandi visited the suit property to determine the boundary, the Covid-19 pandemic had not been declared in Kenya as indicated by the applicant; that from the report of the County Surveyor, Nandi, the boundary was fixed and the respondent completely fenced off his land to the exclusion of the applicant; that the applicant has never lived on the suit property and has never erected any building thereon and cannot therefore be evicted from the suit property; that due process was followed in compromising the appeal before the High Court hence the adoption of the consent by the learned Judge (**Ombwayo, J.**); that it is clear from the impugned judgment that fraud was never proved; that the respondent has never applied to subdivide the suit property; that the instant application has no merit and should be dismissed with costs; that no orders of eviction has been issued; that the applicant will not be prejudiced as the respondent has occupation and possession of the suit property to the exclusion of the applicant; that the applicant will not be rendered homeless as he has never built any structure on the suit property; that the respondent will be greatly prejudiced if the orders sought are granted; and that there is no irreparable loss or damage that the applicant will suffer absent stay. Counsel urged that the application be dismissed with costs.

#### **Determination**

7) We have considered the application, the rival submissions, the authorities cited and the law. The jurisdiction of this Court under **Rule 5(2) (b)** of this Court's Rules is discretionary and guided by the interests of justice. In ***Ishmael Kagunyi Thande v Housing Finance Company Limited Civil Application No 156 of 2006 (UR)*** these principles were restated thus:-

***“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show 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 the appeal will be rendered nugatory.”***

8) On the limb of arguability, counsel for the applicant contended that the appeal is arguable on various grounds, *inter alia*, whether the applicant's application to set aside the consent judgment met the requisite threshold. It is trite that an arguable point is not one that must succeed but merely one that is deserving of consideration by the Court. It suffices that the issue regarding the propriety of the consent judgment is a bona fide arguable ground, and taking caution not to delve into the issue and make conclusions that may prejudice the hearing of the intended appeal, we find that the appeal is arguable.

9) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought, in ***Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR*** this Court stated that:

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

***x). 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.***

***xi). Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's impecuniosity, the onus shifts to the latter to rebut the allegation.”***

10) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. (Authority?)

11) In the instant application, the respondent contended that the applicant has never occupied the 2 acre portion of the suit property and annexed the Report of the County Surveyor, Nandi to the effect that the boundary was determined as fenced off to the exclusion of the applicant. This means that the applicant is not in possession of the suit property, and there being no evidence that the respondent who is in possession, in any way intends to dispose of the suit property or take any action that may change the character of the suit property, we find that the intended appeal will not be rendered nugatory if the orders sought are not granted and the intended appeal succeeds.

12) In the circumstances, the applicant has satisfied only one limb of the requirements under **Rule 5(2)(b)** of this **Court's Rules**. As the applicant is required to satisfy both the limbs of arguability and the nugatory aspect in regard to the requirements, the Notice of Motion dated 28th April, 2020 is hereby dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**