



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAL, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 61 OF 2020

BETWEEN

JOSEPHAT LISIOLO LISHENGA.....APPLICANT

AND

DARIYA SHINYANZWA.....1ST RESPONDENT

JANE AGITSA LUSIMBA.....2ND RESPONDENT

JACKSON KHAYUMBI INZIANA

T/A J.I. KHAYUMBI & CO. ADVOCATES.....3RD RESPONDENT

THE LAND REGISTRAR KAKAMEGA.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Environment & Land Court at Kakamega (Matheka, J.) delivered on 5th November 2019 in ELC Case No. 250 of 2016)

RULING OF THE COURT

1. In a judgment delivered on 5th November 2019, the Environment and Land Court at Kakamega (*N.A. Matheka, J.*) allowed the 1st and 2nd respondents suit and ordered the applicant and his co-defendant to vacate the suit property known as Isukha/Shirere/1183 within six months from the date of the judgment and in default an eviction order to issue.
2. Aggrieved by that judgment the applicant lodged a notice of appeal on 5th November 2019. By his application now before the Court dated 3rd July 2020, the applicant seeks an order to stay execution of the judgment pending the hearing and determination of his appeal. Although served with the application and notice of hearing, no replying affidavit or submissions were filed on behalf of the respondents.
3. To succeed in his application, the applicant is required to demonstrate that the intended appeal is arguable and that should the Court decline to stay the judgment, and the appeal succeeds, the appeal will be rendered nugatory. See for instance *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR*. In that regard, the applicant contends, among other grievances in his memorandum of appeal, that in allowing the 1st and 2nd respondents suit and in ordering his eviction from the suit property, the learned Judge failed to consider that he has an overriding interest over the suit property.
4. The applicant deposes in his affidavit in support of the application that he is exclusively occupying and utilizing the suit property; that the respondents in whose favour judgment was entered have never been in possession of the suit property; and that he will be rendered homeless and destitute should he be evicted.
5. Having regard to the parameters for the exercise of the court's discretion in an application of this nature and having considered the application, the affidavit in support and the submissions filed by Ms. Osango & Company Advocates on behalf of the applicant, we are satisfied that the applicant has demonstrated that the intended appeal is not frivolous. It is indeed arguable. There is for instance the question

whether the learned Judge erred in failing to consider whether the applicant established an overriding interest over the suit property. We are mindful that an arguable appeal is not one that must necessarily succeed when the appeal is ultimately determined but one that is deserving of full consideration by the Court (See China Road & Bridge Corporation (K)Ltd vs. African Gas & Oil Co. Ltd & 3 others [2016] eKLR),

6. Further, considering that the applicant has demonstrated in his affidavit that his eviction from the suit property in execution of the judgment is imminent, we are also satisfied that his intended appeal will be rendered nugatory unless we stay the orders of the ELC in the meanwhile.

7. We accordingly allow the applicant's application and order that the judgment of the ELC delivered on 5th November 2019 and all consequential orders are hereby stayed pending the hearing and determination of the applicant's appeal in Kisumu Civil

Appeal No. 61 of 2020. Costs of the application shall abide the outcome of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 4th day of December, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR