



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OKWENGU & MUSINGA, J.J.A.)

CIVIL APPLICATION NO. 2 OF 2020 (UR NO. 2 OF 2020)

BETWEEN

HARBANS SINGH BIRDI.....1ST APPLICANT

MANMOHAN KAUR BIRDI.....2ND APPLICANT

AND

ESTHER NYAMBURA NGOTHO.....1ST RESPONDENT

CHIEF LAND REGISTRAR2ND RESPONDENT

(Being an application for stay pending the hearing and determination of an appeal from the Order of the Environment and Land Court at Nairobi, (Kossy Bor, J.) dated 27th September 2019

in

ELCC No. 149 of 2007)

RULING OF THE COURT

Before us is a Notice of Motion dated 24th December 2019, and lodged at this court's registry on 3rd January 2020. It is premised on Rule 5(2)(b) of the Court of Appeal Rules (CAR). It substantively seeks stay of execution of the judgment/orders delivered on 27th September 2019, (**K. Bor, J.**) in the Environment and Land Court (ELC) Case No. 149 of 2007, Nairobi, pending the hearing and determination of the intended appeal. It is supported by grounds on its body, a supporting affidavit of **Harbans Singh Birdi**, sworn on 24th December 2019, and filed on 3rd January 2020. It has not been opposed as we have not traced any replying affidavit on record. Lack of opposition to the applicants' application notwithstanding we are in law obligated to consider its merits and draw our own conclusions thereon, based on our appreciation of the record and application of principles of law that guide the court in the exercise of its discretionary mandate in the determination of an application of this nature and give reasons either way.

The background to the application is that the 1st respondent, **Esther Nyambura Ngotho**, (1st respondent) filed suit against the applicants, in her capacity as the executor of the will of her late husband, **Mr. Evanson Ngotho Rubia**, (the deceased), based on a grant of representation issued to her on 12th March 2001. The 2nd respondent was subsequently joined to the suit by the Applicants as a 3rd party. The 1st respondent's claim against the applicants was that a parcel of land known as **Nairobi Block 94/150** ("the suit property") forms part of the estate of the deceased. She therefore sought a mandatory injunction to restrain the applicants from dealing with the suit property situated in **Nyari** estate; a declaration that certificate of lease held by the applicants over the suit property is void and was obtained through fraud whose particulars were given in the plaint. She also sought special and general damages for trespass; an order directing the applicants to remove their materials from the suit property; a declaration that she is entitled to ownership and exclusive use of the suit property; and a declaration that the sale and transfer of the suit property was illegal. The 1st applicant explained that the suit had been triggered by the applicants' action of moving lorry loads of cement onto the suit property with the intention of carrying out developments thereon.

In rebuttal, the applicants claimed that they were lawful and legitimate registered owners of the suit property, having purchased it from one **Kennedy Njoroge Ngugi** on 1st November 2006. Upon being joined to the suit by the applicants, the Chief Land Registrar (the land registrar) responded to the applicants 3rd party notice averring, *inter alia*, that according to records held by his office, the applicants were the registered owners of the suit property and it was upon them to explain the circumstances under which the suit property was acquired by them.

The trial court at the conclusion of the trial evaluated the record in light of the rival pleadings and submissions before it, and delivered a judgment dated 27th September 2019, in which it sustained the 1st respondent's claim against the Applicants because in the court's opinion, the Applicants in their evidence had stated that they could not trace **Kennedy Njoroge Ngugi** who they alleged had sold them the suit property, and had therefore in the court's view failed to prove the genuineness of the sale of the suit property to them. The trial court therefore concluded that the suit property was illegally transferred to the applicants, vitiated the transfer and affirmed the 1st respondent's ownership of the suit property. The trial court also ruled that it was satisfied with the genuineness of the original title in the 1st respondent's possession.

The applicants were aggrieved and timeously filed a Notice of Appeal on the same date of 27th September 2019, intending to appeal against the whole of the said judgment. The applicants have anchored the application under consideration on this intended appeal. In summary the applicants contend that they are aggrieved by the judgment of the trial court and have already filed a notice of appeal against it; that they are in possession of the suit property and have invested heavily on it; that if a stay of execution is not granted as sought the respondent may move to execute the decree rendering the intended appeal nugatory; and that the applicants have applied for proceedings which are yet to be supplied to capacitate them to file the record of appeal.

The application was canvassed by the Applicants written submissions without oral highlighting. In summary the Applicants contend that they have an arguable appeal because the 1st respondent did not prove fraud.

Secondly, the intended appeal will be rendered nugatory if they were to be dispossessed of the suit property before the intended appeal is heard considering that they have not only invested heavily on the land but are also registered owners. They therefore stand to suffer loss if stay is not granted.

To buttress the submissions **Khaminwa and Khaminwa Advocates** relied on the case of **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others [2010]eKLR** for the holding, *inter alia*, that for a party to succeed on an application under Rule 5(2)(b), the applicant is obliged to satisfy the court, first, that the intended appeal is arguable; and second, that if the stay sought is not granted the intended appeal would be rendered nugatory. Counsel for the applicants also relied on the case of **Jaribu Holdings versus Kenya Commercial Bank Limited CA No. 314 of 2007**

[2008]eKLR, for the holding, *inter alia*, that an arguable appeal is not one that must succeed, but one which is not frivolous but raises a bona fide issue deserving full consideration by the Court. Second, that even one bona fide issue will satisfy that requirement, as the law does not look at the multiplicity of arguable issues.

We have considered the pleadings, submissions and principles of case law relied upon by the applicants' counsel. The applicants' motion is brought under Rule 5(2)(b) of this Court's Rules which in law is a discretionary mandate. The principles of law that guide the Court in the exercise of the unfettered discretionary mandate under Rule 5(2)(b) of the Court of Appeal Rules are now well settled. Firstly, an applicant has to satisfy the Court that he/she has an arguable appeal, not necessarily one that will succeed, but one that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by the Court in the case of **Multimedia University & Another vs. Professor Gitile N. Naituli [2014]eKLR** wherein it was stated:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied.

Applying the above threshold to the record before us, we are satisfied that the applicants have satisfied the twin principle for the grant of a stay of execution pending the hearing and determination of the intended appeal in accordance with the prerequisites set out by this court in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013]eKLR**, and which we fully adopt. The first prerequisite is satisfied by the applicants' demonstration that they have an arguable appeal for alleged lack of proof of fraud and/or misrepresentation against them by the 1st respondent, and also that they are on the suit property and also have a title over the suit property in their names.

As we have already pointed out above, an arguable appeal is not one which must necessarily succeed, but one and which ought to be argued fully before the Court. The issue of whether applicants acquired the suit property fraudulently and/or through misrepresentation is arguable, especially when it is not disputed that they currently hold title depicting them as the registered owners, while the 1st respondent also still holds the original title registered in the name of the deceased over the same suit property.

As for satisfaction of the second prerequisite, the Applicants' assertion that they are in possession of the suit property and have invested heavily on the same and that there is threat of execution of the decree if stay is not granted has not been controverted by the respondents. We therefore also find this prerequisite satisfied.

On account of the above assessment and reasoning, we find merit in the application. It is hereby allowed. We direct that an order of injunction be and is hereby issued staying execution of the judgment of the trial court delivered on 27th September 2019 pending the hearing of the intended appeal. In addition, the status quo shall remain and neither the 1st respondent nor the Applicants shall divest themselves of the rival titles they hold over the suit property until the hearing and determination of the intended appeal. Costs of this Motion shall be in the intended appeal.

Dated and Delivered at Nairobi this 7th day of August, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

D. K MUSINGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR