



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KARANJA, KOOME & ASIKE-MAKHANDIA, J.J.A)

CIVIL APPLICATION NO. 178 OF 2019 (UR 124/2019)

BETWEEN

BERNARD THIGA.....APPLICANT

AND

PETER KIHU NG'ANG'A.....1ST RESPONDENT

PETER GICHUHI NG'ANG'A.....2ND RESPONDENT

(An application for stay of execution of the Judgment of the Environment & Land Court

at Murang'a (J.G. Kemei, J.) dated 7th November, 2019

in

ELC Case No. 159 of 2017 (OS)

RULING OF THE COURT

Before us is a notice of motion application dated 25th November, 2019 in which the applicant prays for an order staying execution of the judgment and decree of the Environment & Land Court “ELC” (J.G. Kemei, J.) delivered on 7th November, 2019, pending the intended appeal.

The application is brought pursuant to Rule 5(2) (b) of the Court of Appeal Rules, and it is premised on the grounds that; the respondents filed a suit in the ELC seeking entitlement by adverse possession to land parcel number **LOC 20/MIRIRA/2679** hereinafter, “the suit land” owned by the applicant and judgment was rendered in their favour. The applicant was aggrieved by the judgment and decree and intends to appeal the decision in this Court. That unless stay is granted, the intended appeal shall be rendered nugatory as the title to the suit land shall be handed over to the respondents. That unless the status quo is maintained, the respondents shall be registered as the proprietors in common of the suit land, and efforts towards restitution of the same should the intended appeal be successful, shall be strenuous, costly and an unnecessary burden on the applicant. That the intended appeal is arguable as can be gathered from the draft memorandum annexed to the supporting affidavit of the applicant. That the applicant was willing to abide by any orders of the court for security pending the intended appeal.

The application was further supported by the applicant’s affidavit sworn on the same date in which he reiterated and expounded on the grounds aforesaid.

The application was not opposed as no replying affidavit was filed in response to the application. Further, the application was canvassed by way of written submissions. However, it’s only the applicant who filed his submissions.

In his written submissions filed by **Messrs. Ochieng, Kokul & Velo Advocates**, the applicant while referring to the case **Global Tours & Travels Limited; Nairobi HC Winding Up Case No. 43 of 2000** reiterated the grounds upon which the court acts in granting an order of stay of execution. He referred to the draft memorandum of appeal dated 25th November, 2019 and urged that he had raised substantive grounds of appeal which were not frivolous. He further submitted that the application had been filed timeously. That the respondents had already extracted the decree, hence he was apprehensive that they would proceed to sell the suit land which may complicate matters with

regard to repossession in the event the appeal is successful. It was his further submission that the respondents were not in a position to compensate him in damages.

Having considered the application, the grounds in support thereof, submissions by counsel and the law, we take cognizance of the fact that the jurisdiction of this Court under Rule 5(2) (b) is original, independent and discretionary. The discretion is 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 [2013] eKLR** 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 therefore, he must demonstrate that he has an arguable appeal and that the intended appeal is not frivolous. Upon satisfying that principle, he has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay of execution. (See: **Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999** (unreported)).

Further, in determining whether the appeal is arguable or not, it is trite that by arguable it does not mean that 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 **Dennis Mogambi Mang’are v Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011)** this Court held that:

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

On whether the applicant has demonstrated an arguable appeal, we have considered the applicant’s annexed draft memorandum of appeal. Among the issues raised and emphasized by the applicant which we think merit consideration by this Court is whether the learned Judge erred in granting an order of adverse possession without taking into consideration the basic tenets that would amount to a claim of adverse possession. This is a point of law that can only be determined at a full hearing. Therefore, this and the other issues raised are in our considered view not frivolous.

On whether the appeal will be rendered nugatory should the impugned judgment not be stayed, we note that factors which can render an appeal nugatory should 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. It is common ground that a decree has been extracted demonstrating the respondents’ desire to execute the said decree. There is no doubt that there is an imminent risk of execution. The applicant is also apprehensive that the intended appeal will be rendered academic if not stayed, and that it would be strenuous and costly for his restitution of suit land to the applicant should the appeal succeed, hence it will be in the interest of justice that the status quo be maintained. In **Reliance Bank Ltd v Norlake Investments Ltd [2002] E.A. 227**, this Court while faced with almost similar facts stated:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.” (Emphasis ours).

In **Mukuma v Abuoga [1988] KLR 645**, this Court held *inter alia*:

“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.”

The applicant has further demonstrated that it will be near impossible for him to be compensated in damages should the intended appeal be successful as his title to the suit land would have been transferred to the respondents whom he states would not be in a position to compensate him in damages in the event the appeal succeeds. Thus, the appeal would be rendered nugatory if successful, in the event that stay is not granted.

On the basis of the foregoing, we are satisfied that the applicant has satisfied the twin principles for the grant of a stay of execution pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of **Stanley Kangethe Kinyanjui (supra)**.

The application dated 25th November, 2019 is accordingly allowed. Costs shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR