



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, J. MOHAMMED & KANTAL, J.J.A)

CIVIL APPLICATION NO. E011 OF 2020

BETWEEN

PAUL WANDATI MBOCHI.....APPLICANT

AND

STEPHEN KIMOTHO KARANJA.....RESPONDENT

(An application for stay of execution and/or for an injunction pending the hearing and

determination of the judgment and decree of the Environment & Land Court

at Nairobi (S. Okong'o, J.) dated 30th April, 2019

in

ELC Cause No. 569 of 2008

RULING OF THE COURT

Background

1) By way of a Notice of Motion dated 13th July, 2020, **Paul Wandati Mbochi** (the applicant) urges this Court to exercise its discretion under **Rule 5(2)(b)** of the Court of Appeal Rules (this Court's Rules) and grant him orders in the main:

a) That the Court be pleased to stay the execution of the judgment and decree of the Environment and Land Court (ELC), (**S. Okong'o**) pending the hearing and determination of the intended appeal;

b) That further, or in alternative to prayer (a) hereof, this Court be pleased to restrain the respondent from denying the applicant access to the piece of land with subdivisions marked **Limuru/Ngecha 4323, Limuru/Ngecha 4324, Limuru/Ngecha 4325** and **Limuru/Ngecha 4326** by use of the access road therein.

2) The application is premised on the grounds: that he subdivided **Plot No Limuru/Ngecha 2153** into 3 plots which he allocated to his 3 children; that upon delivery of the impugned judgment, the respondent denied the applicant and his 3 children access to the road adjacent to the land parcel **No. L.R. Limuru/Ngecha 2004**; that the disputed access road is the passage route to the sub-divisions as indicated in the registry map; that the strip road was marked as a public road in the registry map and its use does not pose any danger or interference with the respondent's privacy; that the applicant's 3 children and their families no longer have easy access to their allotted parcels of land and the respondent has restricted access to their homes by erecting a gate at the upper part of the strip road; and that the applicant is apprehensive that if stay is not granted or an injunction issued against the respondent, the applicant and his family will be aggrieved as access to their homes will be impeded.

3) The application was further supported by the applicant's affidavit in which he reiterated the grounds on the face of the application; that he has an arguable appeal as evidenced by the draft memorandum of appeal; and that it is in the interest of justice that the prayers sought be granted failing which the intended appeal will be rendered nugatory. From the record, there was no replying affidavit or written submissions filed by the respondent despite notice of the hearing date.

Submissions

4) The application was heard by way of written submissions. The applicant who was unrepresented submitted that he is aggrieved by the fact that the respondent has blocked the applicant and his family members from accessing their respective parcels of land; that the stay order sought will safeguard the interests of the applicant and reduce the rising tensions between the parties; and that the application is arguable on the ground *inter alia* that the learned Judge ignored material evidence on record. The applicant reiterated that he will be highly prejudiced should the orders sought not be granted and that his appeal will be rendered nugatory as the respondent may remove the strip road from the registry map. He relied on **Regnoil Kenya Limited v Winfred Njeri Karanja [2019] eKLR** in support of his propositions.

Determination

5) We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under **Rule 5(2) (b)** of this **Court's Rules** is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

6) The principles for granting a stay of execution, injunction or stay of proceedings under **Rule 5(2)(b)** of this Court's Rules are well settled as was observed by this Court in the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR (Civil Application Nai. 258 of 1999)** where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

7) In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

8) On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single *bona fide* arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR (Civil Application No. Nai. 31 of 2012)** where this Court described an arguable appeal in the following terms:

“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.

viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

9) We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view it is arguable *inter alia* whether the disputed road was a public road. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

10) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others (supra)** this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

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.

11) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, the applicant's main contention is that the respondent has constructed a permanent gate at the road path and the applicant and his family have been forced to use an alternative route to gain access to their homes. In the circumstances, we find that the instant application has been overtaken by events and an order of stay of execution or injunction would be granted in vain.

12) In the circumstances, the applicant has demonstrated that the intended appeal is arguable but has failed to demonstrate that the appeal will be rendered nugatory, absent stay. The upshot is that we decline to grant the orders sought and dismiss the application with costs.

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

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR