



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE, J. MOHAMMED & KANTAI, J.J.A]

CIVIL APPLICATION NO. 80 OF 2020

BETWEEN

PHARES NDUNGÚ CHEGE.....1ST APPLICANT

GURSHARN SINGH.....2ND APPLICANT

AND

LINNET WAIRIMU MUKUHA.....1ST RESPONDENT

GRACE WAMBUI MUKUHA.....2ND RESPONDENT

LUCY WANJIRU NYAGA (Suing as the administrator of the
estate of JOSEPH NYAGA WAMBITI.....3RD RESPONDENT

(A Notice of Motion Application for an injunction pending the Hearing and determination of an intended Appeal from the Ruling of the Environment and Land Court of Kenya at Nakuru (Ohungo, J) dated 5th March, 2020,

in

ELC Case NO. 551 of 2016)

RULING OF SICHALE, J.A

1. UPON perusing the Notice of Motion dated 16th March, 2020 by the applicants, said to be brought under Rules 5, 41 and 47 of this Court's Rules wherein the applicants Pharis Chege and Gursharn Singh seek, *inter alia*, the following orders:

“1. THAT this Application be certified urgent and be heard ex parte in the first instance in accordance with Rule 47 of the Court of Appeal Rules, 2020.

2. THAT pending the hearing and determination of this application interpartes, this Honourable Court be pleased to issue an injunction restraining the Respondents herein either by themselves, their agents, Auctioneers, Bailiffs, servants, workers and/or any other person or firms deriving title from them or any of them from dispossessing or evicting the Applicant and/or any member of his family from the parcel of land known as NAIVASHA MUNICIPALITY BLOCK 6/117 situate in Naivasha within Nakuru County, levying Distress, attaching or seizing any property therein belonging to the Applicant or in any other way interfering with the Applicant's or his family's quiet and peaceful occupation, use and possession of any of the premises currently standing on NAIVASHA MUNICIPALITY BLOCK 6/117 or any part thereof.

3. THAT pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to grant an Injunction in terms of prayer No. 1 above

4. THAT the costs of this Application be provided for” ; and

2. UPON perusing the affidavit of **Pharis Ndungú Chege**, the 1st applicant herein sworn on the **16th day of March, 2020** where he has deposed that he is the sole registered owner of all that parcel of land known as **NAIVASHA MUNICIPALITY BLOCK 6/117 (the suit premises)** since the year 2015; that he and his family are in occupation of the suit premises; that the issue of ownership of the suit premises is pending before the E&LC Nakuru and therefore the respondents have no right to demand rent from him and or threaten to commence the process of levying distress against him; that he sought injunctive orders against distress over the suit property and his application was dismissed with costs in a ruling delivered on **5th March, 2020** by **Ohungo, J.** and that he and his family are likely to suffer irreparable loss as the respondents are likely to evict them by way of levying distress in the event that the orders sought are not granted; and

3. UPON perusing a replying affidavit sworn on **14th July, 2020** by **Grace Wamboi Mukuha**, the 2nd respondent sworn on her behalf and on behalf of the 1st respondent and the 3rd respondent wherein, it is contended that the applicant through one, **Julia Wangari** occupied part of the suit premises as a tenant paying rent of Kshs. 25,000.00 per month in the year 2014; that a certificate of lease dated **24th August, 2015** was fraudulently obtained by the applicant; and

4. **HAVING** considered the principles that guide this Court in determination of **Rule 5(2)(b) applications** as enunciated in **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR**; and

5. **NOTING** that the applicants have not demonstrated that they have an arguable appeal which may be rendered nugatory, absent stay, given that the applicants' entry onto the suit premises was on a tenancy arrangement and that they have hitherto been paying rent in respect of the suit premises; and

6. **GIVEN** that no prejudice will be occasioned to the applicants absent stay, we make the following orders:

(i) That the Notice of Motion dated **16th March, 2020** is disallowed.

(ii) The respondents shall have the costs of this application.

Dated and Delivered at Nairobi this 4th Day of December, 2020.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

RULING OF J. MOHAMMED, JA

I have had the benefit of reading the ruling of the **Hon. Lady Justice F. Sichale, J.A.** in draft. I entirely concur with her findings and I have nothing useful to add. As the **Hon. Mr. Justice Kantai, J.A.** agrees, the final orders of the Court shall be as proposed by the **Hon. Lady Justice Sichale, J.A.**

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

J. MOHAMMED

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JUDGE OF APPEAL.

RULING OF KANTAI, JA

We are asked in the Motion brought under **rule 5** of the **Rules of this Court** amongst other provisions of law that pending the hearing and determination of the application we be pleased to grant an injunction restraining the respondents from disposing or evicting the applicant or members of the applicant's family from the parcel of land known as **Naivasha Municipality Block 6/117, Nakuru County**, levying distress, attaching or seizing any property belonging to the applicant or in any way interfering with the applicant's quiet and peaceful occupation, use and possession of the said land. We are also asked to order an injunction pending hearing and determination of an intended appeal.

It is stated in grounds in support of the Motion and in a supporting affidavit of the applicant **Pharis Chege** that the proposed appeal is

arguable and has merit; that if we don't stop the distress and eviction of the applicant as ordered by the Environment and Land Court at Nakuru it would cause substantial loss to the applicant and his family. It is also stated that the applicant is the sole registered owner of the said parcel of land since the year 2015; that the respondents' own an adjacent property; that the respondents' had filed a suit against the applicant; that a surveyor had been appointed by the parties and, upon a visit to the lands found that the respondents' had encroached into the applicants land to the extent of 0.11372 hectares; that a proclamation had been made over the applicant's property; that a suit at the ELC at Nakuru is pending hearing; that by a ruling of **Ohungo, J.** made on 5th March, 2020 the applicants application was dismissed and that status quo should be maintained pending appeal.

Grace Wambui Mukuha, the 2nd respondent, in a replying affidavit it is deposed that the applicant was/is a monthly rent paying tenant of the respondents since 2014; that the Certificate of Lease in the name of the applicant was obtained fraudulently; that the applicant's agent had in 2017 confirmed that there was a tenancy agreement by the applicant with the respondents; that the respondents had applied for distress of rent at the Rent Restriction Tribunal which ordered the applicant to pay rent; an application for stay of execution at the High Court was dismissed; that the applicant had not paid rent or arrears; that the applicant had then filed a suit at the subordinate court asking for similar orders which was dismissed and, finally, that the applicant is a man who comes to court with unclean hands, who has filed multiplicity of suits but had not paid rent arrears Kshs.1,050,000.

I have considered the application and the rival positions taken by the parties.

In the ruling of Ohungo, J. delivered on 5th March, 2020 the learned Judge did not find any specific threat facing the applicant as no particular date of proclamation or distress had been given by the applicant. The Judge found that the applicant had not established a *prima facie* case to the standard set in the case of **Giella v Cassman Brown & Company Limited [1973] EA 358**. The Judge also reviewed the various matters that the applicant had filed in various courts and found in the event that the applicant was not entitled to an equitable remedy.

The principles that apply in applications of this nature are well known and were summarized in the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR**. For an applicant to succeed in such an application he must, firstly, demonstrate that he has an arguable appeal which is the same as saying that the appeal, or intended appeal, is not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory absent stay.

The record shows that the applicant has filed a multiplicity of suits and applications which he has lost. It has been found that he is a tenant who should pay rent but he has not paid the rent or arrears. I cannot, in the premises, see an arguable point in the intended appeal. Being of that view I need not consider the second limb of the principles in an application of this nature.

As proposed by Sichale, JA whose draft ruling I have had the benefit of perusing, the Motion fails and is dismissed with costs to the respondents.

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

S. ole KANTAI

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JUDGE OF APPEAL