



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. 330 OF 2019

BETWEEN

HALIMA KHAMALA ABDALLA.....APPLICANT

AND

YUSUF MOHAMED BILAL.....RESPONDENT

*(Being an application for stay of execution of the judgment of the Environment and Land Court at Nairobi (Obaga, J.) dated 27<sup>th</sup> August 2019 in ELC Case No. 116 of 2013)*

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RULING OF THE COURT

1. In her application dated 4<sup>th</sup> October 2019 made under Rule 5(2)(b) of the Court of Appeal Rules among other provisions, Halima Khamala Abdalla, the applicant, seeks an order of stay of execution of the judgement of the Environment and Land Court (ELC) (*Obaga, J.*) given on 27<sup>th</sup> August 2019 directing the Land Registrar to cancel the title in respect of the undisclosed suit property and to re-issue the same in the joint names of the applicant, her brother Yusuf Mohamed Bilal, the respondent and their other brother Abasi Wanjala Bonde.
2. Arguing the application before us, learned counsel *Ms. Halima Wanjiku* for the applicant relied on her written submissions in which it is urged that the application meets the threshold for grant of the orders of stay under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Counsel submitted further that the intended appeal is arguable and that unless we grant the orders sought, the intended appeal will be rendered nugatory.
3. It is the applicant's case that the un-named property was initially owned by their mother who transferred it to the applicant in 1993; and that the Judge erred in ordering the title to be transferred to all the siblings. According to the applicant, if their mother had intended the property to be owned by all three siblings, she would have transferred it to them herself but instead chose to transfer it to the applicant alone. On the nugatory aspect, counsel submitted that it would be a waste of time to implement the decision of the trial court, transfer the property to the siblings, and then have to again re-transfer it back her should the appeal succeed.
4. For the respondent, learned counsel *Mr. Paul Mungla* relied entirely on the respondent's replying affidavit and his written submissions urging that the notice of appeal is defective and incompetent for vagueness; that there is a pending application to strike it out; that the intended appeal is not arguable as the learned Judge considered all the material evidence on record; that in any event the intended appeal will not be rendered nugatory as "*there is practically no risk of the suit property being wasted, permanently lost nor even alienated*" but will on the contrary "*be safely secured in the joint names of the applicant, the respondent and their brother Abasi Wanjala Bonde and will thus be readily available to the successful litigant.*"
5. Although counsel for the applicant in her written submissions referred to the conditions that should be met before an order for stay is granted under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which do not apply here, we have nonetheless considered the application within the parameters of Rule 5(2)(b) of the Court of Appeal Rules as pronounced in many decisions of the Court including *Stanley Kangethe Kinyanjui vs. Tony Ketter & others [2013] eKLR*.

6. Bearing in mind that an arguable appeal is not one that will necessarily succeed, we are prepared to give the applicant the benefit of doubt and say that the intended appeal is not frivolous. There is for instance the contention that the learned Judge misapprehended the evidence, which is arguable.

7. On the nugatory aspect, there is no suggestion by the applicant at all that there is a risk of the property being disposed of or wasted or otherwise transferred other than to the siblings. The assertion by the respondent that “*there is practically no risk of the suit property being wasted, permanently lost nor even alienated*” has not been challenged.

8. The applicant has therefore not demonstrated that the intended appeal will be rendered nugatory if we decline the application and we therefore dismiss it. As the dispute involves siblings, we make no orders as to costs.

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

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**