



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, J. MOHAMMED & KANTAI, J.J.A.)

CIVIL APPLICATION NO. NAL E267 OF 2020

FRED RABONGO.....1ST APPLICANT
MARY AKATCH.....2ND APPLICANT
DANIEL OCHIENG’ OGOLA3RD APPLICANT
IMPULSE HOLDINGS LIMITED.....4TH APPLICANT
MUTHANGARI GARDENS MANAGEMENT LIMITED.....5TH APPLICANT
DAYAX INVESTMENTS LIMITED..... 6TH APPLICANT

AND

ANGELA MUSIMBA.....1st RESPONDENT
STEPHEN GITHINJI KAMAU.....2ND RESPONDENT
CHARLES NJUGUNA MUKIRI.....3RD RESPONDENT
EVANS KIPKEMOI SIGILAI.....4TH RESPONDENT
JANE CHELAGAT SIGILAI.....5TH RESPONDENT
JOEL NGUGI.....6TH RESPONDENT
SYLVIA KANGA’RA7TH RESPONDENT
JOHN WACHIRA WANG’OMBE.....8TH RESPONDENT
NAIROBI COUNTY GOVERNMENT.....9TH RESPONDENT
GUANZHOU VILLA LIMITED.....10TH RESPONDENT
PATRICIA MWIHAKI MWANGI.....11TH RESPONDENT

*(Being an application for stay of execution and stay of proceedings of
the Ruling and Order of the Environment and Land Court of Kenya at
Nairobi (Obaga, J.) dated 23rd January, 2020 in ELC No. 331 of 209)*

RULING OF THE COURT

Background

(1) By way of a notice of motion dated 4th September, 2020, **Fred Rabongo** (the 1st Applicant), **Mary Akatch** (the 2nd applicant), **Daniel**

Ochieng' Ogola (the 3rd applicant), **Impulse Holdings Limited** (the 4th applicant), **Muthangari Gardens Management Limited** (the 5th applicant) and **Dayax Investments Limited** (the 6th applicant) (the applicants) urge this Court to exercise its discretion under **Rule 5(2)(b)** of the **Court of Appeal Rules** (this Court's Rules) and grant them orders in the main:

a) THAT execution of the Ruling and Order of the Superior Court dated 23rd January 2020 in Nairobi ELC No. 331 of 2019 and all subsequent and/or ancillary proceedings be stayed pending an appeal therefrom to this Honorable Court.

b) THAT the Honorable Court be pleased to issue an order of stay of proceedings and execution in Nairobi ELC No. 331 of 2019 of the order dated 23rd January 2020 pending the hearing and determination of this Application.

(2) The motion is supported on the grounds on the face of it and an affidavit sworn by **Fred Rabong'o** a Director of the 4th applicant who deponed *inter alia* that the 4th applicant developed 9 town houses on **LR No. 3734/1045, Lavington** and sold the units to **Angela Musimba** (the 1st respondent), **Stephen Githinji Kamau** (the 2nd respondent), **Charles Njuguna Mukiri** (the 3rd respondent), **Evans Kipkemoi Sigilai** (the 4th respondent) **Jane Chelagat Sigilai** (the 5th respondents). That **Patricia Mwhaki Mwangi** (the 11 respondent) is the registered owner of **LR No 3734 /1046**.

(3) That the 1st to 8th respondents failed to commence proceedings in the County Physical Planning and Land Use Liaison Committee and instead filed a suit against the applicants in **Nairobi ELC No. 331 of 2019** and sought injunctive orders restraining the applicants from developing on **LR No 3734/1045 and LR No 3734/1046** (the suit property) until the hearing and final determination of the suit.

(4) The applicants filed a Preliminary Objection challenging the jurisdiction of the Environment and Land Court (ELC) over the proceedings. They averred that filing the suit at the Court was in contravention of **Sections 14, 15, 72, 73, 78 and 80** of the **Physical Planning and Land Use Act**. Further, that the proceedings in the ELC were in breach of the Special Condition 18 of the agreement for sale between the 4th applicant and the 1st to 8th respondents which provided for arbitration as a dispute resolution mechanism.

(5) The learned Judge (**Obaga, J.**), delivered a ruling on 23rd January, 2020, dismissed the Preliminary Objection and found that the ELC had jurisdiction to hear and determine the matter. The learned Judge also granted an injunction restraining the applicants from entering upon, constructing upon or in any way interfering with the respondents' quiet enjoyment, possession and user of the suit property until the hearing and determination of the suit.

(6) Aggrieved by that decision, the applicants filed a notice of appeal and the instant application. The motion is based on 9 grounds and is supported by an affidavit sworn by the 1st applicant, a Director of the 4th applicant. The application was heard by way of written submissions with no appearance by Counsel.

Submissions

(7) In written submissions filed on behalf of the applicants, learned counsel **M/S Ogola Okello & Co. LLP** contended that the discretion of this Court to grant stay orders is wide and unfettered; that the applicants' intended appeal is arguable; that the ELC lacked jurisdiction to entertain and hear the dispute by dint of the **Physical Planning and Land Use Act**; that the proceedings by the respondents in the ELC are in breach of special condition 18 of the Agreement of Sale in respect of the Sale Agreements between the 4th respondents and the 1st to 8th respondents which provide for arbitration as the dispute resolution mechanism; that unless a stay of execution and stay of proceedings are granted, there is all likelihood that the suit will proceed for hearing; and that the substratum of the intended appeal will be rendered nugatory if the orders sought are not granted and the appeal succeeds.

(8) It was the applicants' further contention that the 1st to 8th respondents will not suffer any prejudice should this Court grant the orders sought. The Court was urged to grant the orders in the interest of justice.

(9) The application was opposed by way of written submissions filed by **M/S Nderitu and Partners, Advocates**, learned counsel for the 1st to 8th respondents. Counsel contended that the application does not provide a sufficient factual and legal basis for this Court to exercise its discretion in the applicants' favour; and that the applicants cannot raise the issue of jurisdiction at this juncture as they had expressly signified their acceptance of the jurisdiction of the ELC to hear and determine the dispute once they filed their defence. The respondents further argued that the applicants have not sufficiently demonstrated that they have an arguable appeal or that the appeal will be rendered nugatory should this Court fail to grant the orders sought.

Determination

(10) We have considered the application, the affidavits, the rival submissions, the authorities cited and the law. It is trite that in an application under **Rule 5(2)(b)** of this Court's Rules, the applicant must establish that there is an arguable appeal and secondly, that the intended appeal or appeal as the case may be, would be rendered nugatory if an injunction or stay as the case may be, is not granted and the appeal succeeds.

(11) In **Stanley Kangethe Kinyanjui V Tony Ketter & 5 Others [2013] eKLR** this Court expressed itself on a **Rule 5(2) (b)** application as follows:

“iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its

own facts and peculiar circumstances.

....

vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

....

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.

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”.

(12) Guided by the principles above, a cursory perusal of the pleadings herein reveals that the applicants have an arguable appeal since fundamental issues relating to the jurisdiction of the ELC have been raised. See *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR*. We therefore find that the intended appeal is not frivolous. We are however mindful not to make any definitive comments as pertains to the arguability of the intended appeal lest we embarrass the bench that will hear and determine the intended appeal.

(13) With regard to whether the appeal will be rendered nugatory if a stay of execution and stay of proceedings are not granted, it is not in dispute that matter was listed for mention for compliance before the trial court. The matter will therefore be heard and determined if an order of stay of proceedings is not granted. We are therefore satisfied that the intended appeal will be rendered nugatory if we decline to grant the orders sought and the appeal succeeds.

(14) We have come to the conclusion that the applicants have satisfied the twin limbs of **Rule 5(2)(b) of this Court’s Rules** and are therefore deserving of the stay orders sought. In the circumstances, we find that this application has merit and deem it fit to grant an order of stay of execution of the ruling and order of the ELC (**Obaga, J.**) dated 23rd January, 2020 and a stay of further proceedings in **Nairobi ELC No.331 of 2019** pending the hearing and determination of the intended appeal. The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF MAY, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR