



IN THE COURT OF APPEAL

AT NYERI

(CORAM: ASIKE-MAKHANDIA, MUSINGA & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 51 OF 2020

BETWEEN

PRISCILLA WAMBUI MATHENGE.....APPLICANT

AND

MARY WAIRIMU MATHENGE.....1ST RESPONDENT

GERALD MUTHIGANI NGARI.....2ND RESPONDENT

(An application for stay of execution of the Ruling of the High Court at Kerugoya

(L.W. Gitari, J.) dated 29th May, 2020 in HC Succession Cause No. 123 of 2013)

RULING OF THE COURT

Before us is a notice of motion application dated 12th June, 2020 in which the applicant prays for an injunction to restrain the respondents by their servants or agents from interfering with the applicant's quiet possession and enjoyment of all that piece or parcel of land known as LR MWERUA/KAGIOLINI/881 hereinafter, "the suit land" and an order for stay of proceedings in Baricho SPMCC No. 25 of 2019 pending the hearing and determination of this application and the intended appeal from the ruling of the High Court (**L.W. Gitari, J.**) delivered on 29th May, 2020.

The application is brought under Rule 5(2) (b) of the Court of Appeal Rules and Sections 3A and 3B of the Appellate Jurisdiction Act. The application is premised on the grounds that; the applicant was dissatisfied with the judgment of the High Court dated 15th July, 2019 and so she lodged an appeal on 29th July, 2019 against the said judgment. The applicant had filed an application for revocation of grant but an order of stay was issued in favour of the respondents; that she had lived on the suit land with her deceased husband for over 50 years and had extensively developed the same and her children also live and depend on the suit land; that the 1st respondent admitted during the hearing that the applicant and her children have at all material times had exclusive, uninterrupted and quiet possession of the suit land. The applicant and the 1st respondent were both widows of their husband and buried the body of the deceased jointly. If the applicant and her children were to be evicted they would be rendered destitute and would suffer substantial loss; the intended appeal would be rendered nugatory should the suit land be sold to an innocent third party since the 1st respondent has since transferred the suit land to her brother, the 2nd respondent, the applicant contended. She added that there is a real danger that they will be alienated from the suit land since the 2nd respondent has since filed eviction proceedings against the applicant in Baricho SPMCC No. 25 of 2019 in addition to being a person of unsound mind. The applicant further stated that the said suit is premised on the impugned judgment, hence it is in the interest of justice that the suit be stayed; that she is willing to offer such security as the court may in its discretion order; and that the appeal is arguable with a probability of success.

The application was further supported by the applicant's affidavit in which she reiterated and expounded on the above grounds.

The application was opposed. The respondents filed grounds of opposition stating that the application had no merit or basis in law; that there was no evidence that an appeal had been filed against the orders of the High Court of 15th July, 2019 or 29th May, 2020; that the applicant had not demonstrated the substantial loss she will suffer should the injunction not be granted; and that the applicant had also not shown that she has an arguable appeal against the impugned ruling where the court held that 2nd respondent should have his day in court under Article 65 of the Constitution.

The 1st respondent further stated that the orders sought are against a stranger as the 2nd respondent is yet to be joined as a party to the suit; that the orders sought are in vain since the grant was executed more than 11 years ago and that the applicant has not advanced any sufficient or good grounds upon which the orders sought may be granted. Further, the 1st respondent in her replying affidavit reiterated the grounds of opposition save that the orders sought to be appealed against were issued over 14 months ago and an appeal, if at all, is yet to be filed. She deposed further that the grant had been executed and the estate distributed to the beneficiaries and that she transferred the suit land to the 2nd respondent in 2014; and that she is not a party to Baricho SPMCC No. 25 of 2019.

The application was dispensed by way of written submissions.

The applicant in her written submissions reiterated the grounds in the supporting affidavit, and further stated that on 15th July, 2019 the High Court dismissed the applicant's application for revocation/ annulment of grant and in so doing erred in finding that the applicant was not a wife or dependant of the deceased despite the weight of evidence tendered. It was submitted that this is a case that warrants the issuance of stay orders; that it will be in the interest of justice and equity for this Honourable Court to allow the application so as to preserve and maintain the status quo of the suit land until hearing and determination of the appeal. She urged that her application had merit and ought therefore to be allowed with costs being borne by the respondents.

In response, the respondents submitted that the applicant had not demonstrated that she has an arguable appeal. It was further submitted that the application is fatally defective as it seeks to stay proceedings in a lower court against the 2nd respondent who has not been made a party to the suit, yet he is the registered owner of the suit land. They further submitted that the applicant had not shown that the intended appeal will be rendered nugatory if the injunction or stay is denied; that the order the applicant seeks to stay is negative in nature as the High Court merely dismissed her application. It cannot therefore be the subject matter of the application for injunction or stay. They denied that the suit land was transferred to the 2nd respondent in 2014 hence this Court is being called upon to act in vain in issuing the orders. Lastly, the respondents submitted that the applicant had not shown any substantial loss she may suffer if the orders are not granted or that the loss cannot be compensated with an award of damages.

Having considered the application, the grounds in support thereof, the replying affidavit filed by the 1st respondent, the submissions by counsel and the law, the issues for determination is whether this application is merited.

The present application is brought under Rule 5(2) (b) of the Court of Appeal Rules, it is trite that the jurisdiction of this Court under the rule is original and discretionary. In **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR** this Court laid down the principles for grant of the orders sought as follows:

***“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 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.*”**

The Supreme Court in **Teachers Service Commission v Kenya National Union of Teachers, Sup. Ct. Appl. No. 16 of 2015** considered the nature and scope of the jurisdiction of this Court under Rule 5(2) (b) as follows:

“It is clear to us that Rule 5(2) (b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years...Rule 5(2) (b) of the Court of Appeal Rules, 2010 is derived from Article 164(3) of the Constitution. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.”

For the applicant to succeed, she has an obligation to prove that she has an arguable appeal, that is, the appeal is not frivolous. Upon satisfying that principle, the applicant also has the additional duty to demonstrate that the appeal, if successful, would be rendered nugatory should the orders sought not be granted. In **Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999** (unreported) this Court stated that:

“The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to 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...” Emphasis ours.

With regard to the arguability of the appeal, it is trite that by arguability, it does not mean that the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious a question of law or a reasonable argument deserving consideration by the court. In **Dennis Mogambi Mang’are v 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.”

The applicant did not annex a draft memorandum of appeal to this application. Therefore, we are not in a position to tell whether the grounds intended to be raised in the appeal are arguable or not. It is not enough for the applicant to just state that she was dissatisfied with the impugned ruling.

We note further that the orders are being sought against a stranger as the 2nd respondent is yet to be joined as a party to the suit. Were we to

grant the orders sought, the 2nd respondent would have been condemned without being heard. It is also not lost on us that the suit land was transferred and registered in the name of the 2nd respondent way back in 2014. Being the registered owner, an injunction would ordinarily not issue against such registered owner.

On whether the appeal will be rendered nugatory should the impugned ruling not be stayed, the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. It is common ground that there is no immediate or imminent danger of the eviction of the applicant or the suit land being put beyond her reach by being sold to third parties. In any event, the applicant conceded that the suit land is already transferred in the name of the 2nd respondent. The case for stay of proceedings in Baricho SPMCC 25 of 2019 has not been made. And even if it had been made, we doubt our jurisdiction to make such an order. The applicant has also not demonstrated that it will be near impossible for her to be compensated in damages should the intended appeal be successful. In **Mukuma v Abuoga [1988] KLR 645**, this Court held, *inter alia*:

“The discretion of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory.”

From the circumstances of the application before us, the applicant has failed to demonstrate the existence of both limbs as required by Rule 5(2) (b) of this Court's Rules and in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of **Stanley Kangethe Kinyanjui** (supra). The upshot is that we decline to grant an injunction and or stay of proceedings pending the hearing and determination of the appeal. The application is accordingly dismissed with no order as to costs as it appears this is a family dispute.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR