



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), ASIKE-MAKHANDIA & SICHALE, JJA)

CIVIL APPLICATION NO. E237 OF 2020

BETWEEN

CATHERINE NJERI.....APPLICANT

AND

ROSE WANGARI NDUNG’U

*(Suing on their own behalf and for their own benefit*

*and on behalf of and for the benefit of the Estate of the late Stanley*

*Ndung’u Njoroge).....1<sup>ST</sup> RESPONDENT*

STELUC LIMITED.....2<sup>ND</sup> RESPONDENT

*(An application for stay of execution pending appeal against the*

*decision of the High Court in Thika (Gacheru, J.) made on 16<sup>th</sup> July,*

*2020 in Thika ELC No. 180 of 2017 Formally NRB ELC No. 1282 of 2014)*

RULING OF THE COURT

On 23<sup>rd</sup> May, 2017, the Environment and Land Court (Gacheru, J.) issued a temporary order of injunction against the applicant and restrained her from dealing with land parcel No. **DAGORETI/RIRUTA/6213**, the suit property, pending the hearing and determination of the main suit.

A few months later on 26<sup>th</sup> October, 2017, the court further directed that the 2<sup>nd</sup> respondent was at liberty to use the suit property.

However, this could not be realized as the applicant had refused to vacate the suit property, also claiming its ownership, on the basis of which she continued to develop it, thereby denying the 2<sup>nd</sup> respondent of its use and possession.

As a consequence of these actions, and upon application by the 2<sup>nd</sup> respondent dated 21<sup>st</sup> March, 2019, the court below, by a mandatory injunction compelled the applicant to vacate the suit property within 45 days from the date of the ruling pending the hearing and determination of the suit; and that should the applicant fail to comply and voluntarily vacate, the Officer Commanding Station (OCS), Muthangari Police Station, would supervise her eviction.

It is this order that the applicant intends to challenge before this Court. Pending the lodgement, hearing and determination of the intended appeal, she has taken out this application for injunction and stay of execution under **Rule 5(2)(b)** of this Court’s Rules, fearing the demolition of her home and eviction from the suit property, which she states is her matrimonial home, where she has lived with her family for over 30 years.

The combined effect of the respondents’ response to the application, in the replying affidavits and submissions is that, the 1<sup>st</sup> respondent as

the lawful owner of the suit property, sold it to the 2<sup>nd</sup> respondent, a *bona fide* purchaser, for value; and that the applicant is a trespasser, hence, the intended appeal is not arguable. They have also insisted that the appeal will not be rendered nugatory as the court below also bound the respondents not to dispose of the suit property to third parties and that the applicant would have her day in court when the suit comes up for hearing before the trial court.

By the decisions cited by the parties, **Regnoil Kenya Limited vs. Winfred Njeri Karanja** [2019] eKLR and **Pauline Yebei & Another vs. Estate of Kiprotich Arap Letting represented by Andrew Kiprotich Kiprono** [2017] eKLR, in a long line of cases decided by this Court, it is settled that the jurisdiction of the Court under **rule 5(2) (b)** is discretionary; and that the Court is guided by two principles, that the appeal or intended appeal is arguable and that unless the orders sought are granted the appeal will be rendered nugatory.

We have considered the grounds proffered in the draft memorandum of appeal to show the arguability of the appeal. We respectfully think that issues such as the application of the principles for the grant of mandatory injunction, the lawful ownership of the suit property and the question of fraud are not idle.

Secondly, the applicant, being in occupation of the suit property, her apprehension of eviction before the determination of the appeal is not without justification.

Accordingly, we allow this application and order that, pending the hearing and determination of the appeal, the orders of 16<sup>th</sup> July, 2020 and further proceedings in the court below are hereby stayed.

Within 30 days of this ruling, the applicant is directed to lodge and serve the record of appeal, failing which these orders shall stand vacated without any further orders.

Costs to be in the appeal.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of October, 2020.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**ASIKE – MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**