**Eri Limited v Velji (Civil Appeal (Application) 47 of 2020)**
**[2021] KECA 306 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 306 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CIVIL APPEAL (APPLICATION) 47 OF 2020**

**MSA MAKHANDIA, F SICHALE & S OLE KANTAI, JJA**

**DECEMBER 17, 2021**

**BETWEEN**

**ERI LIMITED ..... APPLICANT**

**AND**

**ZAINUL VELJI ..... RESPONDENT**

***(Being an application for stay of all further proceedings in High Court Civil Case No. 66 of 2018 pending the hearing and determination of Civil Appeal No. 47 of 2020 in HCCC No. 66 of 2018)***

**RULING**

1. The applicant has approached this Court under the provisions of Articles 10, 25(C), 27, 40, 48, 50 & 159 of the *Constitution*; Sections 3A & 3B of the *Appellate Jurisdiction Act* and Rule 5(2) (b) of the *Court of Appeal Rules*. He seeks in the main that an order staying all further proceedings in Kisumu High Court Civil Case No. 66 of 2018 Zainul Velji Vs Eri Limited do issue pending the hearing and determination of the appeal.

2. The motion is premised on several grounds which can be summarized thus that; the applicant was the registered owner of land reference No. Kisumu Municipality Block 3/92 from 1995, ( hereinafter the "suit property"), on 1st August 2011, the High Court struck out its defence and counterclaim in the above suit which had been filed against it by the respondent with regard to the ownership of the suit property, for reason that it was frivolous; it then filed an application for the review of the ruling aforesaid which was dismissed for reasons that the court lacked jurisdiction to entertain the motion, since the applicant had filed a notice of appeal on the same matter and could not therefore seek a review at the same time and finally, that the application had been made six years after the decision of the court.

3. The applicant in support of the motion merely reiterated and expounded on the above grounds. Suffice to add that; the filing of the notice of appeal did not connote an appeal, that in any event the appeal if at all, had not been prosecuted and over a year and had therefore lapsed by virtue of Rule 83 of the

Court of Appeal Rules. The applicant further deposed that it will suffer prejudice if the orders are not granted since the respondents had fixed the suit for hearing in the High Court by way of formal proof and the respondents will rely on the title in respect of the suit property as part of its evidence which title is at the centre of the dispute and lastly that if formal proof proceeds, the appeal filed will be heard after the matter had proceeded which will be prejudicial to the applicant and thereby render the appeal a mere academic exercise. Finally, that the application had been brought without undue delay.

4. The application was opposed by the respondent who filed a detailed replying affidavit. He contends that he has never been served with the notice of appeal and copy of the letter bespeaking the proceedings, thus there is no appeal on which the instant application can be anchored. That he bought the suit property from Southern Credit Banking Corporation Ltd after the applicant, who had charged the suit property to the said bank defaulted in the loan repayment compelling the bank to exercise its statutory power of sale. That this suit is an offshoot of Civil Suit No. 143 of 2004 in which the respondent sought vacant possession, general damages and mesne profits following the transfer of the suit property to the respondent following the public auction but the applicant refused to let go the suit property. The applicant filed a defence and a counterclaim against the respondent and the bank which as already stated were struck out and the suit allowed to proceed by way of formal proof. Later, the applicant moved the court for the review of the orders above and reinstate the applicant's defence and counterclaim to enable it prosecute fraud allegations on the part of the respondent among other prayers, which application was once again dismissed on the grounds that; the time the applicant had taken to file the application was inordinately long, the application was not for review but one that required the trial court to interrogate and possibly fault the findings of the initial court that struck out the defence and counterclaim thus making the court act like it is sitting on an appeal of a ruling by judge of concurrent jurisdiction, that the applicant having filed a notice of appeal could not pursue a review application as well. The respondent further enumerated several cases and applications that had been filed by the applicant against him which had all been dismissed and that the current application was the applicant's normal delaying tactics that he employs to ensure that the formal proof does not proceed.

5. The applicant in its submissions maintains that the appeal is arguable and will be rendered nugatory if the prayers sought are not granted. On arguability, the applicant reiterates that the memorandum of appeal raises triable issues among them that the trial court erred in finding that the applicant had filed an appeal by merely filing a notice of appeal, that the appeal if at all, lapsed after one year when the applicant did not prosecute it and that the six year period of delay which was attributed to the applicant by the trial court was an error apparent as the lapse was only five months. As to the nugatory aspect, the applicant reiterates the contents of his affidavit and further states that the respondent stands to be awarded mesne profits against it whereas it was the registered owner of the suit property. That failure to issue an order to stop the formal proof will render the appeal an academic exercise and he will have been condemned unheard.

6. The respondent on the other hand submitted that the intended appeal was frivolous and a non-starter as the notice of appeal on which the application ought to have been founded was never served on him as required by the rules. The application was only meant to frustrate the finalization of the suit and that the applicant had sought for review of the ruling which is a discretionary power of the court and had not demonstrated how the trial court had erred in exercising it. Lastly, that since there existed a notice of appeal, the applicant was therefore precluded from pursuing the appeal as he had the chance to choose one but not all. On the appeal being rendered nugatory, the respondent stated that there had been no demonstration of how formal proof will deny the applicant a right to a fair hearing. That even after formal proof, if the applicant is dissatisfied with the outcome, he can always appeal. That there was no suggestion that the respondent will not be in a position to make good any loss that the applicant may suffer if orders sought are not granted. The respondent relied on the case of *David*

*Morton Silversterin Vs. Atsango Chesoni* [2002] eKLR to buttress the fact that for anapplication of this nature to be allowed, the applicant has to satisfy two limbs, that the intended appeal is arguable and that should the application be denied the intended appeal shall be rendered nugatory which the applicant had failed to demonstrate in this case.

7. We have considered the application before us, the response and the rival submissions by Counsel. First, there is a notice of appeal duly filed which grants this court jurisdiction to entertain the application. (See *Safaricom Ltd Vs. Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR.

8. The principles applicable in the exercise of this courts unfettered discretion under Rule 5(2) (b) to grant an order of stay of proceedings are now well settled. Firstly, the applicant has to satisfy that it has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice, that it is an appeal that is not frivolous and or idle. Secondly, an applicant has to demonstrate that unless an order of stay of proceedings is granted the appeal or intended appeal would be rendered nugatory. See the case of *Multimedia University & Another Vs. Professor Gitile N. Naituli* [2014] eKLR.

9. Has the applicant satisfied these twin limbs to entitle it to the orders sought. On the arguability, we have perused the grounds of appeal raised by the applicant. We note that at a cursory glance of the history of the dispute brings out a convoluted litigation that has reigned court since 2004 to date with several suits and applications being filed by the applicant in all manner of courts over the same subject matter. In our view the grounds do not pass the muster. Further in dismissing the application for review, the trial court was exercising discretion. Rarely does this court interfere with the trial court's exercise of discretion.

10. On the nugatory aspect, we ask ourselves what legal ramifications will result if the orders are not granted. The matter before the High Court will ideally proceed to hearing and a judgment entered either way and if the applicant is not satisfied, it may prefer an appeal. It is also possible that the respondent may not succeed in his formal proof. Further if the formal proof proceeds and equally the appeal is heard and determined, if successful, the judgment in the High Court will be rendered otiose. Given the foregoing scenarios, we do not find any plausible reason that the applicant has advanced that will render the appeal nugatory.

11. The applicant having failed to demonstrate both limbs of arguability and nugatory aspect, the application fails and is accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**