



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KARANJA, KOOME & MAKHANDIA, JJA)

CIVIL APPLICATION NO. 177 OF 2019 (UR 123/19)

BETWEEN

JANE WAIRIMU NGARI.....1ST APPLICANT

JORUM KAMAU NGARI.....2ND APPLICANT

AMES MWANGI NGARI.....3RD APPLICANT

SAMUEL GITHU NGARI.....4TH APPLICANT

PATRICK KURIA NGARI.....5TH APPLICANT

ELIUD KAGUMO NGARI.....6TH APPLICANT

AND

MARY MUTHONI NGARI.....RESPONDENT

(Being an application for stay of execution of the judgment and decree of the Environment and Land Court at Kerugoya, pending the hearing and determination of the intended appeal against the said judgment (E.C Cheronu, J.) dated 18th October, 2019

in

ELC Case No. 12 of 2015)

RULING OF THE COURT

[1] UPON considering the application before us which is by way of a notice of motion dated 25th November, 2019 by the applicants and noting that it is principally predicated under the provisions of **Rule 5 (2) (b)** of this Court's Rules among other statutory enactments cited, the applicant principally seeks an order of stay of execution of the judgment delivered on the 18th October, 2019 by **Cheronu, J.** and all consequential orders thereto until the intended appeal is heard and determined.

[2] UPON reading the supporting affidavit sworn on 25th November, 2019 by **Joram Kamau Ngari** (the 2nd applicant) on behalf of the other applicants and the grounds in support of the application which allude to the fact that the appeal is arguable and has high chances of success; that the applicants have applied for proceedings to lodge an appeal and filed a Notice of Appeal; that they have attached a copy of a draft memorandum of appeal that shows there are several grounds that they intend to pursue and demonstrate that the impugned judgment was against the weight of the evidence among other grounds; that unless the order of stay of execution is granted, the appeal will be rendered nugatory since title deeds registered in the names of 2nd

to the 6th applicants are to be cancelled as per the judgment and the parcel of land in dispute is likely to change hands, if the order of stay is not granted thereby rendering the appeal nugatory. Finally she deposed that the respondent will not suffer any prejudice.

[3] UPON further reading the replying affidavit sworn by **Mary Muthoni Ngari** (the respondent) on 18th March, 2020 opposing to the orders sought; the respondent deposes that the intended appeal lacks merit; that the judgment was based on sound findings; that the deceased who was the husband of the 1st applicant and the respondent had distributed his land parcel **No. Mutira/Kiaga 525** (the suit property) according to a family agreement passed at a meeting held on 12th December, 1996; that by the time the deceased is alleged to have executed transfers in regard to the applicants, he had become senile having been incapacitated by dementia; and that on the nugatory aspect, the applicants are in possession of the suit land but the respondent and her children will be excluded from taking possession of their five-acre portion of land that was awarded to them in the said judgement which will prejudice them.

[4] UPON also considering the written submissions filed on behalf of the applicants where they gave a detailed account of the dispute before the trial court which was between members of the same family over the suit land that belonged to the late **Joseph Kamau Ngari**. The applicants argue that the Judge relied on a document which the deceased had merely indicated his intentions of how he wanted to share the suit property in 1996; that the said document was not a Will or a contract and that the respondent had made an application before the trial court seeking to review order No. 3 of the orders issued in the judgement so as to expedite the execution. The applicants gave an undertaking that they would provide security for due performance by depositing the title **No. Mutira/Kiaga 1511** in court so as to preserve the property until the appeal is heard and determined.

[5] COGNIZANT of the guiding principles that the jurisdiction of this Court under **Rule 5(2)(b)** is discretionary, but is exercised judiciously and with reason not whimsically; that for the applicants to succeed, it is trite that they must show that they have an arguable appeal hence it is not frivolous and also to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay; that in the case of **Stanley Kang'ethe Kinyanjui vs. 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.”

[6] NOTING FURTHER that in determining whether the appeal is arguable or not, it should be appreciated that an arguable appeal, does not necessarily 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 vs. 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.”

[7] HAVING CONSIDERED the instant application and the replying affidavit within the above parameters, we note the dispute before the High Court that gave rise to the judgment that is intended to be appealed against was among members of the same family. On one hand is the 1st applicant who was married to the late **Joseph Ngari** the original registered proprietor of the suit property with her children; while on the other hand is her co-wife who is the respondent, she too has 6 children. At the centre of the dispute is the suit property measuring 10 acres that belonged to the deceased but was transferred to the applicants at a time when the respondent claims the deceased was suffering from senile dementia and was incapable of undertaking the said transfer and whereas the applicants stand by the said transfer; we find the appeal raises an arguable issue(s) of whether the decision in favour of the respondent was against the weight of the evidence.

[8] In considering the nugatory aspect, we note that this dispute involves members of the same family, whereas the applicants argued that an order of stay of execution will not prejudice the respondent, on the other hand the respondent states that an order of stay will interfere with her ability to utilize her portion of 5 acres as the land was divided equally between the two houses of their late husband. We are of the view that it is not in the interest of justice to grant a stay order that will keep out one part of the family from a family land. Moreover, we are not persuaded that by the respondent who is indisputably the co-wife of the 1st applicant taking possession of the 5 acres out of the 10 acres, that would render the appeal nugatory.

[9] The applicants having failed to satisfy the twin limbs as required by **Rule 5(2)** of this Court's rules, the application must fail and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 9th 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

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR