



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, SICHALE & J. MOHAMMED, JJA]

CIVIL APPLICATION NO. 48 OF 2019 (UR. 54 OF 2019)

BETWEEN

GEORGE MWAURA KABUI.....APPLICANT

AND

CATHERINE MUTHONI IRERI.....RESPONDENT

*(Being an application under Rule 5(2)(b) of the Court of Appeal Rules 2010 for stay of execution pending the hearing and determination of an appeal from the judgment of the Environment & Land Court of Kenya at Nairobi (K. Bor (Mrs), J dated 30th august, 2018*

IN

ELC NO. 1032 OF 2003)

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RULING OF THE COURT

The applicant, **George Mwaura Kabui** filed a Notice of Motion application under **Rule 5 (2) (b)** and sought the following orders:

“

(i) *Spent,*

(ii) *That the execution of the orders of the Honourable Lady Justice K. Bor made on 30th August,2018 ordering the eviction of the applicant from all that property known as Chania/Kanyoni/2088 be and is hereby stayed pending the hearing and determination of this application,*

(iii) *That in the alternative to prayer No. 2 above, this Honourable Court be pleased to issue an order for Status Quo maintaining on all that property known as Chania/Kanyoni/2088 pending the hearing and determination of Civil Appeal No. 415 of 2018,*

(iv) *That the execution of the orders of the Honourable Lady Justice K. Bor made on 30th August,2018 ordering eviction of the applicant from all that property known as Chania/Kanyoni/2088 be and is hereby stayed pending the hearing and determination of Civil Appeal No. 415 of 2018,*

(v) *That the costs of this application be provided for”.*

The motion was supported by the applicant’s affidavit sworn on **11th February, 2019**, in which he deponed that in the year 1990, he purchased all that property known as **Chania/Kanyoni/2088** (the suit property) from the respondent, **Catherine Muthoni Ireri** at an agreed sum of seventy thousand (Kshs 70,000.00) which sum he fully paid, albeit in two instalments of Kshs forty thousand (40,000.00) and Kshs thirty thousand (30,000.00); that in the year 1996, he constructed a matrimonial home on the suit property and he has lived on the property ever since; that in 2003, he was sued by the respondent; that in a judgment delivered on **30th August, 2018**, an order was made for his eviction from the suit property on expiry of six (6) months from the date of judgment.

In response, the respondent filed a replying affidavit sworn on **13th May, 2019**.

She deponed that the applicant is abusing the Court process as he had filed a similar application before the Environment and Land Court which had been fixed for hearing on **29th May, 2019**; that no consent of the Land Control Board was obtained for the purposes of transfer and/or subdivision.

On **10th December, 2019**, the motion came up for hearing before us. **Mr. Dewood**, learned counsel for the appellant in urging the motion contended that there is an arguable appeal as consent of the Land Control Board had been sought and obtained.

On the nugatory aspect, it was counsel's submission that the applicant has been on the suit property from 1993.

In opposing the appeal, **Mr. Ongegu**, learned counsel for the respondent refuted arguability on the basis that no consent of the Land Control Board was obtained and hence the alleged purchase by the applicant was a nullity.

We have considered the record, the rival oral arguments made before us, the authorities cited and the law. The twin principles to be considered in an application made under Rule 5(2) (b) are that an applicant has to show that he/she has an arguable appeal which will be rendered nugatory, absent stay. As always, our jurisdiction under **Rule 5(2)(b)** is discretionary and fairly wide, guided only by the interests of justice. In the judicious exercise of this discretion, however, the Court must be satisfied on the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. These principles were aptly summarized in the case of **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 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. See Ruben & 9 others v Nderitu & Another (1989) KLR 459.*
- 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. 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.*
- xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim”. International Laboratory for Research on Animal Diseases v. Kinyua, [1990] KLR 403.*

Firstly, it is not disputed that the applicant is in possession of the suit property.

The respondent's contention is that no consent of the Land Control Board for sub-division was sought and obtained. The applicant however refutes that contention. Be that as it may and given the conflicting positions of this court in respect of the effect of lack of consent of the Land Control Board, it is our view that this is an arguable point.

It is arguable whether the lack of consent of the Land Control Board, if this be the case, vitiates the sale/purchase.

On the nugatory aspect, again, and as stated above, the applicant is in possession.

In his supporting affidavit, the applicant deponed that he lives on the suit property as this is where he has set up his matrimonial home. It is our view that the ends of justice will best be served if the applicant remains on the suit property pending the hearing and determination of the intended appeal.

Accordingly, the motion dated **11th February, 2019** is hereby allowed. Costs of the motion shall abide the outcome of the intended appeal.

It is so ordered.

*Dated and Delivered at Nairobi this 3rd Day of April, 2020.*

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**