



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, OKWENGU &, SICHALE J.J.A.)

CIVIL APPLICATION NO. 274 OF 2019

BETWEEN

CABIN CREW INVESTMENTS LIMITED.....APPLICANT

AND

KENYA MEDICAL TRAINING COLLEGE.... ..1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF LANDS

AND URBAN DEVELOPMENT.....2ND RESPONDENT

THE REGISTRAR OF TITLES.....3RD RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

(An application for stay of execution pending the hearing and determination of the intended appeal from the Judgment and decree of the Environment and Land Court of Kenya at Nairobi (K Bor, J.) dated 24th June, 2019

in

ELC Case No. 1162 of 2013)

RULING OF THE COURT

[1] By a Notice of Motion dated 19th August, 2019 brought under **sections 26(2) of the Court of Appeal Organization & Administration Act** and **Rules 5(2)(b) of the Court of Appeal Rules**, the applicant, **Cabin Crew Investments Limited** has moved the Court for an order of stay of execution of the judgment and decree of the High Court delivered on 24th May, 2019 pending the hearing and determination of an intended appeal.

[2] The suit resulting in the judgment and decree was lodged in the Environment and Land Court (ELC) by **Kenya Medical Training College** who is now the 1st respondent to the motion before us. The applicant was the 1st defendant while the **Principal Secretary, Ministry of Lands Housing and Urban Development, Registrar of Titles, The National Lands Commission**, and the **Attorney General** now the 2nd to 5th respondents respectively were the 2nd to 5th defendants.

[3] Following the hearing of the suit, the ELC gave judgment in favour of the 1st respondent and issued two declarations. First, that the property known as LR Nos 209/14277 is part of the unsurveyed parcel of land known as parcel 61 to 64 measuring 12.3 hectares of land on Kenyatta Hospital Land Area, and secondly, that the title Grant No IR 85965 dated 1st September, 2000 in respect of land known as LR No.

209/14277 was irregularly and or illegally issued to the applicant. In addition, the Court issued an order compelling the applicant to surrender to court the grant No IR. 85965 dated 1st September, 2000 in respect of land now known as LR No. 209/14277 for cancellation and for the 4th respondent and the 3rd respondent to issue a fresh letter of allotment and title in respect thereof to the 1st respondent.

[4] The applicant being aggrieved by the judgment filed a notice of appeal on 28th May, 2019 and subsequently filed the motion that is now before us. Attached to the motion is a draft memorandum of appeal in which the applicant has raised 22 grounds.

[5] **Mr. Tole**, learned counsel for the applicant in arguing the motion pointed out that the intended appeal raises arguable issues. He singled out as an example, the contested issue of the superiority of the titles for the disputed land held by each party.

[6] Regarding the nugatory aspect, **Mr. Tole** pointed out that the applicant was wary of the orders made by the court as they required the applicant to surrender his title to the suit property and the 1st respondent to be issued with a fresh allotment for the suit property, and once this was done the applicant's appeal would be rendered nugatory as the process may be irreversible if the title changes and he may lose the suit property. In support of the submissions **Mr. Tole** cited **Multimedia University & Another vs Professor Gitile N. Naituli** [2014] eKLR; and **Stanley Kangethe Kinyanjui vs Tony Ketter & Others** [2013] eKLR.

[7] The 1st respondent opposed the motion through a replying affidavit sworn by its administration manager **David Ondeng'**. In the affidavit, David swears that the applicant's intended appeal is incompetent because it was lodged out of time and without leave of the court; that the applicant conceded during the trial in the lower court that they had been offered another plot and could in fact be given an alternative plot, and therefore it does not stand to suffer irreparable damage, nor will the appeal be rendered nugatory. In addition, that the balance of convenience was in favour of the 1st respondent which is a public institution and needs the parcel of land for the expansion and improvement of its facilities.

[8] In opposing the motion, **Mr. Tiego** learned counsel for the 1st respondent argued that without a competent notice of appeal the Court cannot grant an order of stay of execution pending appeal. In support of this position, counsel relied on **Justus Aloo Ogeka & 6 others v Kenya Union of Commercial Food and Allied Workers & 2 others** [2018] eKLR. Counsel conceded that they had no issue with the notice of appeal but maintained that the record of appeal had not been served upon the 1st respondent. In addition, counsel argued that no arguable issue has been raised, and that the suit property has remained vacant and therefore the appeal would not be rendered nugatory.

[9] The circumstances under which an application under Rule 5(2)(b) of the Court Rules is to be determined is now well settled. These were well summarized in **Stanley Kangethe Kinyanjui vs Tony Ketter & 2 others** [2013] eKLR). They include:

“(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.”

[10] Of importance to the application before us is whether the jurisdiction of this Court has been properly invoked by the filing of an appropriate notice of appeal. It is evident that the applicant filed a notice of appeal just four days after the judgment of the ELC Court was delivered. A copy of the notice of appeal has been annexed to the motion, and it is evident that the notice was filed and served within 14 days in accordance with **Rule 75(2)** of the Court Rules. This is sufficient to invoke the jurisdiction of this Court in so far as an application under **Rule 5(2)(b)** of the Court Rules is concerned. The issue regarding the competence of the notice of appeal and whether there is reason to strike out the notice or the appeal, is not before us at this stage. It is one that ought to be canvassed under Rule 84 of the Court Rules, and no such application has been made. We are therefore satisfied that we are properly seized of the motion.

[11] The next issue that we must address is whether the threshold provided in the twin principles have been met. The twin principle requires an applicant to demonstrate that the appeal or intended appeal is arguable and not capricious or frivolous; secondly, that unless the applicant is granted an order of stay of execution, the intended appeal, if successful, would be rendered nugatory. (**Reliance Bank Ltd vs Norlake Investments Ltd** [2002] 1EA 227.

[12] On the first limb as to whether the intended appeal is arguable and not frivolous, this Court's decision in **Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001** addressed what is considered to be an arguable appeal by

holding;

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision”

[13] The applicant has annexed to its Notice of Motion a draft memorandum of appeal, which contains 23 grounds of appeal. As pointed out by the applicant's counsel the issue regarding the contest as to which of the titles produced by the applicant and the 1st respondent is superior, is one that stands out as an arguable issue that ought to be settled, and this suffices to demonstrate that the appeal is arguable.

[14] On the second limb regarding whether the appeal would be rendered nugatory if the orders sought are not granted, the learned Judge has ordered the applicant to surrender its title for cancellation, and further ordered the 3rd and 4th respondents to issue a fresh allotment to the 1st respondent in regard to the suit property. Such action will no doubt prejudice the applicant and may compromise his appeal as there is nothing to prevent disposition of the suit property to a third party and this may render the appeal nugatory.

[15] For the above reasons we are satisfied that the applicant has satisfied the threshold for granting the order of stay of execution. Accordingly, we grant the motion dated 19th August, 2019 and issue an order staying the execution of the judgment and decree of the ELC dated 24th June, 2019 pending the hearing and determination of the intended appeal.

Costs of the motion shall be in the appeal.

Dated and delivered at Nairobi this 21st day of February, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar