



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: (NAMBUYE, GATEMBU & MURGOR, JJA.

CIVIL APPLICATION NO. NAI. 355 OF 2018 (UR 288/2018)

BETWEEN

JAMES MWANGI NJEHIA.....1ST APPLICANT

JANETTA WANJIKU MWANGI..... 2ND APPLICANT

AND

SIMON KAMAU..... RESPONDENT

(An Application for stay of Execution of the entire orders and Judgment of the High Court of Kenya at Nairobi pending the lodging, hearing and determination of the intended appeal from the Judgment (S. Okong'o) Dated 1st November, 2018 in ELC No. 1818 of 2002)

RULING OF THE COURT

Before us is a Notice of Motion dated the 27th November, 2018 and lodged on the 29th November, 2018, brought under **Rule 5(2) (b)** of the Court of Appeal Rules. One substantive prayer is sought namely that, there be a stay of execution of the order made by the Learned Judge, delivered on the 1st of November, 2018 in ELC No.1818 of 2002, pending the hearing and determination of the intended appeal, together with an attendant prayer that costs of the application be in the intended appeal. It is supported by grounds in its body, a supporting and supplementary affidavits together with annexures thereto. It has been opposed by a replying affidavit of **Simon Kamanu**, deposed on 19th December, 2018 and lodged on 21st December, 2018, together with annexures thereto. It was canvassed by way of oral submissions. Learned counsel **Mrs. Judith Guserwa** appeared for the applicants, while learned counsel **Mr. Simon Kamere** appeared for the respondent.

In support of the application, the applicants contend that they acquired the suit property for valuable consideration way back in 1994, from one **Mary Murugi John**, now deceased; that the said **Mary** passed on in the year 1998 four years after the purchase and the transfer of the suit property in their favour; that it was not until the year 2004 when the respondent appeared on the scene alleging forgery of title that had been executed and transferred in their favour in 1998; that they are genuinely aggrieved by the decision of the ELC (S. Okong'o, J.) delivered on 1st November, 2018 divesting their ownership of title to the suit property from them and vesting it in favour of the respondent; that being dissatisfied with that decision, the applicants timeously filed a Notice of Appeal dated 1st of November, 2018 intending to appeal against the whole of the said decision; that the intended appeal has high chances of success as the draft memorandum of appeal annexed to the application raises arguable points.

It is further the applicants' contention that the respondent has registered the resulting decree of the ELC court without the benefit of the original title which is still in the possession of the applicants; and also before the expiry of the thirty (30) days granted to the applicants to surrender the original title to facilitate the change of the title holding from them and in favour of the respondent; and which action, the applicants contend was taken by the respondent in order to defeat the outcome of the application under consideration; that the interest of justice to both parties to the application under consideration demand that, the stay order sought be granted pending the hearing and determination of the intended appeal as there is a likelihood of transfer of the suit property in favour of 3rd parties which will be highly prejudicial to the applicants interests.

In Opposition to the application, **Mr. Kamere** reiterated the content of the replying affidavit and submitted that the intended appeal is not arguable as the Judgment of the ELC court was well considered and complied with every aspect of the law; that there was sufficient demonstration in the evidence tendered before the trial court that the transfer of the suit property to **Mary John Murugi** as well as the subsequent transfer of the same to the applicants was tainted with fraud to which the applicants were proven to have been party; that the Judgment intended to be appealed against has already been executed as the respondent is now the current registered proprietor of the suit property effective 26th November, 2018. There is therefore nothing to stay, as the applicants' application has been over taken by events and

should therefore be dismissed with costs.

In reply to the respondent's submission, **Mrs. Guserwa** added that the applicants application has not been overtaken by events solely by reason of the change in the title of the suit property in favour of the respondent; that there is need for the Court to intervene and stay any likelihood of any transfer of the suit property from the respondent as the current registered title holder to 3rd parties pending the hearing and determination of the intended appeal. Lastly, counsel undertook to expedite the appellate process as soon as capacitated to do so.

Our jurisdiction to intervene has been invoked under **rule 5(2) (b)** of the Rules of the Court. The principles we are enjoined to bear in mind when determining the application have now been crystalized by case law. We find it prudent to highlight a few as follows: The jurisdiction is said to be original, independent and discretionary. See **Githunguri versus Jimba Credit Corporation Limited No. (2) [1988] KLR**. 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 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 in this Court stated *inter alia* thus:

“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.”

Both limbs must be established before a party can earn the relief under Rule 5(2) b of the Court of Appeal rules, 2010. See **Republic versus Kenya Anti-Corruption Commission & 2 Others, 2009 KLR 31** and the **Githunguri case**.

We have given due consideration to the above guidelines, in light of the rival submissions set out above. We now proceed to determine the merits of the application.

With regard to the first ingredient, the applicants have relied on the draft memorandum of appeal annexed to the application. In summary, the complaints the applicants' intend to agitate in the intended appeal are that the learned Judge erred when:

- i. he failed to properly appraise and appreciate the evidence and submission put forth by the applicants' in support of their case.**
- ii. he ordered cancellation of the applicants' ownership of the suit property in favour of the respondent on alleged forgery without basis.**
- iii. he directed the Land Registrar who was not party to the proceedings to cancel the registration of the suit property in favour of the applicants and substitute it with a registration in favour of the respondent.**
- iv. he granted a permanent injunction against the applicants in favour of the respondent who was not in possession of the suit property at the time the said injunction was issued.**

In response to the applicants' contention that, in light of the above summarized intended grounds of appeal, their application has met the threshold on the first ingredient, that the intended appeal is arguable, **Mr. Kamere** submitted that the trial Court Judgment was well founded both on the facts and the law. On that account, counsel urged us to fault the application for the failure to establish the first ingredient.

On our own appreciation of the above intended grounds of appeal, it is our view that issues of whether forgery was proved to the required legal threshold; whether the Registrar was a necessary party to the proceedings before the High Court; and lastly, whether a permanent injunction could issue in favour of the respondent, a party alleged not in possession as against the applicants who were allegedly in possession are all in our view arguable, notwithstanding that these need not ultimately succeed.

Turning to the second ingredient, it is not disputed that the contest between the opposing parties is who should be the rightful and legal owner of the suit property. It would also appear that registration was effected in favour of the respondent before time allowed for the applicants to surrender the original title to facilitate the change in the registration of title in favour of the respondent had lapsed. The law on the rights of a proprietor of property need no exposition herein as these are within public domain. One such right is the right of disposition to 3rd parties. The applicants have expressed the fear of the property being disposed to 3rd parties. We do not think the fear of disposition to 3rd parties is unfounded. Should the appeal ultimately succeed, when the respondent would have already divested himself of title to the suit property, then such a success would be rendered nugatory. On the basis of the above reasoning, we are satisfied that the 2nd ingredient has

also been satisfied.

We accordingly allow the application in terms of prayer 3 of the application. We order that the *status quo* on the registration of the suit property as at 26th November, 2018 be maintained pending the hearing and determination of the intended appeal. Costs of the application to abide the outcome of the intended appeal. The applicants to file and serve the record of appeal for the intended appeal within thirty (30) days from the date of their capacitation for them to do so.

Dated and delivered at Nairobi this 8th day of February, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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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.

Deputy Registrar.