



IN THE COURT OF APPEAL

AT NAKURU

[CORAM: OUKO (P), NAMBUYE & SICHALE, JJA]

CIVIL APPLICATION NO. 69 OF 2016

SAMWEL KIPRURO CHEPKEITANY.....1ST APPELLANT

JERUTO TAPKILI TENGEKYON.....2ND APPELLANT

AND

STEPHEN KIBOWEN1ST RESPONDENT

RAYMOND RUTO.....2ND RESPONDENT

KIPKORIS RUTO.....3RD RESPONDENT

KIPROP RUTO.....4TH RESPONDENT

KIPCHUMBA RUTO.....5TH RESPONDENT

CHEPCHIRCHIR RUTO.....6TH RESPONDENT

CHEPKOECH RUTO.....7TH RESPONDENT

(Being an application for stay of further proceedings in Nakuru ELC Case No. 174 of 2015

pending the hearing and determination of an appeal against the ruling and orders of

Munyao J dated 14th July 2016.)

IN

(Nakuru ELC Case No. 174 of 2015)

RULING OF THE COURT

Before us is a motion dated 21st March 2017, brought under the provisions of **Rule 5 of the Court of Appeal Rules and Articles 159 (2) (d) of the Constitution, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 42 Rule 6 (1) of the Civil Procedure Rules** in which **Samwel Kipruto Chepkeitany and Jeruto Tapkili Tengekyon (the applicants)** seek the following orders:

“1. Spent.

2. Spent.

3. That this Honourable Court be pleased to stay further proceedings in Nakuru Environment and Land Case No. 174 of 2015 pending the hearing and determination of this appeal by the applicants against the ruling and orders of the High

Court given on 14th July 2016.

4. That costs of the application to abide the outcome of the appeal.”

The motion is supported on the grounds on the face of the motion and an affidavit sworn by **Samwel Kipruto Chepkeitany (the 1st applicant herein)**, who deponed that he was 83 years old and had been in occupation of the suit land from 1962 or thereabout with his children who are the 2nd to 7th respondents and that he was the original owner of the suit land herein before selling the same to the 2nd applicant in 1996, which transaction was financed through a loan facility from the Agricultural Finance Corporation and that he repurchased the same when the 2nd applicant was overwhelmed with the repayment of the loan facility and took over the outstanding loan owing to the Agricultural Finance Corporation wherein he repaid over Kshs 4,600,000/= and the said financial facility accepted the repayments.

That, he was shocked to learn that Agricultural Finance Corporation had secretly auctioned the suit land behind his back and title thereto transferred to the 1st respondent without his knowledge vide orders of court in Nakuru High Court ELC Case No. 218 of 2014, which neither himself nor the 2nd appellant was a party; whereupon he complained of the fraud and the Agricultural Finance Corporation immediately rescinded and cancelled the sale upon learning of the fraud and anomalies and that the 1st respondent in Nakuru ELC Case No. 174 of 2015, was seeking eviction orders against his children who are the 2nd to 7th respondents herein to his exclusion despite the fact that he was a proper and necessary party and that the 2nd to 7th respondents being his children occupy the suit land under his title.

He further deponed that vide an application dated 18th April 2016, he sought to be enjoined in the High Court proceedings but the court dismissed the application vide its ruling dated **14th July, 2016**. He further deponed that he was dissatisfied with the aforesaid ruling, had lodged an appeal against the same, which appeal is arguable; and that he would suffer irreparably unless a preservative order was issued staying further proceedings.

The application was opposed vide a replying affidavit sworn by **Stephen Kibowen** the 1st respondent herein who deposed *inter alia* that he was currently the registered owner of the suit land and that only the 2nd to the 7th respondents were in possession and/or occupation of the land and that he had sought eviction orders against them and that the 2nd applicant has never been in possession and or occupation of the land and that the applicants had not been able to demonstrate that their application meets the threshold for stay of further proceedings required under Rule 5 (2) (b) of the Court of Appeal Rules.

It was submitted for the applicants that the prima facie issues herein could only be canvassed substantively if the conservatory orders are granted and that the applicants would be highly prejudiced and unless stay was granted, there would be miscarriage of justice as the applicants' appeal shall be rendered nugatory and an academic exercise and a waste of judicial time and that the applicants would be condemned unheard and evicted from the suit land without making any representation and that as such the application was merited and ought to be allowed.

On the other hand, it was submitted for the 1st respondent that the applicants had not established an arguable appeal that will be rendered nugatory in the absence of an order of stay of further proceedings and that the instant application had been made for the sole purpose of delaying the just determination of the 1st respondent's suit in the superior court which was an abuse of the court process. Consequently, we were urged to dismiss the application with costs.

We have carefully considered the motion, the grounds thereof and the supporting affidavit, the replying affidavit, the supplementary affidavit, the further replying affidavit, the rival submissions by the parties and the cited authorities.

The applicants' motion is brought *inter alia* under **Rule 5** of this Court.

Rule 5 (2) (b) of this Court's Rules which guide the Court in applications of these nature provides:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

(a)...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay of execution, injunction or stay of further proceedings are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR**.

In the case of **Ishmael Kagunyi Thande vs. Housing Finance Kenya Limited-Civil Application No. Nai 157 of 2006 (unreported)**, it was stated;

“The jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in

exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must 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.”

A cursory perusal of the pleadings herein show that the applicants have an arguable appeal and more particularly so the issue as to whether they are a proper and necessary parties in Nakuru ELC Case No. 174 of 2015. We are mindful of the fact that we should not say more regarding this aspect lest we embarrass the bench that will be eventually seized of the appeal. As has been previously stated by this Court, an arguable appeal is not one that must necessarily succeed but one which merits consideration by the court. Consequently, from the circumstances of this case, we are satisfied that the applicants have an arguable appeal

On the nugatory aspect, we are satisfied that if an order of stay of further proceedings in Nakuru ELC Case No. 174 of 2015 is not granted, the case will be heard and determined and the substratum of the appeal pending in court shall be destroyed thereby being rendered nugatory and/or superfluous.

In view of the above, we have come to the conclusion that the applicants have established the twin principles for consideration in an application under **Rule 5(2) (b) of this Court’s Rules** and accordingly the motion dated **21st March 2017** succeeds. The prayers in the motion are therefore allowed as prayed

The costs of this motion shall abide the outcome of the appeal.

Dated and Delivered at Nairobi this 19th Day of May, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR