



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, KIAGE & SICHALE, JJ. A]

CIVIL APPLICATION NO. 118 OF 2020

JENNIFER AKINYI OSODO.....APPLICANT

AND

BONIFACE OKUMU OSODO.....1ST RESPONDENT

ALFRED JUMA.....2ND RESPONDENT

EDITH ATIENO KAGOMBA.....3RD RESPONDENT

THE LAND REGISTRAR BUSIA.....4TH RESPONDENT

(An Application for stay of execution and injunction from the Judgment of the High Court of Kenya at Busia (Omollo, J) dated 30th July, 2020.)

in

(ELC Cause No. 30 of 2016)

RULING OF THE COURT

Before us is a motion dated 14th October 2020, brought under the provisions of Rules 5 (2) (b) 41, 42 and 47 of the Court of Appeal Rules, 2010 and all other enabling provisions of the Law in which Jennifer Akinyi Osodo (the applicant herein) seeks the following orders:

“1. Spent.

2. THAT the Honourable Court do issue an order of Stay of Execution of the Decree and Orders of the Honourable Superior Court, Hon Justice A. Omollo issued in ELC Case No. 30 of 2016 between Jennifer Akinyi Osodo and Boniface Okumu Osodo & Others on 30 July 2020.

3. THAT the Honourable Court do issue a temporary injunction restraining the Respondents, their servants and or agents from selling, charging, disposing off and or otherwise interfering with the suit property Bunyala/ Mudembi/2920 pending the hearing and determination of this application interpartes.

4. THAT the Honourable Court do issue a temporary injunction restraining the Respondents, their servants and or agents from selling, charging, disposing off and or otherwise interfering with the suit property Bunyala/Mudembi/2920 pending the hearing and determination of Civil Appeal No. 118 of 2020.

5. THAT the costs of this application be provided for.”

The motion is supported on the grounds on the face of the motion and an affidavit sworn by Jennifer Akinyi Osodo who deposed *inter alia* that the 1st respondent had illegally and without the consent of the Land Control Board transferred her matrimonial property namely;

Bunyala/Mudembi 2920 to the 2nd and 3rd respondents. That, the property had been bequeathed upon them by the 1st respondent's father when they got married as part of their ancestral transmission and inheritance in accordance with Luhya customary practices and laws, and that the said property is where their children would all build their houses.

That, she had filed a civil suit in the superior court seeking *inter alia* an order to restrain the 1st respondent from dealing with and/or transferring the suit property which suit was dismissed by the superior court with costs on 30th July 2020 and that she had since filed Civil Appeal No. 118 of 2020 before this Court, which appeal was awaiting hearing at the invitation of the Court and that it was proper and just that the substratum of the appeal be preserved, pending the hearing of the main appeal and that she had an arguable appeal which would be rendered nugatory if the orders sought herein were not granted.

She further deposed that in execution of the decree and order of the Court appealed against, the respondents had initiated steps to attach her property and unless restrained by an order staying the decision of the High Court and an injunction sought herein, the respondents may interfere with the suit property and its title thereby defeating the substratum of the appeal rendering it nugatory.

The application was opposed vide a replying affidavit sworn by **Alfred Ojiambo Juma** the 2nd respondent herein who deposed *inter alia* that there was nothing to stay as the suit was dismissed, thus altering no parties rights/ interests in the subject matter and that the applicant had never sought for stay of execution in the High Court in the first instance and that the application had been filed 3 months after delivery of the judgment, which period was inordinate and had not been explained and that further the applicant had never used/occupied the subject land and as such she would not be prejudiced in any manner.

The 1st and 4th respondents did not file any replying affidavit or submissions in respect to the application.

It was submitted for the applicant that she had an arguable appeal as the transfer of the suit property to the 2nd and 3rd respondents by the 1st respondent was done in a manner that breached the mandatory provisions of Section 6 of the Land Control Act as the 1st respondent never sought the consent of the Land Control Board. It was further submitted that the respondent transferred the suit property when there was already a caution registered against the title to the property.

As to whether the appeal would be rendered nugatory if the orders of stay and injunction were not granted, it was submitted that the subject property was a matrimonial home of the applicant and the 1st respondent and that if the orders sought were not issued, the same would be dealt with in a manner that could not be compensated by way of money and that further, the applicant would suffer irreparable loss as the subject land was ancestral land and no monetary compensation would be adequate to replace the sentimental and ancestral value of the land.

On the other hand, the 2nd and 3rd respondents reiterated the contents of a replying affidavit sworn by the 2nd respondent on **26th February 2021** and submitted *inter alia* that the applicant had not filed and or served the Record of

Appeal and that the reliefs sought herein were for stay or injunction pending the hearing and determination of this application and once the application was spent, there would be nothing pending and that further the applicant had not adduced any evidence to support any of the allegations in the supporting affidavit and that the allegations were false or merely calculated to mislead the Court. Consequently, they submitted that the application was devoid of merit designed to prejudice the respondent and urged that the same be dismissed with costs.

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

The applicant's motion is brought *inter alia* under **Rule (5) (2) (b)** of this Court's Rules. The Rule which guide 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 of execution 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 [2013] eKLR**.

In the instant case, the applicant is essentially seeking two orders namely; an order of stay of execution of the decree and orders of **Omollo, J**

issued on **30th July 2020**, in Busia ELC Case No. **30 of 2016** and a temporary injunction restraining the respondents from selling, charging disposing off and or otherwise interfering with the suit property pending the hearing and determination of the intended appeal.

With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated **30th July 2020**, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See **Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR** where the Learned Judges stated thus:

“what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

Similarly, in **Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, Makhandia, J** (as he then was) stated thus:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

Consequently, the prayer for stay of execution must fall by the wayside and the same is hereby dismissed.

With regards to the prayer for temporary injunction, and as to whether the applicant has an arguable appeal, it is our considered opinion that the issue raised by the applicant namely; failure to obtain the consent of the Land Control Board by the 1st respondent in transferring the suit property to the 2nd and 3rd respondents raises an arguable appeal worthy of consideration by this Court and as such the intended appeal is not frivolous. Of course we are mindful of the fact 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, it was contended by the applicant that the subject property was matrimonial and ancestral home of the applicant and the 1st respondent and that if the orders of injunction were not issued, the subject property may be dealt with in a manner that could not be compensated by money. From the circumstances of this case we are satisfied that if an order of injunction is not granted to preserve the suit property and the property is dealt with in an adverse manner, the substratum of the appeal will have been lost and the intended appeal shall have been rendered nugatory.

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 the motion dated **14th October 2020**, is hereby allowed in terms of **prayer 4**.

Accordingly, a temporary injunction is hereby issued restraining the respondents, their servants and or agents from selling, charging, disposing off and or otherwise interfering with the suit property Bunyala/Mudembi/2920 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 THIS 9TH DAY OF JULY, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

P. KIAGE

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR