IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KARANJA & MURGOR & KANTAI, JJ.A)

CIVIL APPLICATION NO. 72 OF 2018

BETWEEN

TAPNYOBII CHEBII NGASURA.....1ST APPLICANT

PHILEMON ROTICH ALIAS DAVID.....2ND APPLICANT

AND

BERNARD KIBET RONO (suing as the personal representative Of the Estate of

EUNICE CHEPNGETICH NGASURA (Deceased).....RESPONDENT

(Being an application for stay of execution of the judgment and decree of the *Environment and Land Court at Kericho (J.M. Onyango, J.) delivered on 16th May 2018 in* Environment and Land Case No. 28 of 2014)

****

RULING OF THE COURT

By way of a Notice of Motion dated 4th June 2018, the applicant sought a stay of execution of the judgment and decree of the Environment and Land Court pending the hearing and determination of this application and the intended appeal, and further for orders that the applicants be allowed to deposit the land title to LR Number Kericho/Silbwet/33 *(the disputed land)* in Court as security for due performance of the decree and for the status quo to be maintained as it was on 16th May 2018 before the delivery of the judgment of the Environment and Land Court.

The application was brought on the grounds that, for the reason that they were dissatisfied with the decision of the trial court, the applicants had filed an appeal to this Court that raises serious points of law with an overwhelming chance of success; that in the event the appeal were to succeed the respondent would be unable to refund the decretal sums if paid and finally, that should execution be carried out before the appeal is heard and determined, the appeal would be rendered nugatory. The application was supported by the affidavit of the 1st applicant sworn on the same date.

The respondent also swore a replying affidavit on 13th July 2018, wherein he opposed the application for reasons that in 2007, the applicants had evicted his family and himself from the disputed property, and denied them access to the disputed land, which rendered them landless and destitute; that they stood to suffer immense prejudice if the stay of execution orders sought were granted. It was further deponed that the applicants application was merely intended to frustrate the finalization of the dispute, and that in any event the threshold requirements for granting the orders had not been met.

In the submissions ***Mr. Mugumya***, learned counsel for the applicants submitted that the 1st applicant is the registered owner of the disputed land, and is still alive; that the conclusion of the trial court was erroneous as it's effect was tantamount to forcing her to subdivide the disputed land during her lifetime which was contrary to her rights as registered owner. On whether the appeal would be rendered nugatory were it to succeed, it was submitted that the respondent would enter onto the land and proceed to subdivide and settle on it.

Mr. Langat, learned counsel for the respondent opposed the motion, and submitted that the application was incompetent as the dispute involved ancestral land, which the 1st applicant held in trust; that the applicants had evicted the respondent and his mother from the disputed land, yet they were entitled to a portion, which was the reason why the court ordered that it be subdivided. It was further submitted that,

though it was not produced in Court, the title that the applicants seek to deposit no longer exists as the disputed land was already subdivided. The respondent had registered 2 acres in his name, and is currently in occupation.

In response Mr. Mugumnya, urged in view of the disclosures, that the status quo on the disputed land, and in particular, the question of the costs, should be maintained. Counsel sought a stay of execution of the suit in the lower court as the applicants were on the verge of being arrested for contempt.

We have considered the pleadings and the submissions of the parties., 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."**

It is therefore well established that, two principles guide the court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, in other words, not frivolous. Secondly, that unless he or she is granted a stay of execution or injunction, as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory. See ***Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others*, *Civil Application No. NAI. 31/2012.***

We would also add that in dealing with applications under ***rule 5 (2) (b),*** the court exercises original jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See ***Ruben & Others vs Nderitu & Another (1989) KLR 459***.

As to whether the intended appeal is arguable, we think so. The 1st applicant, who is still alive, is the registered proprietor of the disputed land. The respondent is the son of the 1st applicant's daughter, Eunice Chepngetich Ngasura who is deceased. The respondent claims that the applicant was holding the disputed land on trust for the deceased and other members of her family. As to whether the trial court rightly ordered the 1st applicant, as registered proprietor of the disputed land to subdivide her land whilst she is still alive, or whether or not there was a trust in existence over the disputed land, are matters that we consider should rightly be ventilated before this Court.

On the nugatory aspect, the applicants contend that, in the event the stay of execution is not granted the respondent will enter onto the land and subdivide it. From the bar, learned counsel for the respondent informed us that following the orders of the trial court the respondent had since subdivided the disputed land, and taken up occupation, which would mean that the application is overtaken by events.

Though the title in respect of the subdivided portions was not produced in court, if indeed the orders of the trial court have been fully executed, then the second limb of the preconditions for grant of orders under ***rule 5 (2) (b)*** of the rules of this Court has not been fulfilled. There is nothing left for us to stay and for this reason, the motion fails.

Accordingly, the Notice of Motion dated 4th June 2018 is dismissed. As the parties herein are members of a family, we order each to bear their own costs.

It is so ordered.

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

W. KARANJA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR