



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: W. KARANJA, GATEMBU & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. E339 OF 2020

BETWEEN

CHARLES OKINDO OTEKI.....APPLICANT

AND

JOSEPH WARARI GATHOGA.....1ST RESPONDENT

MARTHA WAMAITHA NGUNJIRI (Being administrator of the Estate of

JACKSON GITHUA NGUNJIRI.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

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

an intended appeal from the judgment of the Environment & Land Court

at Nairobi (Okongo, J.) delivered on 8th October, 2020

in E.L.C. Cause No. 123 of 2019)

RULING OF THE COURT

Background

1) By way of a Notice of Motion dated 3rd November, 2020, **Charles Okindo Oteki** (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:

1) that pending the hearing and determination of this application inter-partes, there be a stay of execution, enforcement and/or implementation of the judgment and decree made on 8th October, 2020.

2) that pending the hearing and determination of the intended appeal, there be a stay of execution, enforcement and/or implementation of the judgment and decree made on 8th October, 2020.

2) **Joseph Warari Gathoga** is the 1st respondent, **Martha Wamaitha Ngunjiri** (Being administrator of the Estate of **Jackson Githua Ngunjiri** is the 2nd respondent and **The Attorney General** is the 3rd respondent herein.

3) The application is premised on the grounds that; on 8th October, 2020, **Okongo, J.** allowed the 1st respondent's claim that will result on the cancellation of Certificate of Title in respect of **Nairobi/Block 63/348** (the suit property) and inevitably eviction of the applicant from the suit property despite being an innocent purchaser of the suit property without notice; that being aggrieved by the judgment of **Okongo, J.** the applicant herein has duly filed and served a notice of appeal dated 14th October, 2020 within the stipulated time; that the applicant herein has an arguable appeal which raises weighty issues of law and fact with high chances of success as evidenced in the draft Memorandum of Appeal having purchased the suit property after conducting an official search confirming ownership of the suit property; that the applicant is

apprehensive that the 1st respondent will commence enforcement of the impugned judgment and decree which will result in the demolition of the already constructed and occupied storey building; that if the orders sought are not granted, the intended appeal which raises weight issues of law and fact with overwhelming chances of success will be rendered nugatory; that the applicant stands to suffer substantial loss if the said judgment and decree are not stayed; that the instant application for stay has been timeously filed; that the applicant is willing to abide by the condition which the honourable court will issue and that it is in the interest of justice that the orders sought herein are granted.

4) The application was further supported by the applicant's affidavit in which he reiterated the grounds on the face of the application that he has an arguable appeal as evidenced by the draft Memorandum of Appeal and that it is in the interest of justice that the prayers sought are granted failing which the intended appeal will be rendered nugatory.

5) The application was also supported by the 2nd respondent's replying affidavit wherein she avers that she is aggrieved with the impugned judgment and prays that the orders sought by the applicant are granted.

6) From the record, there was no other replying affidavit or written submissions filed by any of the other respondents despite notice.

Submissions

7) The application was heard by way of written submissions. Counsel for the applicant, **Ms Okongo Omogeni & Co Advocates** submitted that in the impugned judgment, the learned Judge entered judgment against the applicant who is the proprietor and who is in possession of the suit property; that the applicant has an arguable appeal with overwhelming chances of success; that the applicants draft Memorandum of Appeal raises arguable points *inter alia*, whether the applicant acquired a good and valid title from the 2nd respondent and whether the 1st respondent proved fraud on the part of the 2nd respondent.

8) The applicant's counsel reiterated that the applicant's intended appeal will be rendered nugatory, absent stay, as the suit property will be transferred to the 1st respondent and the applicant forcefully evicted; and that the applicant will suffer great hardship and financial loss in view of the fact he has invested over Kshs 45 million to develop the suit property; and that the 1st respondent may transfer the suit property to third parties or charge the same, rendering them out of the applicant's reach.

9) Counsel for the applicant further submitted that the respondents have not demonstrated that they will suffer prejudice if the orders sought are not granted.

Determination

10) We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under **Rule 5(2) (b)** of this **Court's Rules** is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

11) The principles for granting a stay of execution, injunction or stay of proceedings under **Rule 5(2)(b)** of this Court's Rules are well settled as was observed by this Court in the case of ***Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR (Civil Application Nai. 258 of 1999)*** where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

12) In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

13) On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single *bona fide* arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See ***Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR (Civil Application No. Nai. 31 of 2012)*** where this Court described an arguable appeal in the following terms:

“ vii). 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.

viii). 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.”

14) We have carefully considered the grounds set out in the motion and the draft Memorandum of Appeal. In our view it is arguable *inter alia* whether the applicant acquired a good and valid title from the 2nd respondent. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

15) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (*supra*) 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.

16) 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.

17) In the instant application, the applicant contends that absent stay, the suit property will be transferred to the 1st respondent and the applicant will be forcefully evicted from the suit property; and that there is real danger that the 1st respondent will transfer or charge the suit property to third parties.

18) In the circumstances, the applicant has satisfied both limbs of the requirements under **Rule 5(2)(b)** of this **Court’s Rules**. The Notice of Motion dated 3rd November, 2020 is allowed. Costs of the application to abide by the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

W. KARANJA

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JUDGE OF APPEAL

S.GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR