



IN THE COURT OF APPEAL

AT NYERI

[CORAM: NAMBUYE, KARANJA & KIAGE J.J.A.]

CIVIL APPLICATION NO. 191 OF 2019

BETWEEN

MACCU MOTORS LTD APPLICANT

AND

BIKHABHAI MATHURBHAI PATEL 1ST RESPONDENT

DR. FRANK MAUNDI MWONGERA 2ND RESPONDENT

CYPRIAN IBURI NGARURO3RD RESPONDENT

(An application for stay of execution of the Decree of the Environment and Land Court of Kenya

(E. C. Cheron, J.) dated 3rd June, 2019

in

Meru ELC No. 31 of 2018)

RULING OF THE COURT

Before us is a Notice of Motion dated 20th December, 2019 brought under **Rule 5(2)(b)** of the **Court of Appeal Rules**, substantively seeking orders as follows:

“2. That the honourable court be pleased to stay execution of the decree herein and or suspend the operation of the decree pending hearing and determination of the appeal herein.

3. That this honourable court be pleased to issue an order of inhibition upon land reference No. Meru Municipality Block II/50, pending hearing and determination of this appeal.”

The motion is supported by grounds on its body and a supporting affidavit of **Fredrick Mburugu**, the Chief Executive Officer of Meru Farmers’ Co-operative Union and also doubling up as a Director of the applicant herein, sworn on 20th December, 2019 together with annexures thereto. It has been opposed by a replying affidavit of **Cyprian Iburi Ngaruro**, the 3rd respondent herein sworn on his own behalf and that of the 1st and 2nd respondents, on 21st February, 2020 together with annexures thereto. It was canvassed in the absence of advocates for the respective parties, through rival pleadings, without written submissions and legal authorities.

The background to the application albeit in a summary form is that the Respondents filed Meru Environment and Land Court (ELC) Cause No. 31 of 2018 against the Applicant and others seeking orders *inter alia* that the applicants and those others do vacate Land Parcel No. **Meru/Municipality Block 11/50** (the suit property) and give vacant possession, mesne profits and costs. The applicant and those others filed a defence and counterclaim denying the respondent’s claim in the first instance and in their counterclaim sought orders declaring the allocation of the suit property to the respondents unlawful, a permanent injunction and general damages. The respondents filed a reply to defence and defence to counterclaim traversing the applicant’s defence and counterclaim.

The cause was canvassed through oral testimony and written submissions. In a judgment delivered by **E.C Cheron, J.** on 3rd June, 2019,

the learned Judge found in favour of the respondents. The applicant was aggrieved and filed a notice of appeal dated 6th June, 2019 lodged on 7th June, 2019 on which the application under consideration is anchored.

Supporting the application, the applicant avers *inter alia* that judgment was delivered on 3rd June, 2019, their advocate timeously instituted an appeal on 22nd October, 2019, the subject matter of the appeal is the suit property worthy Millions of shillings registered in the names of the respondents. There was therefore danger of the suit property changing hands before the appeal is heard and determined. It is therefore in the interests of all the respective parties herein that the substratum of the appeal be preserved by registering an inhibition order against title to the suit property to prevent it from changing hands. Likewise, it will also be in the interests of all the respective parties herein if both the decree and all other subsequent orders arising therefrom particularly those touching on payment of taxed costs amounting to Kshs.14 Million are also stayed until the appeal is heard and determined.

In rebuttal, the respondents aver that the applicant does not have an arguable appeal for failure to either annex a draft memorandum of appeal or alternatively specify grievances it intends to take up on appeal in the supporting documents. Second, it is undeserving of the court's exercise of its discretionary mandate in its favour for failure to disclose in their supporting documents that it has unsuccessfully moved this Court on two previous occasions on the same subject matter. Third, the respondents already have an indefeasible title in the suit property being the first registered proprietors. Granting the relief sought will therefore be an exercise in futility.

Our invitation to intervene on behalf of the applicant has been invoked under **Rule 5(2)(b)** of the **Court of Appeal Rules**. It provides:

“5(2)(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 that guide the Court in the exercise of its mandate under the above rule form a well-trodden jurisprudential path. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** among numerous others.

We have accordingly applied the above threshold to the above rival positions. It is our position that there are two jurisdictional preliminary issues to be addressed before we delve into the merits of the application. The first is whether on the facts of the record our mandate has been properly invoked. See **Githunguri vs. Jimba Credit Corporation Limited No. 2 [1988] KLR 838** in which the court expressed itself *inter alia* as follows:

“We think this Court’s jurisdiction under rule 5(2) to grant either a stay of execution, an injunction or stay of any further proceedings, arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with rule 74(as it was then now Rule 75(1) and (2) of the Court of Appeal Rules)”.

As we have already mentioned above, there is on record a notice of appeal filed on 6th June, 2019 by the firm of **Leonard K. Ondari & Co. Advocates**. The application is therefore properly anchored and warrants merit interrogation.

The second jurisdictional issue is whether we have mandate to grant prayer 3. In the case of **Stanbic Bank Limited vs. Kenya Revenue Authority [2008] eKLR** the court was explicit that under **Rule 5(2)(b)** of the Court of Appeal Rules, the court has mandate to grant only three reliefs namely an order staying execution of orders arising from a decision of the Superior Court, stay of proceedings giving rise to an appeal and, lastly, an injunction order. In light of the above crystallized position, we hold that there is no mandate for us to grant prayer 3. It is accordingly struck out.

Turning to the merits of prayer 2 of the application, the position in law is that the applicant has to satisfy the twin prerequisites which is now trite for granting relief under **Rule 5(2)(b)** of the **Court of Appeal Rules**, namely demonstration that the intended appeal is arguable. Second, that if the relief sought is not granted the intended appeal will be rendered nugatory. See **Githunguri vs. Jimba Credit Corporation Limited No. 2 [supra]**.

On the arguability of the intended appeal, demonstration of satisfaction of this prerequisite is usually either through exhibition of a draft memorandum of appeal or alternatively setting out grievances intended to be taken up on appeal either in the body of the application or part of the content of the supporting affidavit(s). Grounds (a) and (b) on the body of the application read as follows:

“a) The appeal is arguable.

b) The appeal may be rendered nugatory while the supporting affidavit has this:

while paragraph 4 and 12 of the supporting affidavit, on the other hand read as follows:

Pr. 4. That, subsequently our advocate instituted the process of appeal, and the same was timeously filed on 22nd October, 2019.

Pr.12. I have been advised by our advocate on record which I verily believe to be true that our appeal is arguable and has high chances of success.”

Our take on the above is that these do not contain particulars of grievances appellant intends to take on appeal. We are, therefore in the circumstances, not in a position to gauge the arguability of the intended appeal. This prerequisite has therefore not been satisfied.

The position in law is that both prerequisites must be established before a party can be granted relief under **Rule 5(2)(b)** of the **Court of Appeal Rules**. Having failed to establish the first prerequisite we find no need to interrogate satisfaction of the second prerequisite.

In the result, the application fails and is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR