



THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. NAI. 117 OF 2019

(CORAM: KARANJA, KOOME & KANTAL, J.J.A)

BETWEEN

JANE NYAGUTHI NDIRANGU.....APPLICANT

AND

PENINAH WANJIRU NJOROGE.....1ST RESPONDENT

JANE WAIRIMU NJOROGE.....2ND RESPONDENT

ESTHER WANJIKU NJOROGE.....3RD RESPONDENT

MUCHIRI NJOROGE.....4TH RESPONDENT

(An application for stay of execution pending the hearing of the appeal against the judgment and decree of the Environment and Land Court at Nairobi (Obaga, J.) dated 26th November, 2018

in

ELC Appeal No 24 of 2014)

RULING OF THE COURT

[1] *Jane Nyaguthi Ndirangu* (applicant) states that she intends to appeal against the judgment and decree issued by Obaga, J. on 26th November, 2018 in **ELC Appeal No 24 of 2014**. Towards that end the applicant filed the instant notice of motion under the provisions of **Rule 5 (2) (b)** of this Court Rules seeking an order staying the execution of the aforesaid judgment and/or an order of injunction be issued pending the hearing and determination of the intended appeal. Nonetheless her intention to appeal is not supported by a Notice of Appeal as none is included in this application. It is trite that a party is bound by their own pleadings and just as the saying goes, “*a party cuts the cloth they desire to be covered with*”. In other words a court cannot import pleadings that are not included in an application so as to sustain it. We shall revert to this issue as it appears the respondents substantively raised it in the replying affidavit in opposition to this application

[2] A brief background to the dispute that gave rise to the instant application was ownership over a parcel of land which was originally registered as **LR No. Ruiru/ Ruiru East Block 1/1480** that was later subdivided into 14 plots known as **LR No. Ruiru/Ruiru East Block 1/3553 to 3566**. The suit was filed before the Chief Magistrate’s court who heard the matter and decided in favour of the applicant. Aggrieved the respondent appealed before the Environment and Land Court and the learned Judge overturned the judgment of the lower court and made the following orders: -

“1. That the judgment of the trial magistrate is hereby set aside.

2. That an order is hereby issued dismissing the respondents claim with costs to the appellants.

3. That the appellants claim is hereby allowed with the result that the Land Registrar Thika is hereby ordered to cancel land titles No Ruiru/ Ruiru East Block 1/3553 to 3366.

4. *That the cancellation should also include any entries in favour of Caroline Wambui Ndungu and the respondent in relation to LR No Ruiru/Ruiru East Block 1/1480.*

5. *That the appellants shall have costs of the counter-claim and appeal.”*

[3] The application is supported by the grounds stated in the body thereto that are elaborated in greater detail by the matters deposed to in the supporting affidavit sworn by the applicant on 10th April, 2019. In all, the applicant contends that she has an arguable appeal which will be rendered nugatory if the execution process were to proceed; that the learned trial judge failed to adjudicate on the issues, misapprehended the facts and applied the wrong principles of law to the prejudice of the applicant; that the issues did not involve a dispute over succession of the estate of the late **Muchiri Njoroge** who was the alleged allottee of the suit premises and drawing an inference of fraud on the part of the applicant when there was no evidence in support thereto.

[4] The application was opposed vide a replying affidavit sworn by **Penninah Wanjiru Njoroge**, (1st respondent) sworn on 2nd October, 2019. The affidavit is also sworn with the authority of the 2nd, 3rd and 4th respondents who are her children. According to the respondent, there is no notice of appeal on record; the judgment was delivered on 26th November, 2018 and the Notice of Appeal was supposed to be filed within 14 days; the applicant filed an application seeking an extension of time;

the applicant also proceeded to file the record of appeal before first obtaining leave to file a notice of appeal out of time. The respondent dismissed the grounds in support of the application which in her view were factual as the appeal before this Court will basically turn only on points of law. On the nugatory aspect, the respondent contended that there was nothing to stay as she had already proceeded to obtain the title after judgment and subdivided the suit plot into 12 plots as per the copy of the mutation forms annexed to the affidavit and took possession thereto. Therefore in her opinion there was nothing to stay as there is no basis upon which the order of stay can be granted.

[5] During the plenary hearing, **Mr. Ondieki** learned counsel for the applicant reiterated the above points stated in support of the application and the supporting affidavit. He submitted that the appeal raises issues of law that are arguable on whether the trial judge erred by disregarding the findings of the trial magistrate who had the opportunity of hearing and seeing the witnesses as they testified. Also, the issue of succession of the estate of the late **Muchiri Njoroge** was never canvassed but was introduced in the appeal and that the Judge went against the canon principle in law that parties are bound by their pleadings. On the nugatory aspect, counsel argued that if an order of stay is not granted, the title to the suit property may change hands and as the respondent states she has subdivided the land, there is a likelihood that it may be transferred to third parties.

[6] On the other hand **Mr. Njiru**, learned counsel for the respondents opposed the application on the grounds that the applicant failed to demonstrate that she has an arguable appeal. According to counsel for the respondent what is raised as proposed grounds of appeal are mere statements of factual matters that were disposed of by way of evidence. Counsel went on to state that the suit premises no longer exists as it was subdivided and the prayers sought cannot issue against the respondents. Finally, he stated that the application has no leg to stand on there being no notice of appeal to grant this Court jurisdiction to grant orders as sought.

[7] We have considered the application, and all the material presented before us and deliberated on the submissions. Before we delve into whether the application has met the required threshold or its merits, it is important to examine the provisions of

Rule 5 (2) (b) which states: -

“...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”

There was no notice of appeal exhibited in this application therefore there is no basis upon which we can proceed to grant the orders sought by the applicant. A notice of appeal being the sole foundation which gives this Court jurisdiction under which orders can be issued under the aforesaid provision. The respondent challenged this application on that ground but counsel for the applicant did not make submissions on the issue, he merely brushed it aside perhaps because an application for extension of time or to strike out an appeal for non-compliance with the Rules is always considered as a separate matter under **Rules 83** or **84** as the case may be. In the instant case however there was no copy of the notice of appeal at all which makes this application a non- starter.

[8] In the circumstances we think it is futile to address the two issues on whether the intended appeal is arguable and whether it will be rendered nugatory as this would merely be hypothetical or at best an academic exercise. As we have found the application incompetent it is hereby struck out with costs to the respondents.

Dated and delivered at Nairobi this 7th day of February, 2020

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR