



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. E363 OF 2020

BETWEEN

GEOFFREY KARANJA MWAURA.....APPLICANT

AND

RAHAB MUTHONI MBATIA.....1ST RESPONDENT

JOB KARANJA NGUGI2ND RESPONDENT

COUNTY LAND REGISTRAR, KIAMBU.....3RD RESPONDENT

(Being an Application seeking for stay of Execution of the Judgment and Order of the Environment and Land Court of Kenya (O. Angote, J.) dated 18th October, 2019 *in Thika ELC No. 509 of 2017*)

RULING OF THE COURT

Before this court is a Notice of Motion application dated 23rd November 2020 under **Rule 5(2)(b)** of this Court's **Rules** and **Sections 3A** and **3B** of the **Appellate Jurisdiction Act, Cap 9 Laws of Kenya** seeking orders that the court does issue an order of stay of execution of the judgment and decree of **O. Angote, J.** dated 19th September 2019 in ELC Case No. 509 of 2017 pending the hearing and determination of the appeal together with an attendant order that costs of this application be costs in the appeal.

The application is supported by grounds on its body and a supporting affidavit of **Geoffrey Karanja Mwaura**, the applicant, together with annexures thereto. It has been opposed by a replying affidavit of **Rahab Muthoni Mbatia**, the 1st respondent, sworn on 30th November, 2020. The application was canvassed virtually on 10th February, 2020 through rival pleadings, written submissions, and legal authorities relied upon by the respective parties in support of their opposing positions with oral highlighting. Learned counsel **Miss Koki** appeared for the 1st respondent while learned counsel, **Mr. Mwicigi** appeared for the 1st respondent. The Court being satisfied that learned counsel, **Mr. Harrison Kinyanjui** on record for the 2nd respondent was served electronically with a hearing notice by the Deputy Registrar on Tue, Jan. 26, 2021 at 6.14am allowed learned counsel present to prosecute the application.

The background to the application albeit in a summary form is that on 18th October 2019 the Environment and Land Court at Thika (ELC) (**L. Gacheru, J.**) delivered a Judgment dated and signed on 19th September, 2019 by **O. A. Angote, J.** in favour of **Rahab Muthoni Mbatia** (the 1st respondent) against the applicant whereby the learned Judge allowed the prayers in the plaint filed by the 1st respondent against the applicant and the 2nd and 3rd respondents in ELC No. 509 of 2017 as follows:

- a. A permanent injunction be and is hereby issued restraining the 1st and 2nd Defendants from evicting the Plaintiff from land parcel Number Githunguri/Nyaga/T.243.
- b. The title issued to the 2nd Defendant by the 3rd Defendant in respect of parcel of land known as Githunguri/Nyaga/T.243 be cancelled.
- c. The 3rd Defendant is hereby directed to rectify the register in respect of land known as Githunguri/Nyaga/T.243 by deleting the name of the 2nd Defendant.
- d. The 1st and 2nd Defendants to pay the costs of the suit.

Aggrieved, the applicant together with the 2nd Respondent filed a notice of appeal against the whole Judgment dated 18th October, 2019. On 23rd November, 2020, the applicant filed a memorandum of appeal and the instant application, under **Rule 5(2)(b)** of this Court's Rules seeking stay of execution of the judgment and decree of the ELC pending the hearing and determination of the intended appeal against the whole Judgment. It is the Applicant's averment and submission that based on the supporting facts, he has satisfied the prerequisites for granting relief under **Rule 5(2)(b)** of the **Court of Appeal Rules** namely, that the intended appeal is arguable. Second, that it will be rendered nugatory if the stay order sought is not granted.

Among the arguable issues raised in the intended memorandum of appeal and replicated in the grounds on the face of the application, the supporting affidavit and submissions are that the applicant intends to fault the trial Judge for finding *inter alia* that the suit land was matrimonial property, applying the provisions of **section 3** of the **Land Registration Act, 2012** as reenacted by the **Land Laws Amendment Act, 2016** which is inapplicable to this dispute; failing to appreciate that the provisions of the **Registered Land Act** as at 21st March, 2013 did not mandate the production of spousal consent affidavit by the transferee. Neither did the RLA recognize spousal interests caution as a legally cognizable basis for encumbering the title. The caution by the 1st respondent was therefore an unlawful entry in the register; failing to appreciate that the only consent required for the registration of the transfer of the suit land was the consent of the Land Control Board issued pursuant to the provisions of the **Land Control Act, Cap 302 Laws of Kenya**, disregarding the date of registration of the transfer and issuance of the separate title being 21st March, 2013 which date predates the commencement of the **Matrimonial Property Act, 2013** being the 16th January, 2014, holding that the 1st respondent had an overriding interest over the land under **section 12** of the **Matrimonial Property Act, 2013** whereas spousal consent was inapplicable to the sale transaction between the applicant and the 2nd respondent.

On the nugatory aspect, the applicant submits that the substratum of the appeal would be rendered nugatory if the orders sought were not granted, especially when it is evident from the record that the 1st Respondent was threatening to enforce the judgment and decree of the trial court to the detriment of the applicant's interests as the suit property may be alienated to third parties hence rendering the appeal nugatory.

To buttress the above submissions, the applicant cited the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (2013) eKLR** in which the Court succinctly crystallized the principles that guide the Court in the discharge of its mandate under **Rule 5(2)(b)** of the Court's **Rules** in support of the submission that due to the potential alienation of the suit property by the 1st and 2nd respondents the intended appeal would be rendered nugatory.

The 1st respondent on the other hand opposed the application arguing that the instant application had been filed thirteen (13) months after the judgment delivered on 18th October, 2019 which period was not only unreasonable but also amounted to an inordinate delay in seeking redress, it therefore amounts to an afterthought. It is also not only devoid of merit but does not also meet the threshold required to be satisfied under **Rule 5(2)(b)** of the **Court of Appeal Rules**.

To buttress her submission, the 1st respondent relies on the case of **Pascal Obonyo Agwena & 3 Others vs. Simon Juma Odiyo (2018) eKLR**, and submits that applicant's application is devoid of merit for reasons given above and it should be dismissed.

Our invitation to intervene on behalf of the applicant is substantively under **Rule 5(2)(b)** of the **Court of Appeal Rules**. It is therefore sufficient for us to mention that **sections 3A** and **3B** of the **Appellate Jurisdiction Act** enshrines the overriding objective principle of the Court which donates greater latitude to the Court in the discharge of its mandate under the **Act** and which we proceed to take into consideration in the discharge of this mandate.

On jurisdiction, it is our finding that we are properly seized of the matter as there is on record a notice of appeal duly filed by the applicant and the 2nd respondent on 29th October 2019. See **Safaricom Ltd vs. Ocean View Beach Hotel Ltd & 2 Others (2010) eKLR**.

The principles that guide the Court in the exercise of its unfettered discretion under **Rule 5(2)(b)** to grant an order of stay are now well settled. Firstly, an applicant has to demonstrate that he/she has an arguable appeal, not necessarily one that will succeed, but one that is not frivolous. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. See the case of **Multimedia University & Another vs. Professor Gitile N. Naituli (2014)eKLR** wherein it was stated *inter alia* as follows:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide **whether the applicant has presented an arguable appeal** and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR**

Starting with the first prerequisite, the position in law is that, an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court. A single bona fide issue would suffice. See the case of **Kenya Tea Growers Association & Another vs. Kenya Planters & Agricultural Workers Union [2018] eKLR**.

In satisfaction of this prerequisite, the applicant relies on the intended memorandum of appeal dated 23rd November, 2020, annexed to the supporting application whose contents are already highlighted above all of which in our considered view are not frivolous. The same merit not only a response from the opposite parties but also consideration by this Court on appeal. The applicant has therefore satisfied the first

prerequisite for grant of relief under **Rule 5(2)(b)** of the Court's **Rules**.

On the nugatory aspect, the position in law is that 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. See the case of **Reliance Bank (In Liquidation) vs. Norlake Investments Ltd (2002) 1 EA 227**.

Applying the above threshold to the rival position herein on this issue, it is our finding that if the title deeds were to revert to the original owner with no caveat over dealings with the said title deeds pending determination of the appeal nothing would stop the original owner from dealing with the said title as deemed fit which in essence would not only affect the interests of the applicant over the suit property but may also alternatively necessitate him to incur costs to pursue those rights should the original owner divest himself of the substratum of the intended appeal before the intended appeal is heard and determined. We are, therefore, satisfied that this prerequisite too has been satisfied.

Since the requirement in law is that both limbs must be satisfied before a relief can issue, the requisite threshold has been satisfied. The application under consideration has met the threshold for granting relief under **Rule 5(2)(b)**. It is accordingly allowed. Costs of the application to abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL, 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