



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, ASIKE-MAKHANDIA & SICHALE, J.J.A.)

CIVIL APPLICATION NO. 323 OF 2019

BETWEEN

SAMUEL MWANGI KOMU.....APPLICANT

AND

NANCY W.G. MWANGI.....RESPONDENT

(Being an application for stay of execution from the judgment of the High Court of Kenya at Nairobi (A. Ongeri, J.) dated 17th May 2019

in

MILIMANI HCCC NO. 12 OF 2015 (O.S)

RULING OF THE COURT

[1] The motion on notice before us for consideration is dated 2nd October, 2019. It was taken out by **Samuel Mwangi Komu** (the applicant) wherein he is seeking an order of stay of execution against the judgment and decree made on 17th May, 2019 by Ongeri, J. in **Milimani Civil Case No 12 of 2015 (OS)**. In the said judgment **Nancy W. G Komu** (the respondent) was declared the sole registered proprietor of a property known as **House No. 475 Buruburu Estate Phase 11** (the suit property).

[2] Briefly, the applicant was married to the respondent in 1998 but the marriage was dissolved in 2015. Upon the dissolution of the marriage, the respondent filed the aforesaid suit vide an originating summons seeking a declaration that she was the sole owner of the suit property which she had acquired before marriage vide a mortgage facility she had obtained from her employer and she single handedly repaid the mortgage. The learned trial Judge was persuaded by the respondent's case and judgment was entered in her favour and the applicant was ordered to vacate the suit property within forty five (45) days post judgement and in default be evicted.

[3] Aggrieved by the said outcome the applicant unsuccessfully sought an order of stay before the High Court vide an application dated 26th June 2019, (for similar orders as in the instant application), which was dismissed with costs on 2nd August 2019. Unperturbed, by the said dismissal, the applicant filed a Notice of Appeal dated 17th May 2019 and the instant application which he supported with his affidavit sworn on 2nd October, 2019 as well as the grounds stated thereunder.

[4] The applicant contends that he has an arguable appeal with good chances of success as he has lived in the suit property since he married the respondent; that in the event that an order of stay is not granted he is likely to be evicted and he in the event, stands to suffer substantial loss in the sense that he will be rendered destitute by being evicted from the suit property where he has been staying for over two decades and has substantially contributed to the improvements of the suit property. Consequently, his appeal will be rendered nugatory and will occasion extreme hardship upon him; that since he is in active possession of the suit property it is just and fair that he remains in possession until the appeal is heard and determined.

[5] The motion was opposed by the respondent stating that the suit property is legally registered in her name; that she purchased the suit property vide her salary; that the applicant never contributed to its acquisition, and the judgment which was issued by the High Court represents the correct position of the law that the applicant cannot claim suit property that was acquired before marriage. The applicant therefore termed the present application a mere delaying tactic to stop her from enjoying the fruits of her litigation and to prolong her

suffering as the respondent has been living on the suit property for six (6) years post-divorce without paying any rent thereby denying her the investment. According to the respondent the appeal is not arguable and even if it were, it cannot be rendered nugatory as the respondent has always been the registered proprietor of the suit property and if he were to prove any monetary contribution it is quantifiable and can be converted in monetary terms.

[6] We have considered the motion, the supporting as well as the replying affidavits which invokes the jurisdiction of this Court as provided under **Rules 5**

(2) (b), 41 & 47 of the court of Appeal Rules, 2010 that:-

“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...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 fit.”

[7] That said, the principles that guide the Court under the aforesaid rule are now an old hat; that is, for the applicants to succeed, they must establish that, the appeal is arguable and not frivolous and that if the order of stay of execution sought is not granted, the appeal will be rendered nugatory.

See the case of **Ismael Kagunji Thande vs. Housing Finance 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 exercise of that jurisdiction. These principles are 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 also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

[8] Is the intended appeal arguable, the applicant has listed various grounds to demonstrate that the draft memorandum of appeal will be arguable. The four grounds postulated can be summed into the allegation that the applicant claims to have contributed to the improvement of the suit property which fact the learned Judge is faulted for failing to take into consideration as a non-monetary contribution. In our view the applicant will be hard pressed to demonstrate the arguability of the intended appeal. This is because it is not disputed that the respondent purchased the suit property before the celebration of the marriage; secondly, the suit property was registered in her name long before couverture and thirdly, she single handedly paid the mortgage vide her monthly salary.

[9] On whether the appeal will be rendered nugatory if the appeal were to succeed, the applicant must demonstrate that should he prove his indirect contribution which is quantifiable in monetary terms, the respondent will not be able to compensate him for it. To us this contribution can be quantified in monetary terms and it fell on the applicant to demonstrate that the respondent would not be able to compensate him. This Court in **Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86** stated that an appeal will not be rendered nugatory if the loss suffered can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount will never be adequate remedy.

[10] As to whether the intended appeal would be rendered nugatory in the event it was to succeed, we are not in the least persuaded. This is because any improvements made on the suit property if proven, can be quantified in monetary terms. In the final analysis, the applicant also fails to satisfy the second limb.

[11] The above being our view, it goes without saying that the motion dated 2nd October 2019 is unmerited and is hereby dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 7th day of May, 2021.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKAHNDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR