



Dickson Sinkeet Mapi (Suing as the Personal Representative of Benjamin Mapi Ole Partimo – Deceased v Mutunkei (Civil Appeal (Application) E041 of 2020) [2021] KECA 235 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 235 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E041 OF 2020
SG KAIRU, J MOHAMMED & S OLE KANTAI, JJA
DECEMBER 3, 2021**

BETWEEN

DICKSON SINKEET MAPI (SUING AS THE PERSONAL REPRESENTATIVE OF BENJAMIN MAPI OLE PARTIMO – DECEASED APPLICANT

AND

NAISENYU PARGARNA MUTUNKEI RESPONDENT

(Being an application for stay of execution from the judgment of the Environment and Land Court (C. Ochieng, J.) dated 27th May, 2020 In E.L.C. Cause No. 777 of 2017)

RULING

1. Before us is a notice of motion dated 24th July, 2020, in which Dickson Sinkeet Mapi (suing as the personal representative of Benjamin Mapi Ole Partimo – deceased) (the applicant) seeks an order of stay of execution pending the hearing of the appeal of the judgment of the Environment and Land Court (ELC) in Kajiado (C. Ochieng, J.) dated 27th May, 2020. The application is brought under Rule 5(2)(b) & Rule 41 of the Court of Appeal Rules (this Court's Rules). Naisenyu Pargarna Mutunkei is the respondent herein.
2. The grounds upon which the notice of motion is based are inter alia that on 16th April, 2014, the Deceased (now substituted by the applicant) filed a suit in the ELC seeking various orders against the respondent including a prayer for a declaration that he was the absolute, rightful and bonafide owner of Land Reference Number Kajiado/Kaputiei Central/1766 (the suit property).
3. Aggrieved by the judgment which dismissed the applicant's suit with costs, the applicant lodged an appeal and the instant application supported by his affidavit in which he averred inter alia:-that he has a meritorious appeal with a high probability of success as it raises serious and arguable factual, evidentiary and legal issues; that he is reasonably apprehensive that unless the orders sought are granted,



the respondent may dispose of the suit property before the appeal is heard and determined rendering the eventual orders of the Court nugatory and an academic exercise; that the disposal of the suit property by the respondent before the appeal is heard and determined will occasion irreparable harm to the Estate of the deceased; that the respondent stands to suffer no prejudice as the suit property is currently fallow; and that the application has been brought timeously, in good faith and in the interest of justice.

4. The respondent opposed the application and filed a replying affidavit and stated that the suit property is not ancestral land as the deceased sold it and she has been in possession since 2009.

Submissions by Counsel

5. The application was heard by way of written submissions. The applicant submitted that he has an arguable appeal inter alia: that the ELC erred in admitting an oral agreement as evidence of sale of the suit property; that the court relied on the unsubstantiated evidence of the Criminal Investigations Officer (CID) officer in finding that the transfer documents were genuine; that the court failed to consider that consideration was not proved; and that the court erred in finding that the suit property could be transferred without spousal consent.
6. On the nugatory aspect, it was the applicant's contention that the suit property is ancestral land and an inheritance from the applicant's deceased's father which the applicant, his siblings and family attach great significance and which has no substitute and, if lost, may not be reasonably compensated by way of damages.
7. The respondent opposed the application and contended that the applicant has not proved a prima facie case and the appeal will be a waste of judicial time as the ELC dealt with all the issues raised in the draft memorandum of appeal; that the order granted by the ELC is not capable of being stayed since the respondent is in occupation of the suit property and has documents evidencing ownership; and that the applicant will not suffer any irreparable damage if the orders sought are not granted as he has never had possession of the suit property neither is the suit property ancestral land as the deceased sold the suit property in 2002.

Determination

8. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2) (b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
9. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled. For example, this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR* delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”



10. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.
11. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* where this Court described an arguable appeal in the following terms:
 - 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.
 - 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.”
12. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view the appeal is arguable inter alia whether the Court erred in admitting the oral agreement allegedly entered into between the deceased and the respondent as evidence of the sale of the suit property by the deceased to the respondent. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
13. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds. The ELC dismissed the applicant's suit with costs to the respondent. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the ELC is in the nature of a negative order incapable of execution and as such there is therefore no positive and enforceable order made which can be the subject matter of the application for stay of execution. In *William W. Wabome & The Registrar of Trade Unions vs. Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers, [2006] eKLR* this Court stated:

“The order of 19.9.2005 did not grant the respondents any relief other than costs which can be enforced through execution. On the contrary, the order in fact denied the applicant a relief in the sense that it struck out the application for leave and of order of stay and set aside the leave and stay granted earlier. There is no judgment in favour of the respondents which is capable of enforcement by execution save for costs.”
14. By parity of reasoning, the applicant has failed to prove the second limb of the Rule 5(2)(b).
15. As the applicant is required to establish both limbs, the applicant has failed to satisfy the requirements under Rule 5(2)(b) of this Court's Rules. Accordingly, the notice of motion dated 24th July, 2020 is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

S. GATEMBU KAIRU FCIArb

.....

JUDGE OF APPEAL

J. MOHAMMED

.....



JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

