



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. NAL 144 OF 2020

BETWEEN

BANK OF AFRICA KENYA LIMITED.....APPLICANT

AND

BENARD MULONGO MWANIA.....1<sup>ST</sup> RESPONDENT

*(Suing on his behalf and on behalf of 19 others)*

CHARLES MBUGUA NGUGI.....2<sup>ND</sup> RESPONDENT

*(Being an Application for Stay of Execution of the Ruling and Order of the Environment and Land Court of Kenya at Nairobi (E.O. Obaga, J.) dated 5<sup>th</sup> May 2020*

in

ELC 854 of 2014)

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RULING OF THE COURT

[1] **Bernard Mulongo Mwanja**, (the 1<sup>st</sup> respondent) suing on behalf of 19 others (hereinafter referred to as 20 purchasers) filed suit before the **Environment and Land Court** (ELC) against **Charles Mbugua Ngugi** (the 2<sup>nd</sup> respondent) seeking transfer of several plots of land which were subdivided from **LR No. 26693/14** (suit premises) and sold to them between the years 2002 to 2008. The 2<sup>nd</sup> respondent filed a defence but failed to participate in the hearing with the result that judgment was entered against him in favour of the twenty (20) purchasers. **Bank of Africa Limited**, (the applicant) who held a legal 1<sup>st</sup> charge and a further charge over the suit property became aware of the said judgment sometimes in May 2019, when the 20 purchasers were pursuing execution of the said judgment. They wrote a letter to the applicant asking for a discharge of the charges registered over the suit premises.

[2] The applicant contended that it was not notified of the suit despite the fact that by the time it was filed in 2014, the 2<sup>nd</sup> respondent had executed and registered a charge and a further charge over the suit premises to secure banking facilities with the applicant. The applicant further stated that it was not aware that the 2<sup>nd</sup> respondent had sold the suit land because there was no indication of any encumbrance in the register at the Lands Office when the said charges were registered. The applicant therefore filed an application before the ELC seeking to be joined as a party in the said suit and to set aside the judgment claiming that it was not heard although a judgment was entered ordering the 2<sup>nd</sup> respondent to transfer the suit premises to the 20 purchasers which was not possible as the suit premises had not been discharged.

[3] The 20 purchasers objected to the applicant's application and in addition, they filed an application seeking that the applicant be ordered to discharge the suit premises and they prayed for an order that the suit premises be vested upon them as purchasers. The matter was heard by **Obaga, J.** and in a ruling delivered on 5<sup>th</sup> May, 2020 the learned Judge allowed the applicant to be joined in the suit as a party but dismissed the application to set aside the judgment. As regards the application by the 20 purchasers, it was allowed with the result that the applicant was ordered to execute a discharge of charge over the suit premises and a further order was made vesting the suit premises to the 20 purchasers.

[4] Aggrieved by the said turn of events, the applicant filed a Notice of Appeal and the instant application which is brought under **rule 5 (2)**

(b) of the Court of Appeal Rules. The applicant is principally seeking an order of stay of execution of the Ruling dated 5<sup>th</sup> May, 2020. The application is supported by an affidavit sworn by **Kenneth Mawira**, which elaborates on the grounds given in support thereof. It is stated that before the aforesaid suit was filed, in 2014 the applicant had registered a charge and a further charge over the suit premises upon extending certain financial facilities which were secured by the suit premises and that the 2<sup>nd</sup> respondent is the registered proprietor; and that the applicant was never served with summons, nor was it made a party to the suit despite holding a charge over the said premises. The applicant therefore urged that the intended appeal is arguable and annexed a draft memorandum of appeal with grounds of appeal that are a replica of the matters deposed to in support of the application.

[5] The application was opposed by the 20-purchasers vide a replying affidavit sworn by **Bernard Mulongo Mwanja**. According to the 20 purchasers, by the time the 1<sup>st</sup> and 2<sup>nd</sup> charges over the suit premises were registered in 2011 and 2014, the 2<sup>nd</sup> respondent had already sold to the purchasers several plots which had already been subdivided as follows: -

No.	Name	Land	Reference	Number
1.	Bernard Mulongo Mwanja	L.R. No.	26693/22	( 26693/14/9)
2.	Paul Muthuma Mwacha	L.R. No.	26693/20	(26693/14/7)
3.	Jenaro Munyi Mwago	L.R. No.	26693/25	(26693/14/12)
4.	Duncan Njoroge Ngugi	L.R. No.	26693/16	(26693/14/3)
5.	Samuel Kibara Ndigiri	L.R. No.	26693/24	(26693/14/11)
6.	Harun Kariuki Muchendu	L.R. No.	26693/38	(26693/14/25)
7.	Francis Mururi Njoroge	L.R. No.	26693/23	(26693/14/10)
8.	Stephen Thairu Njoroge	L.R. No.	26693/34	(26693/14/20)
9.	Joshua Njuguna Ngigi	L.R. No.	26693/21	(26693/14/8)
10.	Joseph Mwangi Kingori	L.R. No.	26693/28	(26693/14/15)
11.	Charles Thoithi Maina	L.R. No.	26693/29	(26693/14/16)
12.	Moses Kinyanjui Ngethe	L.R. No.	26693/19	(26693/14/6)
13.	Nelson Mwangi Kamau	Mwangi L.R.	Ngarachu 26693/35	(26693/14/22)
14.	Dedan Mwangi Kamau	L.R. No.	26693/35	(26693/14/22)
15.	David Maina Waweru	L.R. No.	26693/27	(26693/14/14)
16.	Francis Hinga	L.R. No.	26693/30	(26693/14/17)
17.	Tilus Ngugi Warigi	L.R. No.	26693/18	(26693/14/5)
18.	John Mwangi Wanjohi	L.R. No.	26693/26	
19.	Charles Kamau	L.R. No.	26693/15	
20.	Ngugi Mwangi	L.R. No.	26693/6	

[6] The purchasers further stated that what remained was signing of the Transfer forms as required by law. It is around this time that plans were published for construction of the **Southern Bypass** but the 2<sup>nd</sup> respondent who had sold the plots became dodgy and eventually refused to sign the Transfer forms completely. This is what prompted the 20 purchasers to file **Civil Suit 408 of 2012** (now E.L.C 854 of 2014) requiring the 2<sup>nd</sup> respondent to appear in court and explain his failure to effect the transfers of the various portions of L.R. No. 26693 Kikuyu and the court to order him to specifically perform the contract. The 2<sup>nd</sup> respondent filed a defence seeking to have the agreements set aside claiming that he was suffering from Attention Deficiency Hyperactive Disorder (ADHD). Nonetheless the 2<sup>nd</sup> respondent showed no interest in the matter; his advocate withdrew from acting and the matter proceeded to hearing, their absence notwithstanding.

[7] Judgment was delivered on 3<sup>rd</sup> March 2017 directing the 2<sup>nd</sup> respondent to transfer to the 20 purchasers their various portions of the suit property. The 2<sup>nd</sup> respondent did not comply with the judgment, forcing the purchasers to place caveats on the suit premises and that is when they discovered that the suit property was charged to the applicant, and on 19<sup>th</sup> March, 2020, their advocate wrote to the applicant notifying it of the judgment which prompted the applicant to file the application seeking to be joined as a party to the suit and setting aside of the judgment. The 20 purchasers insisted that by the time the applicants obtained the charge in 2011 and a further charge in 2014, the suit premises had been sold, the purchasers had obtained possession and built their homes. Therefore, the charge was illegally obtained because if a valuation on the suit premises was done, the applicant would have noticed that the land was occupied by the buyers who had a beneficial interest over the suit premises. Moreover, the borrowers were not joined in the suit; and further, the applicant did not attach a statement of account to support the allegation that there is an outstanding loan. We were urged to dismiss the application.

[8] This application was heard virtually vide 'Go to Meeting' platform pursuant to the Court of Appeal Practice Directions during the

prevailing COVID 19 Pandemic. Both counsel for the applicant and the 1<sup>st</sup> respondent filed submissions, but the 2<sup>nd</sup> respondent did not file any papers despite having been served with the application and the notice inviting all parties to file written submissions.

[9] We have considered this application against the background of established principles under **rule 5 (2) (b)** of this Court Rules, that for the applicant to succeed it must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

**“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (see also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”**

[10] Is the intended appeal arguable? The applicant states that it holds a charge and a further charge over the suit premises which were registered before the suit was filed by the 20 purchasers and it was not given an opportunity to be heard. In response, the 1<sup>st</sup> respondent on behalf of his fellow purchasers posited that the charge was illegally obtained for reasons that by the time they were registered, the purchasers were in occupation of their homes. We think that these constitutes some of the triable issues, whether the applicant was denied a hearing, and whether the charge was illegal. We throw caution that an arguable ground(s), does not necessarily mean that the 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.”**

[11] On the nugatory aspect, we note that the trial Judge ordered the applicant to execute a discharge of charge over the suit premises and he also ordered the suit premises be vested on the 20 purchasers. If the suit premises is discharged and consequently transferred to the 20 purchasers, we are persuaded that should the intended appeal succeed, the applicant who has a charge and a further charge will be prejudiced. For the aforesaid reasons, we find that the applicant has satisfied both limbs that the intended appeal is arguable and unless the order of stay is granted, the appeal will be rendered nugatory.

[12] In the event, the Notice of Motion dated 9<sup>th</sup> June, 2020 is hereby allowed. An order of stay of execution of the ruling made by **Obaga, J.** on 5<sup>th</sup> May, 2020 is hereby granted until the intended appeal is heard and determined.

Costs of the Motion will be in the appeal.

*Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.*

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**