



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE, J. MOHAMMED & KANTAI, J.J.A]

CIVIL APPLICATION NO. E049 OF 2021

BETWEEN

EUNICE LAMBA.....APPLICANT

AND

NATIONAL SOCIAL SECURITY FUND,

BOARD OF TRUSTEES.....1ST RESPONDENT

FLORENCE MAINA.....2ND RESPONDENT

(Being an application for stay of execution and injunction pending an appeal from the judgment and decree of Bor J dated and delivered on 2nd February 2021)

IN

(Nairobi ELC Case No. 78 of 2007)

RULING OF THE COURT

Before us is a motion dated 10th February 2021, brought pursuant to the provisions of Sections 3A & 3B of the Appellate Jurisdiction Act, Rule 5 (2) (b) of the Court of Appeal Rules and all enabling provisions of the Law in which Eunice Lamba (*the applicant*) seeks the following orders:

“1. Spent.

2. The Court be pleased to issue temporary stay of execution of the judgment dated 2nd February 2021, issued by the Environment and Land Court (Lady Justice A.K Bor) in Civil Suit No. 78 of 2007; Eunice Lamba v NSSF Board of Trustees and Florence Maina pending the hearing and determination of this application.

3. In the alternative, the Court be pleased to issue a temporary injunction restraining the respondents by themselves and or their agents, assigns or legal representatives from in anyway dealing with, taking possession of and/or otherwise interfering with the title to and/or trespassing onto land parcel L.R No. KIITISURU-101/E49 pending hearing and determination of this application interpartes.

4. The Court be pleased to issue a temporary stay of execution of the judgment dated 2nd February 2021 issued by the Environment and Land Court (Lady Justice A.K Bor) in Civil Suit No. 78 of 2007; Eunice Lamba v NSSF Board of Trustees and Florence Maina-pending the hearing and determination of the intended appeal.

5. In the alternative, the Court be pleased to issue a temporary injunction restraining the respondents by themselves and/or their agents, assigns or legal representatives from in anyway dealing with, taking possession of and/or otherwise interfering with the title to and/or trespassing onto land parcel L.R No. KIITISURU-101/E49 pending hearing and determination of the intended appeal.

6. Costs of this application be costs in the cause”

The motion is supported on the grounds on the face of the motion and an affidavit sworn by **Eunice Lamba** who deponed that sometimes in the year 2007, she filed suit seeking *inter alia* specific performance against the 1st respondent in respect of land parcel L.R No. KIITISURU-101/E49 in accordance with a sale agreement dated **26th February 2004**, which the 1st respondent had unlawfully allocated to the 2nd respondent during the pendency and validity of the aforesaid sale agreement and that on **2nd February 2021**, the High Court, (**Bor, J**), delivered a judgment that effectively granted the 2nd respondent possession and ownership of the suit property.

That, being aggrieved with the aforesaid judgment, she had appealed against the same and that the court *inter alia* made serious substantive assumptions of fact and ignored her submissions, the totality of the evidence that clearly demonstrates bad faith, deliberate non-disclosure and misrepresentation on the part of the 1st respondent which was calculated to defeat her crystalized right to the suit property.

It was further contended that the appeal raised serious questions of law and fact deserving further input of this court and with more than a reasonable chance of success and that she was apprehensive pending the hearing and determination of the application and the appeal, there was a likelihood that the 1st and 2nd respondents may execute the judgment thereby rendering the appeal nugatory.

The application is opposed vide a **replying affidavit dated 15th March 2021, by the 2nd respondent** who deposed *inter alia* that the grant of the orders being sought by the applicant was meant to deny her the fruits of her judgment that she had waited for since the year 2007 and that she was equally entitled to the enjoyment of the same to the exclusion of the applicant and all other persons.

On the other hand, it was submitted for the 1st respondent that as to whether the applicant had an arguable appeal, the 1st respondent was in agreement with the applicant that the intended appeal was not frivolous and that the same should be allowed to be heard and determined on its merits. As to whether the applicant’s appeal would be rendered nugatory if the orders sought were not granted, it was submitted that the property subject to the intended appeal was in a prime area whose value had appreciated tremendously since the time of filing of the suit at the trial court and that the 2nd respondent having succeeded in her counter claim, nothing presently bars her from enjoying the fruits of her judgment and that as such, the applicant herein had satisfied both limbs/test in applications of these nature. Consequently, the 1st respondent urged the court to allow the application as prayed.

Finally, it was submitted for the 2nd respondent that no single issue had been raised that would justify the grant of the orders sought as there was clearly no arguable appeal or point raised that would justify the grant of the orders sought and no substantial loss had been shown by the applicant and the fact that the suit property was worth over Kshs 40,000,000/=was not itself a ground for the grant of the orders sought, more so taking into account the fact that the loss she may ultimately suffer has been quantified by herself.

We have carefully considered the motion and the supporting affidavit, the replying affidavit, the rival submissions by the parties, the authorities cited and the law.

The applicant’s motion is brought *inter alia* under **Rule (5) (2) (b)** of this Court’s Rules. **Rule 5(2) (b)** of the Rules which guides 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 or injunction 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 [2103] eKLR** as follows:

“

i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.

v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

viii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

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

x. 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.

xii. 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.

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

xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

On the first limb, we have perused the memorandum of appeal and find that the applicant’s appeal is not frivolous as it raises arguable points *inter alia* whether the learned judge failed to address and/or fundamentally misapprehend a dispositive point of law raised by the applicant to wit; the effect in law of the 1st respondents failure to produce the sale agreement dated **1st March 2004**, that was proven to be in its exclusive possession and its unequivocal admission that there was in fact a sale agreement that was never rescinded as agreed by the parties. Of course we are mindful that we will not make further comments lest we embarrass the bench that will handle the matter. 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 applicant has an arguable appeal.

On the nugatory aspect, we are satisfied that that if the orders sought are not granted, and should the suit property be transferred to the 2nd respondent, the appeal will certainly be rendered nugatory and the substratum of the applicant’s appeal shall have been defeated.

In view of the above, we have come to the conclusion that the applicant has established the twin principles for consideration in an application under **Rule 5(2) (b) of this Court’s Rules** and accordingly the motion dated **10th February, 2021** 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 4th of June, 2021.

F. SICHALE

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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