



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OKWENGU & J. MOHAMMED JJ.A)

CIVIL APPLICATION NO. E038 OF 2021

BETWEEN

FMWAPPLICANT

AND

LWWRESPONDENT

(An application for stay of execution of the Judgment and Decree of the Environment and Land Court (ELC) Nairobi (S. Okongo, J.) delivered on 22nd October, 2020

in

ECL Case No. 763 of 2014)

RULING OF THE COURT

[1] The applicant has moved this Court under Rule 5(2)(b) of the Court of Appeal Rules for orders of stay of execution of the Judgment and Decree of the Environment and Land Court (ELC) (S. Okong’o J), delivered on 22nd October, 2020, pending the hearing and determination of an intended appeal to this Court.

[2] In the Judgment subject of the intended appeal, the learned Judge of the ELC had dismissed the applicant’s suit in which the applicant had sued the respondent, contending that the respondent who is his stepmother had caused his father, WM (deceased), who was suffering from a mental illness, to transfer property No. Limuru/Bibirioni/[xxxx] (suit property) to her as a gift, thereby denying the applicant his share of the suit property. The applicant sought orders that the suit property be divided equally between him and the respondent. In dismissing the suit, the learned Judge also ordered that a Caution that the applicant had lodged against the suit property on 12th October, 1990 be lifted forthwith by the Land Registrar.

[3] The applicant being aggrieved by that Judgment, filed a notice of appeal on 12th November, 2020, and also applied for copies of proceedings and judgment. The applicant is now before us with a motion under Rule 5(2)(b) of the Court of Appeal Rules, seeking an order of stay of execution of the orders of the ELC.

[4] The applicant contends that the judgment of the ELC has the effect of excluding him as a beneficiary of the estate of the deceased, and has exposed him to risk of being disinherited, because the subject matter of the dispute is property that belonged to the deceased which property has already been awarded to beneficiaries, and there is real risk of the property being sold and/or alienated by the beneficiaries which would render the intended appeal nugatory.

[5] The matter was listed for hearing before us on 30th March 2021 by way of written submissions without the presence of parties or their counsel. Parties were served with hearing notices by way of email and advised to file written submissions. However, only the applicant filed written submissions. The respondent, though duly served with the motion as per an affidavit of service that was duly filed, did not file any reply to the motion, nor has she filed any written submissions.

[6] The applicant has annexed to his notice of motion, a notice of appeal dated 12th November, 2020 as well a draft memorandum of appeal, indicating that he intends to raise two main grounds. That is: that the learned Judge exercised his discretion on wrong principles; and that he totally disregarded the applicant’s evidence in violation of the rules of natural justice.

[7] This being an application for stay of execution, the applicant has to satisfy the twin requirements of Rule 5(2)(b) of the Court of Appeal Rules. As restated in **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others** [2013] eKLR, the requirements are, that the applicant has an arguable appeal, and that the intended appeal if successful, would be rendered nugatory if the order of stay that is sought is not granted.

[8] On the limb of arguability, the applicant's intended appeal is anchored on what he calls the wrong exercise of discretion by the learned Judge, and disregard of his evidence contrary to the rule of natural justice. A look at the impugned judgment shows that the applicant is complaining of a transfer of property to the respondent which was done way back on 2nd April, 1990. The applicant initiated the dispute by having a Caution registered against the suit property on 12th October, 1990, but only filed his suit on 13th June, 2014. These are undisputed facts that appear from the judgment. In light of these facts, the applicant is unlikely to overcome the hurdle to his suit of limitation brought about by Section 7 of the Limitation of Actions Act. This provision requires that any action involving a claim to land be filed within 12 years. Moreover, the intended grounds of appeal are quite general, and do not raise any issue regarding the allegations of fraud.

[9] As regards the nugatory aspect, the applicant's suit was dismissed and that is a negative order not capable of stay. However, the learned Judge also ordered the Caution that the applicant has registered against the property on 12th October 1990, "be lifted forthwith". That order was made on 22nd October, 2020. No evidence has been laid before this Court to show that the order lifting the Caution has not been effected.

[10] Assuming for the sake of argument that the order lifting the Caution has not been effected, much as we appreciate that the subject of the applicant's intended appeal is land, an order of stay of execution regarding the Caution, will have the undesirable effect of maintaining a Caution that has been in effect against the suit property for over 23 years. We appreciate that parties are entitled to exercise their right of appeal. However, that right must be balanced against the right of a successful litigant who is entitled to enjoy the fruits of their litigation. A party who has been indolent in pursuing his/her litigation can only blame himself/herself, if the subject of his/her litigation is compromised due to his/her inordinate delay. Moreover, the applicant has not demonstrated that the respondent intends to dispose of the suit property or deal with it in a way that may change the character of the suit property.

[11] Section 3A & 3B of the Appellate Jurisdiction Act under which the applicant moved this Court, obligates the Court in applying or interpreting the provisions of the Court Rules, to give effect to the overriding objective of the Act, which is, to facilitate the just, expeditious, proportionate and affordable resolution of appeals. In our view, granting an order of stay of execution in favour of the applicant would not achieve this purpose, as the respondent will be prejudiced in being restricted from enjoying the fruits of the judgment entered in her favour.

[12] For these reasons, we find no merit in the applicant's motion dated 3rd February, 2021. It is accordingly dismissed. The dispute being one involving family members, we shall not award any costs.

Dated and delivered at Nairobi this 9th day of July, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR