



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), ASIKE-MAKHANDIA & MOHAMMED, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 555 OF 2019

BETWEEN

ROBERT MUTISO LELLI.....APPLICANT

AND

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

THE ATTORNEY GENERAL..... 2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

(An application for stay of execution of the Judgment of the Environment and Land Court at Nairobi (K. Bor, J.) dated 24th May, 2019

in

ELC Case No. 354 of 2009)

RULING OF THE COURT

Being aggrieved with the judgment of **K. Bor, J.** delivered on 24th May, 2019 in which the applicant's suit was dismissed and the 1st respondent's counter-claim allowed with costs, the applicant lodged the present appeal in which this application has been brought on 15th November, 2019. He subsequently filed a notice of motion dated 28th November, 2019 predicated upon Rule 5(2) (b) of the Court of Appeal Rules and Section 26(2) of the Court of Appeal (Organization and Administration) Act and sought an order for stay of execution of the judgment aforesaid pending the hearing and determination of the appeal.

The grounds in support of the application are that the judgment was delivered on 24th May, 2019 and a decree issued on 1st November, 2019. In the impugned judgment the applicant was ordered to surrender to the 3rd respondent his title LR No. 209/14272, hereinafter "**the suit land**" for cancellation. The 3rd respondent was further directed to issue a letter of allotment to the 1st respondent. He states that his appeal is meritorious and arguable with high chances of success and that the respondents would suffer no prejudice should the orders sought be granted. He is apprehensive though that if the order of stay is not granted the appeal will be rendered nugatory and he stands to suffer irreparable loss and damage should his title be cancelled and a fresh letter of allotment issued to the 1st respondent. The application is further supported by the applicant's affidavit which merely reiterates and expounds on the grounds above.

In reply to the application, the 1st respondent filed a replying affidavit sworn by David Ondeng', the 1st respondent's Administration Manager on 16th December, 2019. He deposed that the applicant had failed to disclose to court that a stay of execution for 60 days was granted by the trial court on 3rd June, 2019 which lapsed on 2nd August, 2019. That no material had been placed before Court to account for the delay since August until 29th November, 2019 when this application was filed.

That the applicant having by his conduct surrendered the title to LR No. 209/14271 was estopped from insisting on any proprietary rights over the suit land as LR No. 209/14271 was equally hived off from the same parcel of land which had been reserved for the 1st respondent's use. He was in agreement with the trial court's finding that protection under Article 40(6) of the Constitution did not extend to land acquired illegally as was held in the case of **Henry Muthee Kathurima v Commissioner of Lands & Another [2015] eKLR**. That the appeal was lodged 114 days out of time without leave of this Court hence it is incompetent. That the substratum of the appeal was lost when the time

within which the applicant should have filed the appeal lapsed. He went on to depose that the applicant has no arguable appeal, does not stand to suffer irreparable damage and that an incompetent appeal cannot be rendered nugatory and finally, that the balance of convenience tilted in favour of the 1st respondent.

At the hearing of the application, **Mr. Mutiso** appeared for the applicant while **Mr. Tiego** appeared for the 1st respondent. There was no appearance by the 2nd and 3rd respondents though served.

Mr. Mutiso urged that the appeal as filed is arguable and the memorandum of appeal had solid grounds. That there was no evidence of surrender of title by the appellant. He contended that despite being found not to be liable by the High Court, the applicant was still burdened with costs. He reiterated that the appeal will be rendered nugatory if stay is not granted and if the decree is executed the suit land will revert to the Government and the substratum of the appeal will be lost forever. Lastly, counsel argued that damages will not be adequate compensation and that the applicant should be allowed to exhaust all avenues of justice.

As was expected, the application was opposed. Mr. Tiego pointed out that the applicant's case in the lower court was that having been the first proprietor of the suit land, his title was indefeasible. The 1st respondent's case on the other hand was that the said acquisition was fraudulent and illegal. That there was evidence of surrender of title by the applicant as opposed to his allegations that no evidence was adduced. Counsel maintained that when the applicant surrendered one of the titles, he was estopped by conduct from challenging his entitlement to the suit land. That indefeasibility of title is inapplicable where property was acquired illegally. Lastly, counsel argued that the appeal will not be rendered nugatory if stay is not granted as there are no developments on the suit land and that the applicant has not moved the Commissioner of Lands to allocate him another parcel of land.

We have carefully perused the record, submissions by counsel and the law. The issue that arises for determination is whether the applicant has satisfied the laid down principles for the grant of stay of execution of a decree pending the hearing and determination of an appeal.

The jurisdiction of this Court under Rule 5(2) (b) is original, independent and discretionary. The discretion has however to be exercised judiciously and with reason; not on the craze of impulse or pity. Rule 5(2) (b) is a procedural innovation designed to enable the court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed. In the case of **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others**, Civil Application No. Nai 31/2012, this Court stated *inter alia*:

***“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.*”**

For the applicant to be successful, he must first show that he has an arguable appeal which is the same as saying that the appeal is not frivolous. Such an applicant, upon satisfying that principle, has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay. In the case of **Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others**, Civil Application Nai. 258 of 1999 (unreported) this Court stated thus:

“The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case ...”

On whether the appeal is arguable or not, it is trite law that by arguable it does not mean the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. In the case of **Dennis Mogambi Mang'are v Attorney General & 3 Others**, Civil Application No. NAI 265 of 2011 (UR 175/2011) this court observed *inter alia*:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”

Further, the appeal need not raise a multiplicity or, any number of such points; a single arguable point is sufficient. (See: **Ahmed Musa Ismael v Kimba Ole NtaMorua & 4 others**, CANai 256/2013).

In the present application, the applicant maintains that he did not surrender the title to LR No. 209/14271. The 1st respondent refutes the claim and states that evidence of surrender of title was adduced before the trial court. Certainly this is an arguable point in the appeal.

As to whether the appeal will be rendered nugatory should stay not be granted, the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the court is bound to consider the conflicting claims of both sides. The applicant's claim is that if stay is not granted, the suit land will revert to the Government and damages would not adequately compensate him while the 1st respondent argues that there are no known developments on the suit land and the only reason the applicant has not been compensated is because he has failed to move the Commissioner of Lands to allocate him another parcel of land. The applicant did not in any way counter this assertion by the respondents. Nor is there evidence that the respondents are bent on alienating the suit property to a third party and put it beyond the reach of the applicant should he succeed in his appeal. That being the case, we cannot see how the appeal will be rendered nugatory if stay is not granted, nor do we see any substantial loss that the applicant will be exposed to.

In the case of **Mukuma v Abuoga [1988] KLR 645**, this Court held:

“The discretion of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory.”

As the applicant has only been able to satisfy one limb of the two limbs required in this kind of applications, and since the requirement is that both limbs be satisfied, the application fails and is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 5th day of June, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar