



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & ASIKE-MAKHANDIA, J.J.A.)

CIVIL APPLICATION NO. NAI 373 OF 2019

BETWEEN

JOSEPHINE MUENI KILUTA.....APPLICANT

AND

FLORENCE NGINA KIMEU.....RESPONDENT

*(Being an Application seeking orders for injunction and stay of execution pending the hearing and determination of the intended appeal against the Judgment and Decree of the Environment and Land Court at Machakos (O.A. Angote, J.) dated 1st November 2019*

*in*

*ELC Case No. 118 of 2009)*

\*\*\*\*\*

**RULING OF THE COURT**

1. Before us is an application dated 28th November, 2019 brought under **Rule 5(2)(b)** of this Court's Rules and **section 3A** and **3B** of the Appellate Jurisdiction Act seeking an order for injunction and stay of execution pending the hearing and determination of the intended appeal against the judgment and decree of the Environment and Land Court (ELC) at Machakos (O.A. Angote, J.) dated 1st November, 2019 in ELC Case No. 118 of 2009.

2. The dispute before the ELC revolved around the ownership of a parcel of land known as **Ndalani/Ndalani/Block 1/541** (the suit property). The applicant herein claimed ownership as the widow and legal representative of the late Mr. Kiluta who had purchased the suit property from one John Benedict Kilonzo on 9th December, 1999. It was her case that in January 2005, the deceased discovered that the suit property was registered in the name of the respondent's late husband, Johnstone Mwaka Lumbi Kitemu.

The applicant argued that the transfer of the suit property to the respondent's husband was done fraudulently and that her late husband purchased the same suit property together with the developments thereon after which they took possession. It is under these circumstances that the applicant filed a suit against the respondent seeking a declaration that her late husband was the rightful owner of the suit property and an order of permanent injunction to restrain the respondent or her agents from alienating and dealing with the suit property. The applicant also prayed for general damages.

3. The respondent opposed the applicant's claim deposing that the suit property formed part of the Estate of Johnstone Mwaka Lumbi, her late husband; that her late husband purchased the suit property from one Paul Muasya Katubi vide an Agreement of Sale of 12th September, 2004 and that the applicant's land was the land adjacent to the suit property. She also raised a counterclaim seeking a permanent order of injunction stopping the applicant from trespassing or dealing in any manner with the suit property and for general damages for trespass.

4. Ultimately, the learned Judge entered judgment in favour of the respondent dismissing the applicant's claim with costs and allowing the respondent's counterclaim hence granting, *inter alia*, an order for a permanent injunction restraining the applicant, her agents or servants from trespassing, fencing or in any way dealing with the suit property.

5. The applicant was aggrieved by this decision and has appealed vide a Notice of Appeal dated 4th November, 2019. The application is predicated on grounds that the applicant was aggrieved by the impugned decision; that she expeditiously filed a notice of appeal and preferred the instant application; the intended appeal is not frivolous and has high chances of success and that if stay is not granted the appeal shall be rendered nugatory and that the applicant will suffer irreparable loss in the event the appeal is successful as execution will lead to her

eviction from the suit property on which she has been living and earning a living therefrom since 9th December, 1999 when she and her late husband took possession of the same. The application was supported by the applicant's affidavit buttressing the grounds on the face of the application.

6. There is also on record a draft memorandum of appeal challenging the impugned judgment on grounds, *inter alia*, that the learned Judge erred by misapprehending the evidence before him hence reaching an erroneous finding that the suit property was validly registered in the name of the respondent's husband, despite overwhelming evidence to the contrary, hence dismissing the applicant's allegations of fraud against the respondent for reasons that they were not sufficiently proved. Further, that the applicant has been in occupation of the suit property since 9th December, 1999.

7. The respondent neither filed a replying affidavit nor written submission in opposition to the application.

8. We have considered the application along with the submissions filed in support thereof by learned counsel for the applicant. The principles applicable to applications such as the one before us are well settled. As was observed by this Court in the case of **Ishmael Kagunyi Thande v. Housing Finance of Kenya Ltd, Civil Application No. Nai. 157 of 2006**

(unreported):-

**“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. These principles are now well settled. For an applicant to succeed he must not only show that 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 that appeal will be rendered nugatory.” (See Githunguri vs. Jimba Credit Corporation Ltd. No. 2 (1988) KLR 838, J. K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982-88)).”**

9. With the above principles in mind, this Court is tasked to interrogate two paramount questions: whether the intended appeal is arguable; and, whether the intended appeal will be rendered nugatory in the event that orders as sought are not granted. Both these principles must be demonstrated and establishing only one of them will not suffice.

10. On the arguability aspect, the applicant needs to demonstrate only one arguable issue; and an arguable appeal is not necessarily one that will succeed but one that is not frivolous. With that in mind all we need to do is consider the draft memorandum of appeal and see if there is one ground deserving of determination by this Court on appeal. We find the issue of whether the respondent's husband had fraudulently caused the suit property to be registered in his name a germane point deserving of this Court's determination.

11. On whether the intended appeal shall be rendered nugatory if orders sought are not granted, it is the applicant's argument that the respondent intends to execute the impugned judgment hence, the applicant stands the risk of being evicted from the suit property and that the residential rental properties erected on the suit property, are also at risk of being demolished.

12. From a cursory reading of the impugned judgment, it is evident that it is common ground that the applicant's late husband developed the suit property, therefore, it is apparent that eviction and subsequent demolition of the said structures and developments of the suit property shall damage and alter the nature, character and substratum of the intended appeal.

13. Moreover, the preservation of the substratum of the appeal (the suit property) will cause no prejudice to either party; it is common ground that the respondent is not in possession and in the event that the intended appeal is not successful, she will be at liberty to enter and take possession thereof.

14. We are satisfied that the applicant has demonstrated both arguability and the nugatory aspect. Accordingly, this application is allowed with costs in the appeal.

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

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**