



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (NAMBUYE, MUSINGA & GATEMBU, JJA.)

CIVIL APPLICATION NO. NAL 317 OF 2018 (UR 255/2018)

BETWEEN

PETERSON MURAGE KARIUKI.....APPLICANT

AND

PETER KAMAU KUNG’U.....1<sup>ST</sup> RESPONDENT

JAMES THENDU GITAU.....2<sup>ND</sup> RESPONDENT

GITHUNGURI CONSTITUENCY RANCHING

COMPANY LIMITED..... 3<sup>RD</sup> RESPONDENT

THE LAND REGISTRAR, THIKA.....4<sup>TH</sup> RESPONDENT

WILSON MUCHIRI KARAGU.....5<sup>TH</sup> RESPONDENT

MARGARET WANGUI MUCHIRI.....6<sup>TH</sup> RESPONDENT

(An Application for stay of any further proceedings in the Environment and Land Court at Thika(L. Gacheru, J.) Dated 23<sup>rd</sup> April, 2018

in

*Thika ELC Case No. 213 of 2017)*

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**RULING OF THE COURT**

Before us is a Notice of Motion dated the 30<sup>th</sup> October, 2018, and filed on 6<sup>th</sup> November, 2018 although the date stamp on the cover erroneously reads 6<sup>th</sup> November, 2017. It is brought under **section 3A and 3B** of the Appellate Jurisdiction Act Cap 9 (erroneously cited as Cap 8) of the laws of Kenya, **Rule 5(2) (b)** of the Court of Appeal Rules, 2010, and all other enabling provisions of the law. One substantive relief is sought namely:-

***(1) That pending the hearing and determination of the intended appeal, this Honorable Court be pleased to issue an order staying any further proceedings in the Environment and Land Court, Thika case No. 213 of 2017 Peter Kamau Kung’u versus James Thandu Gitau & 5 others.***

***(2) That the costs of the application be in the cause.”***

It is supported by grounds on its body and a supporting affidavit. It has not been formally opposed by any of the named respondents.

On the hearing date, learned counsel **Mr. Karei**, holding brief for **Mr. Patrick Ngunjiri** instructed by the firm of Patrick Shaw Associates appeared for all the applicants, while **Mr. Ochieng** holding brief for **Mr. Muthomi**, instructed by the firm of Milimo Muthomi & Co.

Advocates appeared for the 2<sup>nd</sup> respondent. There was no representation for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents. The Court being satisfied that the advocates for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents had notice of both the notice of motion and the hearing date as demonstrated by the content of the affidavit of service of **Stephen Githinji Kinuthia** deposed on 17<sup>th</sup> December, 2018 and filed in Court on the 19<sup>th</sup> December, 2018, allowed the applicant to prosecute the application, canvassed by way of oral submissions.

**Mr. Karei's** submission which is a reiteration of the contents of the supportive documents is that, the applicant is aggrieved by the ruling of the ELC Thika in case Number 213 of 2017 dated 23/4/2018; that there is a notice of appeal filed timeously on 7<sup>th</sup> May, 2018, intending to appeal against the portion of the said ruling stating that the 5<sup>th</sup> and 6<sup>th</sup> respondents are not necessary parties to the ongoing litigation; that he has an arguable appeal which raises triable issues with a high probability of success; that if the order of stay sought is not granted, the proceedings before the ELC, Thika Law Courts will proceed to their logical conclusion, to the detriment of the applicant who intends to rely on the information and documentary evidence currently in the possession of the 5<sup>th</sup> & 6<sup>th</sup> respondents in support of his case.

In further support of the application, the applicant also contends that he purchased the suit property on the 19<sup>th</sup> April, 2014 from the 5<sup>th</sup> and 6<sup>th</sup> respondents who were the then registered proprietors of the suit property; that the conclusion of the sale transaction between him and the 5<sup>th</sup> and 6<sup>th</sup> respondents was pursuant to a confirmation by way of search conducted against the title and which search confirmed that there were no encumbrances registered against the said title; that it was not until May, 2017, while in the process of transferring the suit property to a 3<sup>rd</sup> party for valuable consideration, that he discovered that a prohibition order had been registered against the title to the suit property, pursuant to orders issued by Milimani law courts ELC court in suit number 1426 of 2017, **Peter Kamau Kungu versus the Land Registrar**; that he applied to have himself as the then current title holder and the 5<sup>th</sup> and 6<sup>th</sup> respondents as the persons who had sold him the suit property joined as parties to the ongoing proceedings; that while the trial Judge acceded to his request for his joinder, she declined to accede to the request for the joinder of the 5<sup>th</sup> and 6<sup>th</sup> respondents as parties to the said ongoing proceedings, thereby triggering the intended appeal. The applicant therefore reiterates that the 5<sup>th</sup> and 6<sup>th</sup> respondents are not only necessary but also crucial parties to the ongoing litigation; that interests of justice to all the parties involved in the ongoing litigation will best be served if the 5<sup>th</sup> and 6<sup>th</sup> respondents were made parties to the said litigation; and lastly that the intended appeal will be rendered nugatory if the order sought is not granted.

To buttress the above submission, **Mr. Karei** cited the case of **Safaricom Limited versus Ocean View Beach Hotel limited & 2 others** [2010] eKLR; and **Kenya Commercial Bank Limited versus Nicholas Ombija** [2009] eKLR, both on the principles that guide the exercise of the Courts' jurisdiction under Rule 5(2)(b) of the Court of Appeal Rules.

**Mr. Ochieng** chose not to make any submissions. He left the matter to the Court to determine in whichever way it deemed appropriate.

Our jurisdiction to intervene has partially been invoked under **section 3A** and **3B** of the Act. These provide as follows:-

**3A.(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.**

**(3) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**(4) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.**

**3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-**

**(a) the just determination of the proceedings;**

**(b) the efficient use of the available judicial and administrative resources;**

**(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**

**(d) the use of suitable technology."**

These are the provisions that enshrine the overriding objective principle of the Court as distilled and refined by the Court in numerous decisions of the Court. We find it prudent to reproduce and associate ourselves fully with a summary of those principles as set out in the case of **Abok James Odera T/A. J. Odera & Associates' versus John Patrick Machira T/A Machira & Co. Advocates** [2013] eKLR as follows:

**"The principle confers on the Courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. (See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Oriental Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008). The application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the Court to be guided by a broad sense of justice and fairness. (See the case of Kariuki (supra). In applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of Deepak Manlal Kamani and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009). There is a mandatory requirement**

*that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of Dorcas Indombi Wasike versus Benson Wamalwa Eldoret Civil Application No. 87 of 2004). The overriding objective principle is intended to re-energize the process of the Court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made thereunder are “02” compliant (see the case of Hunker Trading Company Limited versus ELF Oil Kenya Limited Civil Application No. Nai 6 of 2010 (UR3 (2010)). The principal aim of the overriding objective principle is to give the Court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective. (See the case of Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR). And, lastly, that the “02” principle does not cover situations aimed at subverting the expeditious disposal of cases or appeal, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the Court process (See the case of Kenya Commercial Bank Vs. Kenya Planters Co-operative Union Nai Civil Application No. 85 of 2010 (UR) 62 of 2010”.*

Central in the above principles is the speedy disposal of matters coming before the Court, a matter we shall revert to at a later stage of this ruling.

Turning to the jurisdiction invoked under **Rule 5(2) (b)** of the Rules of the Court, it is our view that the principles that guide the exercise of the Court’s jurisdiction under these same provisions have also been crystalized by case law emanating from the Court.

We find it prudent to highlight the salient features of the same as follows: The jurisdiction is said to be original, independent and discretionary. See **Githunguri versus Jimba Credit Corporation Limited No. (2) [1988] KLR (The Githunguri case)**. It is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the appeal where one has been filed or is intended. See the case of **Equity Bank Ltd. versus West Link Mbo Ltd Civil Application No. 78 of 2011 (UR) 2013 eKLR**. The jurisdiction arises where the applicant has lodged a notice of appeal. See the case of **Safaricom Ltd Versus Ocean View Beach Ltd. & 2 others**, Civil Application No. 327 of 2009 (UR).

As a matter of both law and practice, the applicant is obligated to satisfy the twin principles to earn a relief under the above rule. These are, first, the appeal or the intended appeal is arguable and second, that if the stay sought is not granted, the appeal/intended appeal as the case may be will be rendered nugatory. See the **Githunguri case** (supra).

By arguable is not meant an appeal or intended appeal which must succeed but one which raises a bona fide issue worthy of consideration by the Court. See **Kenya Tea Growers Association and Another versus Kenya Planters Agricultural Workers’ Union, Civil Application No. Nai 72 of 2001 (UR)**.

An arguable appeal need not raise a multiplicity or any number of such points. A single arguable point is sufficient to earn an applicant such a relief (see **Damji Premji Mandavia versus Sara Lee Household & Body Care (K) Limited Civil Application No. Nai.345 of 2005 (UR)**); **Kenya Railways versus Ederman Properties Ltd, Civil Appeal No. Nai 176 of 2012** and **Ahmed Musa Isamel versus Kumba ole Ntamorua & 4 others**, Civil Appeal No. Nai 256 of 2013.

As for the second limb, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of **Stanley Kangethe Kinyanjui versus Tony Ketter & 5 others**, C.A. No. 31 of 2012 where this Court stated, *inter alia*:

**“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.”**

We have given due consideration to the above two sets of principles in light of the sole submissions put forth by **Mr. Karei** on behalf of the applicant. It is our view and correctly so as demonstrated by the principles in the case law highlighted above that irrespective of the lack of opposition to the applicant’s application, the applicant is obligated to satisfy the twin ingredients for granting relief under **Rule 5(2)(b)** of the Rules of the Court, which is the substantive provision cited as the basis for seeking our intervention.

In support of the first ingredient, the applicant relies on the annexed memorandum of appeal raising eight (8) grounds of appeal. In summary, the applicant intends to urge before this Court that the learned Judge not only misapprehended the facts but also misapplied the law to those facts when she declined to allow the application for joinder of the 5<sup>th</sup> and 6<sup>th</sup> respondents as well to the ongoing proceedings. The position in law as highlighted in the guiding principles set out above is that, demonstration of one arguable point will suffice. Second, that such an arguable point need not be one that will eventually succeed, but one which will make the tribunal seized of the matter invite the opposite party to make a response thereto.

In the instant application, issue as to whether the 5<sup>th</sup> and 6<sup>th</sup> respondents are necessary and crucial parties to the proper determination of the ongoing litigation is arguable. The applicant has therefore satisfied the first ingredient for granting relief under Rule 5(2)(b) of the rules of the Court.

As for the second ingredient, the applicant’s uncontroverted position is that, he purchased the suit property from the 5<sup>th</sup> and 6<sup>th</sup> respondents’ who were the then registered owners of the suit property after carrying out due diligence verifications on the title to the suit property; that it was only after ensuring that there were no encumbrances registered against the said title that the transaction between him and the 5<sup>th</sup> and 6<sup>th</sup> respondents was concluded; that the 5<sup>th</sup> and 6<sup>th</sup> respondents are in possession of vital information and crucial documents necessary for the determination of the pending litigation; that in the interests of justice to the parties to the said litigation, it is imperative that the two be joined as respondents to the ongoing litigation.

We have considered the above grounds in light of the principles of law that guide the Court in sustaining the 2<sup>nd</sup> ingredient for the granting of a relief under the **Rule 5(2) (b)** procedures. Our view is that, declining the stay order sought will neither render the intended appeal

nugatory, nor will the applicant suffer prejudice in any way or rendered remediless. Our reason for finding so is that, the applicant already has a remedy in law, namely, an option institute third party proceedings against the 5<sup>th</sup> & 6<sup>th</sup> respondents in the ongoing proceedings. Such a joinder would enable the two intended parties to participate fully in the proceedings in their own right as parties to the said proceedings. They will also have an opportunity and in the same capacity to tender in evidence the crucial evidence the applicant alleges they are in possession of. Alternatively, it will also suffice if the intended parties were to be called as witnesses and tender the same evidence before court for consideration alongside any other evidence that may have been tendered by the parties in the said proceedings.

In the result and on the basis of the above reasoning, we are not satisfied that the applicant has satisfied the second ingredient, that the intended appeal shall be rendered nugatory if the order sought is not granted. The position in law is that, both prerequisites must be satisfied before an order can issue under the Rule 5(2)(b) procedures, which we are afraid is not the case here.

Turning to the application of the **sections 3A & 3B** of the appellate Jurisdiction Act to the rival positions herein, it is our finding that, declining the order sought will not defeat the overriding objective principles enshrined in the said sections. Instead, it will promote the ideal in the said principle as the applicant will simply move to the ELC and institute third party proceedings against the 5<sup>th</sup> & 6<sup>th</sup> respondents, and in the process contribute to the expeditious progression of the proceedings before the ELC, as opposed to holding them in abeyance pending appeal, thereby prolonging the litigation.

The upshot of the above reasoning is that, we find no merit in the application. It is accordingly dismissed. Since it was not defended, we order each party to bear its own costs.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of February, 2019.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU FCIArb**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**