IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & ASIKE-MAKHANDIA, JJ.A)

CIVIL APPLICATION NO. 130 OF 2020

BETWEEN

THE ATTORNEY GENERAL..APPLICANT

AND

EUNICE MAKORI & HELLEN MAKONE (*The administrators and personal*

Representatives of the estate of the late **Johnson Onduko Makori (deceased)......RESPONDENT**

(Being an application for stay of proceedings pending the hearing and determination of the intended appeal from the Ruling of the High Court of Kenya at Nairobi (Sergon, J.) dated 27th September, 2019

in

Misc. Appl. No. 74 of 2016)

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RULING OF THE COURT

[1] For consideration before us is a Notice of Motion dated 22nd May, 2020 taken out by the Attorney General (applicant) on behalf of the **Kenya Defence Forces**. It seeks an order of stay of execution and issuance of warrants of arrest against the ***Principal Secretary (PS) in the Ministry of Defence*** in **HCCC No 168 of 2009** and **Misc Application No 74 of 2016** pending the hearing and determination of an intended appeal. The application is supported by an affidavit sworn by ***Boniface Maina Ombiro*** on 22nd May, 2020.

[2] The matters deposed to in the aforesaid affidavit and the grounds stated in support of the application are in summary that; on 27th September, 2019 **Sergon, J.** delivered a Ruling in **Misc. Application No 74 of 2016** dismissing an application for review of a judgment rendered in **HCCC No 168 of 2009**; that an application seeking stay of execution of the Ruling pending appeal was dismissed on the 6th May, 2020 by the same Judge. The applicant now states that being dissatisfied with the said Ruling he has lodged a Notice of Appeal and pending the hearing and determination of the intended appeal, he has invoked the jurisdiction of this Court under **Rule 5 (2) (b)** of this Court Rules.

[3] The applicant contends that the intended appeal is meritorious as it raises substantial issues of law and has high chances of success. On the nugatory aspect, the applicant states that should the warrant of arrest be issued against the P S, the intended appeal will be rendered otiose and the said PS will suffer prejudice.

[4] The application was opposed vide the replying affidavit of ***Hellen Makone*** sworn on 20th July, 2020. The applicant is faulted for failing to table material documents despite referring to them as annexures thus there is nothing to show an arguable case besides the averments in the affidavit sworn by ***Boniface Maina*** which are mere sweeping statements. The respondents gave the chronology of what transpired before the High Court even before the application to commit the PS to civil jail was made. The respondents attached a copy of a judgment in **HCCC No. 168 of 2009** which was pronounced on 19th June 2015 in favour of the

respondents who were awarded a sum of Kshs. 9,200,000 in consideration and in exchange of two parcels of land **LR Nos 5002/3** and **5002/4** in Mombasa (the suit parcels). The Ministry of Defence took possession of the suit parcels without paying any consideration despite causing the respondents to surrender the same vide a deed of surrender against a promise to pay the value according to a valuation report.

[5] The respondents further stated that the judgment and the award by the High court was supported by evidence that the suit parcels belonged to the late **Johnson Makori** (deceased) who surrendered the suit parcels to the government in consideration that he was going to be paid a total sum of Kshs. 9,200,000 which was never done as per the deed of surrender. After four (4) years had passed since judgment was entered, the applicant filed a notice of motion dated 22nd March, 2018 seeking to review and set aside the aforesaid judgment on the grounds that, there was discovery of new and important evidence which after due diligence was not within the knowledge of the applicant, to wit, the report by the National Land Commission dated 4th July, 2018 which indicated that the suit parcels were gazetted as protected areas under the **Protected Areas Act** and they therefore formed part of illegally/ irregularly allocated land as per the **"Ndungu Report"** .

[6] In dismissing the application for review, this is what **Sergon, J.** stated: -

> ***"The 'Ndungu Report' has been lying on the library shelves for a long time and was available to the defendant to obtain and rely on it in evidence. The defendant took considerable period of time to discover its existence. I am not convinced that the defendant applied due diligence. With respect, I agree with the submissions of the plaintiffs that the defendant was not diligent in this matter. The defendant is plainly indolent and cannot therefore benefit from the discretion of this court.***
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> ***The other issue which deserves some comment is the purposes intended to be achieved by the application. I have already pointed out that Hon. Justice Hatari Waweru expressly stated in his judgment that the defendant did not contest the ownership of the parcels of land save for the quantum of compensation.***
>
> ***The defendant now seeks to introduce a new line of defence to contest the plaintiff's title yet he had an opportunity of doing so had he been diligent."***

According to the respondents, the application lacks merit, besides, the applicant has never served the respondent with a notice of appeal which they said they saw for the first time when they were served with the instant application; and that the applicant is merely delaying the matter which they have successfully done for twelve (12) years since the suit parcels were surrendered.

[7] Both parties filed written submissions in support of their respective positions which we have considered them within the parameters provided under ***Rule 5(2) (b)*** of the Court of Appeal Rules. An applicant who invokes the aforesaid Rule has to establish that the intended appeal is arguable and that in the event that he/she is not granted the orders, the intended appeal would be rendered nugatory. See the case of **Trust Bank Limited and Anor vs. Investech Bank Ltd & 3 Ors, Civil Application Nos. NAI 258 & 315 OF 1999, (Unreported)** in which this Court stated:

> **"The jurisdiction of the Court under Rule 5(2) (b) is original and discretionally and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, or 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. ....."**

[8] Another important aspect to bring to bear is that in declining to review the judgment of the court, the Judge was exercising discretionary powers and now we are being asked to stay any further proceedings until the intended appeal is filed, heard and determined. In **Butt vs. Rent Restriction Tribunal (1982) KLR 417 at pages 419 & 420**, Madan JA (as he then was) said: -

> ***"It is the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory: per Brett LJ in Wilson Vs Chuch (No 2) 12 CHPP (1879 454 at p. 459)."***

[9] Applying the above principles to the facts of this case, the applicant faults the Judge in the proposed draft memorandum of appeal for finding that the applicant was not diligent in its acquisition of "*new evidence*" that they sought to adduce to challenge ownership of the suit parcels and that the applicant was not granted a right to a fair hearing as encapsulated under ***Article 50*** of the Constitution. We, on our part are conscious that another Bench will determine those issues on merit, but on *prima facie* basis, we are not persuaded of their arguability. This is because the so-called *"new evidence"* that was intended to be adduced as the learned Judge indicated, was always available to the applicant since the **"Ndungu Report"** was published in June 2004 and the suit was filed in 2006.

[10] The applicant has not bothered to demonstrate to us why it took them more than four (4) years to present the said evidence, and how the Judge erred by declining to exercise his discretion to set aside a regular judgment. On the ground that the applicant was denied a fair trial, we

are also not persuaded of the arguability of this ground as no evidence was presented to show how the applicant was denied a fair hearing. The judgment shows two witnesses testified on behalf of the applicant during the trial and the applicant has robustly challenged the said judgment by seeking its review.

[11] Considering the circumstances of this matter, that the applicant took over the suit parcels from the respondents against a document of surrender, and the consideration thereto remains unpaid so many years down the line, we are not convinced that the applicant deserves the exercise of this Court's discretion. The applicant is refusing to pay the decretal sum and cannot be aided in that respect.

[12] In the final analysis, the applicant having failed to satisfy the first limb, of the requirements under ***Rule 5 (2) (b)***, of this Court's Rules, this application is bound to fail.

The upshot of the foregoing is that the application is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 20th day of November, 2020.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

...

JUDGE OF APPEAL

ASIKE-MAKHANDIA

...

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR