



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPLICATION NO. 50 OF 2019

BETWEEN

MM.....APPLICANT

AND

KH.....RESPONDENT

(Being an application for stay of execution of the Judgment of the Environment and Land Court at Mombasa (Yano, J.) delivered on 20th September 2018

in

Mombasa ELC No. 8 of 2015)

RULING OF THE COURT

1. By application dated 12th June 2019 and presented to the Court on the same day, the applicant seeks an order under Rule 5(2)(b) of the Court of Appeal Rules of stay of execution of the judgment of the Environment and Land Court delivered at Mombasa on 20th September 2018 by which that court allowed the respondent's suit against the applicant and declared that the property known as Subdivision Number 1723 (Original No. 386/**) Section III Mainland North, which was until then registered in the joint names of the parties, belongs to the respondent solely.
2. In the same judgment, the court ordered the name of the applicant to be expunged from the entries in the lands office and that the applicant be restrained, by permanent injunction, from dealing with or interfering with the property. It was the applicant's case that the property belonged, jointly, to the applicant and herself, their having purchased it as husband and wife.
3. Urging the application before us, **Mr. Frederick Okanga**, learned counsel for the applicant referred to the affidavit in support of the motion sworn by the applicant and submitted that the applicant duly filed a notice of appeal dated 21st September 2018; that following the judgment of the ELC, the applicant is apprehensive that the respondent who is a foreigner will dispose of the property and leave for his country Austria; and that being a co-owner of the property she stands to suffer irreparable loss;
4. It was urged that the intended appeal is arguable as there is the question whether the judge erred in rejecting her contention that she was customarily married to the respondent; that there is also a question of fraud that was raised in the pleading but was never canvassed by the trial judge; that unless the orders sought are granted, she will be locked out of the property and the appeal will thereby be rendered nugatory; and that even if the property has been transferred, she is nonetheless entitled to her share of the value of the property.
5. In opposition to the application, **Ms. Angeline Omollo**, learned counsel for the respondent referred to the respondent's replying affidavit and submitted that the application is overtaken by events; that the respondent sold and transferred the property to one Wilhelm Hermann Uwe Reitmeier by instruments of Transfer exhibited to the affidavit which were duly registered at the Land Titles Registry, Mombasa on 7th June 2019; that a previous application for stay of execution by the applicant before the ELC was rejected and the applicant condemned to pay costs which she has not paid and should therefore furnish security for costs; that the present application is yet another delay tactic as the applicant also filed an application in this Court at Malindi through a different advocate, being Civil Application No. 66 of 2019, in a bid to deny the respondent the fruits of the judgment.
6. We have considered the application. To succeed in an application of this nature, the applicant is required to demonstrate that she has an

arguable appeal and that if we decline the request to stay execution of the judgment of the lower court, and her appeal succeeds, the same will have been in vain. In other words that the appeal will be rendered nugatory. In ***Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006*** this Court stated:

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

7. It is common ground that the property was registered in the joint names of the parties. The applicant say that she will demonstrate during the hearing of the appeal that the trial judge erred in ordering the applicant’s name to be expunged from the records at the lands office on the basis that she did not establish that she was married to the respondent. We are satisfied that the applicant has fulfilled the first requirement and demonstrated that the intended appeal is indeed arguable.

8. The difficulty we find is with regard to the second limb in that it would appear, based on the instruments of transfer exhibited, that the properties have since changed hands and are presently registered in the name of a third party. In effect, the judgment sought to be stayed has already been executed. An order for stay of execution of the judgment would, in the circumstances, be an order in vain.

9. The result is that the application fails and is hereby dismissed. The costs of the application shall abide by the outcome of the appeal.

Dated and delivered at Nairobi this 8th day of May, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR