



IN THE COURT OF APPEAL

AT MOMBASA

[CORAM: OUKO (P), SICHALE & J. MOHAMMED, JJ.A]

CIVIL APPLICATION NO. E071 OF 2020

BETWEEN

MBARAK SAID AL.....1ST APPLICANT

SALIM MKOTA KOMBO.....2ND APPLICANT

AND

SULTAN PALACE DEVELOPMENT LIMITED..... RESPONDENT

(An application seeking stay of execution of the decision and orders of the Environment and Land court at Malindi, (J. Olola, J) dated 5th November, 2020 In ELC Case No. 29 of 2019 (OS))

RULING OF SICHALE, JA

The applicants' Notice of Motion dated **16th November, 2020** seeks in the main, to stay execution of the orders of the Environment & Land Court (ELC) at Malindi in ELC Case No. 29 of 2019 (OS) issued on **5th November, 2020**. The motion is supported by the affidavit of **Mbarak Said Ali** (the 1st applicant) sworn on the **16th November, 2020**. He depones that the impugned ruling was largely informed by a consent letter whose authenticity he doubted; that he has lived on the suit property for over 30 years and that contrary to the respondent's assertion that he never at any time compromised the suit filed seeking an order of adverse possession (HCCC No. 375 of 2009 (OS)).

On **21st January, 2021**, the motion came before us for hearing in the presence of learned counsel **Mr. Okere** for the applicants and **Mr. Odera** for the respondent. **Mr. Odera** explained to us that the respondent had not filed a replying affidavit as its director had travelled to China and had been caught up by restrictions imposed due to the Covid 19 pandemic. We however directed that the non-filing of the respondent's replying affidavit notwithstanding, the motion be heard.

In urging the motion, **Mr. Okere** contended that the applicants have an arguable appeal as the consent purportedly entered into by the applicants to move out of the suit land did not have the court's sanction. Secondly, the applicants want to challenge the finding as to whether such a consent can halt the running of time for purposes of computing the limitation period as envisaged in the doctrine of adverse possession and finally, whether the law allows for various descriptions of property other than that in the extract of title.

On the nugatory aspect, counsel contended that the applicants have been on the land for more than thirty (30) years and unless an order of stay is granted, the applicants will be evicted. He further submitted that the topography of the suit property is likely to change, absent stay.

In opposing the motion, **Mr. Odera** submitted that the applicants have no arguable appeal as they have variously approached the courts and at some point entered into a consent to vacate the suit property after payment of various sums of money to themselves and that any order of stay will be legitimizing the actions of a trespasser.

We have considered the motion, the supporting affidavit, the rival oral submissions made before us and the law. The application before us is made pursuant to the provisions of rule 5 (2) (b) of this Court's Rules. The twin principles in an application such as this one have now been well defined in the case of **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR** where it was stated as follows:

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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. See *Ruben & 9 others v Nderitu & Another (1989) KLR 459*.

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

iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365*.

iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001*.

v. An applicant must satisfy the court on both of the twin principles.

vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*.

vii. 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008*.

viii. 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.

ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232*.

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

xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniness, the onus shifts to the latter to rebut by evidence the claim". *International Laboratory for Research on Animal Diseases v. Kinyua, [1990] KLR 403*.

In the motion before us, it may well be that the applicants have an arguable appeal. However, we note that the applicants are seeking orders to stay the dismissal of their originating summons, hence an order of stay of a negative order. The applicants were not ordered to do anything or refrain from doing anything. In *Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR*, 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..."

Given that the applicants are seeking to stay a negative order, we have come to the conclusion that the two limbs for consideration in a 5(2) (b) application have not both been satisfied. The motion dated 16th November, 2020 is hereby dismissed with costs.

This ruling is signed under Rule 32(3) of the Court of Appeal Rules (CAR), Ouko J.A (as he then was) having been appointed a Judge of the Supreme Court and as J. Mohammed, JA agrees, the above are the orders of the Court.

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

F. SICHALE

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JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR