



IN THE COURT OF APPEAL

AT NYERI

(CORAM: ASIKE-MAKHANDIA, GATEMBU, & SICHALE, JJ.A)

CIVIL APPLICATION NO. 49 OF 2020 (UR 41/2020)

BETWEEN

MOFFAT GICHURU APPLICANT

AND

WILSON MWIRIGI MANYARA1ST RESPONDENT

MANYARA M'MURITHI.....2ND RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Environment and Land Court at Meru (Lucy Mbugua, J) dated 16th January, 2020 in ELC Case No. 108 of 2019

RULING THE COURT

We are invited by the motion on notice dated 8th June 2020 brought under Rule 5(2)(b) of the Rules of this Court and sections 68 and 69 of this Land Registration Act to stay execution of the judgment and decree of the Environment and Land Court “ELC” at Meru, (**Lucy Mbugua, J**) dated 16th January 2020 pending the hearing of the motion and hearing of an intended appeal. We are also being asked to issue an order of injunction as well as inhibition. In grounds in support of the motion as well as the supporting affidavit of **Moffat Gichuru**, “the applicant”, it is said that the applicant instituted a suit in Nkubu Principal Magistrates Court claiming equitable rights and possession over all that piece or parcel of land known as Abogeta/V-Kithangari/2514 “*the suit property*” registered in the name of the 2nd respondent. He succeeded in that suit. However, the respondents appealed the decision in the ELC at Meru. In a judgment delivered on 16th January, 2020, the ELC upheld the appeal.

Pursuant to that determination, the applicant lodged an application for stay of execution pending appeal in the same court. However, in a ruling delivered on 21st May, 2020 the application was dismissed. Since then, the respondents have embarked on the process of the subdivision of the suit property by obtaining and executing mutation forms. The applicant claims that he has been in occupation and utilization of the suit property and will be highly prejudiced and rendered destitute if orders of stay, inhibition and injunction sought are not granted in respect of the suit property. That the intended appeal is arguable.

In opposing the application, the 1st respondent in a replying affidavit deposed that the applicant was his brother and son to the 2nd respondent. That the suit property had already been subdivided. That the applicant was a beneficiary of the subdivision and had in fact established his matrimonial home in his portion which he occupies without interference from the respondents; that respondents harbour no intentions of selling the suit property and that in any event the suit property no longer exists following the subdivision. Accordingly, there is nothing to stay, inhibit or injunct. To the respondents, the application does not therefore meet the threshold for the grant of such orders as required by the provisions of Rule 5(2)(b) of this Court’s rules. It should accordingly be dismissed with costs.

The principles that guide the Court in considering an application of this nature are now well known and settled. For the applicant to succeed, he must, firstly demonstrate that the appeal, or the intended appeal as the case may be, is arguable, which is the same as saying that it is not frivolous. An applicant who succeeds on that limb must, in addition, demonstrate that the appeal would be rendered nugatory in the absence of stay or injunction – see **Stanley Kangethe Kinyanjui v Tony Ketter & others [2013] eKLR** where the said principles were summarised as follows:

- i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court.**
- ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.**

- iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
- iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.
- v) An applicant must satisfy the court on both of the twin principles.
- vi) On whether the appeal is arguable, it is sufficient if a single *bonafide* arguable ground of appeal is raised.
- vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
- viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
- ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
- xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim.”

From the record it is obvious that the applicant has not demonstrated that the intended appeal is arguable. We say so because in his supporting affidavit, he has not deposed to any ground(s) of appeal he intends to raise before the appellate court, nor has he annexed a draft memorandum of appeal that would have guided us in determining whether the intended appeal, if at all, will be arguable. We also note that it is not controverted that the suit property no longer exists, having been subdivided and shared out to the members of the family. That being the case, there is nothing left to stay, injunct or even inhibit. Further, we doubt given the circumstances, that the intended appeal will be rendered nugatory.

Based on the foregoing, we are satisfied that the applicant has not satisfied any of the limbs required in an application of this nature. We accordingly dismiss the application with no order as to costs, this being a family dispute,

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

ASIKE – MAKHANDIA

JUDGE OF APPEAL

S. GATEMBU KAIRU FCI Arb.

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR