



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAL 129 OF 2019

BETWEEN

SIPOI TIPANGO.....1ST APPLICANT
RICHARD KOMBE TIPANGO.....2ND APPLICANT
WILLIAM SIASI TIPANGO.....3RD APPLICANT
DANIEL LESISA TIPANGO.....4TH APPLICANT

AND

**ROSE MUENI MAITHA (sued as the legal
representative of the estate of Jacob
Mutuku Maitha (deceased)).....1ST RESPONDENT**
**ANNA WANGARI (sued as the
legal representative of the estate
of Herman Kinyanjui Kimani (deceased)).....2ND RESPONDENT**
NICHOLUS F. K. MBUGUA.....3RD RESPONDENT
PRISCILLA KANYOGO.....4TH RESPONDENT
EMILY WAMBUI ISHMAEL.....5TH RESPONDENT
WILSON KARIUKI NJACHU.....6TH RESPONDENT

(An application for an injunction pending the hearing and determination

of an intended appeal from the order of the Environment and Land Court

(C. Ochieng, J.) made on the 7th November 2017 in ELC Case No 668 of 2017)

RULING OF THE COURT

BACKGROUND

1) By way of a notice of motion dated 29th March, 2019, **Sipoi Tipango** (the 1st applicant), **Richard Kombe Tipango** (the 2nd applicant) **William Siasi Tipango** (the 3rd applicant) and **Daniel Lesisa Tipango** (the 4th applicant) seek an order of injunction under **Rule 5(2)(b) of the Court of Appeal Rules** (this Court's Rules) restraining **Rose Mueni Maitha** (sued as the legal representative of the estate of Jacob Mutuku Maitha (deceased) (the 1st respondent), **Anna Wangari** (sued as the legal representative of the estate of Herman Kinyanjui Kimani (deceased) (the 2nd respondent), **Nicholas F.K. Mbugua** (the 3rd respondent), **Priscilla Kanyogo** (the 4th respondent), **Emily Wambui Ishmael** (the 5th respondent) and **Wilson Kariuki Njachu** (the 6th respondent) either by themselves, their servants, and/or agents from selling, disposing, transferring, subdividing, alienating or in any other way adversely dealing with the parcel of land known as **Title No Ngong/Ngong/3768** (the suit property) or any part of the suit property comprising Title Numbers Ngong/Ngong/5386,5387,5388,5389,5390,5391 & 5392 pending the filing, hearing and determination of an intended appeal from the decision of **C. Ochieng J.** in ELC Case No 668 of 2017.

2) The background to the application is set out in the supporting affidavit of the 3rd applicant who avers that by way of a plaint filed on 23rd October, 2013, the applicants claimed to be entitled to the suit property as beneficiaries of the late **Stephen Oiseso Tipango** (the Deceased) while the respondents claimed to be entitled to subdivided portions of the suit property by reason of being purchasers of the suit property. At the time of filing of the suit, the deceased was registered as the proprietor of the suit property and against his title was registered one restriction and four cautions. On 25th August, 2017, the applicants ascertained from the Land Registry that the restriction and the cautions registered against the suit property had been removed and that the suit property had been subdivided, prompting the applicants to file an application before the Environment and Land Court (ELC) seeking to restrain the respondents from further dealing with the suit property.

3) The application was dismissed and the learned Judge in her ruling stated as follows:

“I further note that one of the orders granted was a permanent injunction issued restraining the administrators from dealing with the properties to the estate of the deceased until further orders of the court or any other court with equal status. Since the Notice of Motion dated 31st August, 2017 was also seeking for injunctive orders which were already granted by Justice Nyakundi, I find that there is no need of engaging in academic exercises at this juncture as I do not foresee any prejudice the parties to this suit will suffer, as they are protected vide the succession cause, I will decline to make any further orders as sought vide the instant motion until the succession cause is determined.”

4) Aggrieved with that decision, the applicants filed a notice of appeal and the instant application. The applicants seek an injunction pending the hearing and determination of the intended appeal based on the fact that there are attempts by some unknown parties to fence off portions of the suit property; and that the respondents may attempt to dispose of portions of the suit property which will prejudice the applicants' interest in the suit property.

5) The 1st respondent filed a replying affidavit opposing the instant application on grounds *inter alia* that she was the beneficial owner of all that portion of land known as **Ngong/Ngong/5388** which was excised from the suit property; that the instant application is an abuse of the court process which has been filed over one and a half years after a similar application was disallowed by the ELC on 17th November, 2017; that the instant application has been overtaken by events as she is no longer in possession or occupation of **Ngong/ Ngong/5388** having sold the said property in 2017; that land parcel number **Ngong/Ngong/5388** which was bequeathed to her was purchased for value by her late husband, **Jacob Mutuku Maitha** from the deceased between 1977 and 1981; that the instant application has been overtaken by events as the character of the suit property was changed over 30 years ago; that a subdivision of the suit property, being **Ngong/Ngong/5388** has been subdivided by the registered proprietor and is no longer available to the applicants as the same was disposed of by way of sale in 2017.

The 1st respondent urged us to dismiss the application with costs.

SUBMISSIONS BY COUNSEL

6) At the plenary hearing, **Mr. Githuka Ndungu**, learned counsel for the applicants, submitted that the applicants have an arguable appeal, *inter alia*, whether the learned Judge relinquished her jurisdiction to the High Court to hear and determine issues regarding title and ownership of the suit property and portions thereof, which were pending between the parties. It was counsel's further submission that if the injunction sought is not granted, the applicants will suffer substantial and irreversible loss as the respondents may further adversely deal with the suit property, including selling portions thereof to third parties, thereby rendering the intended appeal nugatory.

7) **Mr. Kamau**, learned counsel for the respondents opposed the application and submitted that the applicants do not have an arguable appeal as the draft memorandum of appeal does not raise any arguable ground. Counsel further submitted that a permanent injunction restraining the applicants from dealing with the estate of the deceased (which includes the suit property) was issued by Nyakundi, J until further orders of the court thus rendering the instant application superfluous. On the nugatory aspect, **Mr. Kamau** submitted that the intended appeal will not be rendered nugatory if the orders sought are not granted as the application has been overtaken by events as the sub-divided portions of the suit property are no longer available to the applicants as they were disposed of by way of sale. Counsel submitted that granting the reliefs sought will prejudice the rights of third parties who are not parties in the intended appeal. Counsel urged us to dismiss the application with costs.

DETERMINATION

8) We have considered the application, the grounds in support thereof, the replying affidavit filed on behalf of the 1st respondent, the submissions by counsel, the authorities cited and the law.

9) The principles for granting a stay of execution, injunction or stay of proceedings under **Rule 5(2)(b)** are well settled as was observed by this Court in the case of ***Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR (Civil Application Nai. 258 of 1999)*** where the Court delineated the jurisdiction of this Court in such an application. It stated that:

i. *“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....”*

10) These principles were reiterated by this Court in Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR (Civil Application No. Nai. 31 of 2012) where it held that:

- 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 bona fide 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.*
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s impecunity, the onus shifts to the latter to rebut the allegation.”*

11) These are the principles that we must apply to the application that is now before us. In considering whether the intended appeal is arguable we remind ourselves that an arguable appeal is not necessarily one that must succeed, but merely one that is deserving of consideration by this Court. From the record, the suit property is the subject of a succession cause. It is not disputed that the orders that the applicants sought in the court below had already been granted within the succession cause. Without making definitive findings on the intended appeal, we are not satisfied that an appeal to this Court, seeking orders that have already been granted in the court below, would be arguable.

12) As we stated earlier, in order to succeed in an application under **Rule 5(2)(b)** of this Court’s Rules, the applicant must satisfy us on both limbs of the twin principles that the appeal is not only arguable, but that it would be rendered nugatory should the orders sought not be granted and the intended appeal succeeds. In the instant application, the applicants have failed to satisfy us that the appeal is arguable, and we cannot therefore exercise our discretion in their favour. The upshot is that we decline to grant a stay of execution pending the hearing and determination of the intended appeal. The application dated 29th March, 2019 is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 10th day of July, 2020

W. KARANJA

.....

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