



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, M'INOTI & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 327 OF 2019

BETWEEN

WAKIHA MUCHUNGU.....APPLICANT/APPELLANT

AND

ZACHARIA MUCHUNGU NJOROGE

TABITHA WANJA NJOROGE Personal representatives of the estate of

NJOROGE MUCHUNGU (DECEASED).....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an application for a stay of execution of the Judgment of the Environment and Land Court of Kenya at Nairobi (Komingoi, J.) delivered on 27th June, 2019 in HCCC/ELC No. 5860 of 1993)

RULING OF THE COURT

By Notice of Motion brought under rule 5 (2) (b) of the rules of this Court we are asked to grant a stay of execution of the judgment of **ELC Civil Case No. 5860 of 1993** delivered on 27th June, 2019 pending hearing and determination of this application and of an intended appeal. In the grounds in support of the Motion and in a supporting affidavit of the applicant (**Wakiha Muchungu**) it is said amongst other things that the applicant has been in possession and occupation of a parcel of land **L.R. No. Limuru/Rironi 171** (subdivided to make **L.R. No. Limuru/Rironi/999 and 1000**) (“hereinafter **“the suit land”**”) from “between” 1958 and 1978; that the Environment and Land Court had in the said judgment ordered that the applicant be evicted from the suit land; that the applicant and his large family have no other land to move to; that the judgment of Environment and Land Court should be stayed and that the 1st respondent **Zachariah Muchungu Njoroge** and **Tabitha Wanja Njoroge** have never been in possession of the suit land and thus would not be prejudiced by orders of stay of execution pending appeal. The applicant states further that the respondent Zakaria Muchungu Njoroge is his son (**“he is son to my elder brother”**) and that the respondent, Tabitha Wanja Njoroge is his sister in law; that his elder brother Njoroge Muchungu (**“the deceased”**) was the original registered proprietor of the suit land from 1958 but that the registration was subject to a trust in the applicant’s favour because he was a minor in 1958; that the deceased filed suit against him (HCCC/ELC No. 5860 of 1993) where orders subject of the intended appeal were issued; that the respondents were in the process of executing the decree and we should order a stay of execution as the intended appeal is arguable and will be rendered nugatory if we did not order a stay of the judgment.

The 1st respondent Zakaria Muchungu Njoroge swore a replying affidavit on his own behalf and on behalf of his mother another respondent. He deposes that the applicant had in the year 1978 lodged a caution on the suit land and filed a case against the deceased being **HCCC No. 2612 of 1978** claiming ownership of part ownership of the suit land which suit was determined in favour of the applicant; that the deceased appealed in **Civil Appeal No. 41 of 1992** which appeal was allowed, this Court ordering that the suit be heard afresh; that the suit was thereafter dismissed upon an application by the deceased, the court ordering that the applicant had no right to the suit land. At paragraphs 8, 9 and 10 of the replying affidavit the said respondent deposes:

“8. That notwithstanding these court orders, the applicant illegally entered our said land in 1993 after coming from the Rift Valley where he had been working, choosing not to take possession of a portion of land known as LIMURU/RIRONI/227 which land belonged to his own father Muchungu Ndiko and which was his entitlement by inheritance. It was immediately after the said trespass, that my father Njoroge Muchungu filed suit in 1993 seeking permanent injunction restraining the applicant from interfering with his parcel of land known as Limuru/Rironi/171, a declaration that the applicant was a trespasser, and damages for trespass, plus costs and interest. Temporary orders restraining the applicant from interfering

with my father's land were issued by the High Court in 1996. A copy of the order is attached and marked ZMN 6.

9. That the applicant also filed another suit against my father Njoroge Mucungu in the High Court Nairobi as No. 759 (os) of 2001 claiming he was in adverse possession of a portion of my father's land even when he knew a suit against him had been filed and an injunction restraining him from interfering with the suit land had been issued. Copies of the originating summons, his supporting affidavit and the replying affidavit of Njoroge Mucungu are annexed marked ZMN 7.

10. However, during the pendency of that suit and despite the High Court order aforesaid, the applicant in unexplainable circumstances that were unknown to us, managed to cause my father's said land to be subdivided into two portions at Kiambu Land registry and titles were issued one to the applicant and another to my father, even though my father still had in his possession the original title for the said LIMURU/RIRONI/227. A copy of the relevant search certificates are annexed marked ZMN 8. Alarmed by the turn of events, my father sought orders to amend the plaint in 2008 to include cancellation of titles issued at the instance of the applicant, and got consent orders for the maintenance of the status quo which unfortunately meant that the applicant remained in our land until the case was determined and the titles would also remain until the matter was heard and decided. Taking advantage of the pendency of the suit, the applicant violently took possession of half of our land in 2017 forcing Tabitha Wanja Njoroge my mother and co-respondent to flee the land and start renting a residence elsewhere which I believe is very unfair. Two copies of our lawyer's letters to the police on the subject are annexed and marked ZMN 9."

The said respondent readily admits in the replying affidavit that the 1st respondent has given the applicant a notice to vacate as ordered by the judge in the judgment intended to be appealed. It is denied that the applicant entered the suit land in 1958 it being stated that he entered the suit land illegally in 1993. The said respondent state further that the applicant has other land – L.R. No. Limuru/Rironi/227 belonging to the applicant's father where he can move to and own as part of his inheritance.

When the Motion came up for hearing before us on 19th November, 2019 the applicant was represented by learned counsel **Mr. F.S. Mwaura** while learned counsel **Mr. N. Muriithi** appeared for the 1st respondent. The 2nd respondent (Attorney General) had been served with a hearing notice for the day but did not appear and we allowed counsel present to proceed, the Attorney General having been served.

Mr. Mwaura, in oral submissions, referred to a draft Memorandum of Appeal on record and submitted that the applicant was an adverse possessor of the suit land who had entered the same in 1958. Further, that HCCC No. 2612 of 1978 was not heard on the merits but was dismissed when the applicant was unable to deposit security for costs ordered by the Court. According to counsel the intended appeal would be rendered nugatory as the applicant was about to be evicted from the suit land.

Mr. Muriithi, in opposing the Motion, wondered why the application was filed about 4 months after judgment where eviction was ordered to be undertaken forthwith. Counsel submitted that the applicant is a trespasser who should be evicted as ordered by the trial court.

The principles that govern our consideration of applications for stay of execution pending appeal are well settled in our jurisdiction. For an applicant to be entitled to favourable orders he must demonstrate that the appeal, or intended appeal, as the case may be, is arguable which is the same as saying that the same is not frivolous. If he succeeded on that limb he must also show that the appeal, or intended appeal, would be rendered nugatory absent stay – these principles were well summarized by this Court in the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR** as follows:

“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.

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.

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.

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 bonafide arguable ground of appeal is raised.

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.

ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

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.”

We have perused the record and have considered the submissions made for or against the application.

The trial judge (**Komingoi, J.**) considered the evidence presented and found that the applicant was not entitled to any portion of the suit land. The judge gave the 1st respondents a permanent injunction restraining the applicant from interfering with the suit land; ordered immediate eviction of the applicant from the suit land; ordered the Registrar of Lands to rectify the register; declared the applicant a trespasser on the land and gave the 1st respondents Kshs.500,000 as general damages for trespass.

Attached to the replying affidavit of Zakaria Mucungu Njoroge are various documents – a copy of the title to the suit land showing that the deceased was registered as proprietor of the same on 20th July, 1976; a copy of the judgment in **Civil Appeal No. 41 of 1982** allowing the appeal; an order by **Pall, J.** given on 22nd September, 1993 stating:

“THAT the plaintiff, WAKIHA MUCHUNGU has no right on the parcel of land title No. Limuru/Rironi/171”

There is an order issued by Ringera, J. given on 17th July, 1996 where the applicant was restrained from carrying out any developments on the suit land; amongst other documents.

As we have shown the High Court (Pall, J.) declared way back in September, 1993 that the applicant was not entitled to any part of the suit land. That order remains and we have not been shown that the applicant moved any court on appeal against that order or the setting aside or review of the same.

The High Court (Ringera, J.) ordered the applicant in 1996 not to carry out any developments on the suit land but it is stated in the replying affidavit that instead of complying with the said court order the applicant not only proceeded to violate the said order but threw out the respondent Tabitha Wanja Njoroge from the suit land where she was forced to rented residential premises.

We have considered the Motion and cannot see or discern any arguable point on appeal. The uncontroverted affidavit evidence before us shows that the applicant has violated court orders with abandon and is entitled to any protection of the court, equitable protection which **rule 5 (2) (b)** of the rules of this Court gives in deserving cases. The Motion has no merit and it is dismissed with costs to the 1st respondents.

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

R.N. NAMBUYE

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR