IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 94 OF 2018

(CORAM: OUKO, OKWENGU & GATEMBU, JJ.A)

BETWEEN

JOHN MULWA NZIOKI.....APPLICANT

AND

PHILIP KIBUBA NZIOKA.....1ST RESPONDENT

JOSEPH MUNYAO KIILU.....2ND RESPONDENT

(Being an application for injunction and/or stay of execution of the

judgment and decree of the Environment and Land Court

at Machakos (**Angote, J.**) delivered 2nd March, 2018

in

ELC No. 282 of 1996)

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RULING OF THE COURT

[**1**] **John Mulwa Nzioki** (the applicant) is aggrieved by the judgment of the Environment and Land Court (ELC) delivered on 2nd March, 2018. By a notice of appeal lodged on 8th March, 2018, he has given notice of his intention to appeal against the judgment.

[**2**] The applicant has now moved this Court under Rule 5(2)(b) of the Court of Appeal Rules, by way of a notice of motion dated 29th March, 2018, for an order of stay of execution of the judgment and decree of the ELC pending the hearing and determination of his intended appeal. He also seeks an order of temporary injunction restraining the respondents, their servants or agents from implementing the judgment and decree of the ELC, or effecting any change of status, or interfering with the applicant's possession of **Title No. Machakos Town Block 11/285 (suit property**) pending the determination of the intended appeal.

[**3**] In his affidavit sworn in support of the motion, the applicant maintains that his intended appeal is arguable and has reasonable chances of success. The applicant has set out 5 grounds that it intends to canvas in the appeal.

[**4**] Hearing of the motion was scheduled to proceed on 22nd March, 2021 by way of written submissions without the presence of counsel. A hearing notice was duly served on the parties by way of email on 4th March, 2021, informing them of the hearing and requesting them to file written submissions. However, no written submissions were received from either the applicant or the respondents. We are therefore forced to determine the application on the motion alone.

[**5**] From the judgment of the ELC and the pleadings annexed to the motion, it is evident that the applicant in his suit had sought an order of specific performance on an agreement entered into between him and the 1st respondent for transfer of the 1st respondent's share in the suit property, and a declaration that the applicant had acquired the suit property from the 1st respondent either through purchase or by way of adverse possession, and also award of damages. The learned Judge dismissed the applicant's suit finding that the agreement of sale dated 9th September, 1978 was rescinded by consent of both parties through agreements of 6th October, 1982 and 10th September, 1982, and that in any case, the applicant's claim anchored on the agreement of 1978 was statute barred. The learned Judge also found that the applicant was

not in adverse possession of the suit property but remained in the suit property as a tenant.

[**6**] It is now well established that under Rule 5(2)(b) of the Court of Appeal Rules, an applicant must prove the twin principles required in the Rule. This is to say that the applicant must demonstrate first, that he has an arguable appeal, and secondly, that if the order of stay/injunction is not granted, the intended appeal will be rendered nugatory. (See **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others** [2013] eKLR).

[**7**] The applicant has set out in his affidavit sworn in support of the motion, various grounds that he intends to canvass at the hearing of his appeal. These include: the learned Judge having erred in relying on a disputed agreement of rescission and ignoring an agreement in which the respondents had received the total sale price; in placing undue reliance on the withdrawal of High Court Civil Case No. 1198 of 1979 when the pleadings in regard to that suit were not availed to the Court; and in finding that the respondents were tenants when the overwhelming evidence showed that they were purchasers. These are grounds that are arguable and cannot be said to be frivolous. The applicant has therefore satisfied the 1st limb of arguability.

[**8**] As regards the nugatory aspect, the applicant has sought to stay execution of the judgment and decree of the ELC. However, the learned Judge having dismissed the applicant's suit, the resultant decree is a negative order not capable of execution, except in regard to costs, which is really not the applicant's complaint.

[**9**] The applicant is also seeking an order of injunction to restrain the respondents from implementing the impugned judgment against which the appeal is intended. As already stated, other than the issue of costs, there is no order that was made by the court that is capable of implementation. There is also the prayer to have the respondents restrained "***from effecting any change of status or interfering with*** **the applicant's peaceful possession of Title Number Machakos Town Block 11/285 until the final determination of the appeal"**.

In the affidavit sworn in support of the motion, the applicant has indicated that he wishes to have the suit property preserved in view of what he states as "***the previous conduct of the respondents in entering into a sale agreement when the suit property was a subject matter before the court***".

[**10**] At paragraph 9A, 9B 10, 10A and 11 of the applicant's amended plaint, the applicant had pleaded that the 1st respondent had sold the suit property to the 2nd respondent, and that the suit property is now registered in the name of the 2nd respondent. Therefore, what the applicant is seeking is to prevent what has already taken place, that is the sale. There is no demonstration that the 2nd respondent intends to further dispose of the suit property. Moreover, the applicant remains in the suit premises as a tenant and there is no demonstration that this is threatened.

[**11**] As was held in **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others** (supra), whether or not an appeal will be rendered nugatory depends on whether what was sought to be stayed if allowed to happen is reversible, or if it is not reversible, whether damages would reasonably compensate the party aggrieved. The applicant has not satisfied us that should his appeal succeed, it will be a mere pyrrhic victory or that damages would not reasonably compensate him.

[**12**] For these reasons, we find no merit in this motion. It is dismissed with costs.

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

W. OUKO (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb.)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR