



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (VISRAM, NAMBUYE, & J. MOHAMMED, JJA.)

CIVIL APPLICATION NO. NAL. 52 OF 2018 (UR 44/2018)

BETWEEN

GEORGE GATHURU KARANJA.....APPELLANT/APPLICANT

AND

GEORGE GATHURU THUO..... 1ST RESPONDENT

MARY WANJIKU THUO.....2ND RESPONDENT

GODFREY WANG'ANG'A THUO.....3RD RESPONDENT

(An Application for stay of execution of the orders of the High Court pending the intended appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (R.E. Ougo, J.) Dated 2nd October, 2017

in

H.C. Succession Cause No. 364 of 1993)

RULING OF THE COURT

Before us is a notice of motion dated and filed on the 27th February, 2018, brought under **section 3, 3A & 3B** of the Appellate Jurisdiction Act, Rules 4 & 47 (1) and 2 of the Court of Appeal Rules 2010, Court of Appeal Practice Directions (Civil Appeal and Applications 2015). Two substantive prayers remain for our determination namely, that:-

- 1. This Honourable Court be pleased to grant a stay of execution of the orders made by the High Court on 2nd October, 2017 in Nairobi High Court Succession Cause No. 364 of 1993 by the Hon. Justice R.E. Ougo.***
- 2. This Honourable Court to order a stay of all or further proceedings and any subsequent orders in Nairobi High Court Succession Cause No. 364 of 1993 pending the lodging and hearing of the intended appeal.***
- 3. That the costs of the application be provided for.***

It is supported by grounds on its body and a supporting affidavit, together with annexures thereto. It is opposed by a replying affidavit of **George Gathuru Thuo** deposed on 14th December, 2018 and filed on the 17th December, 2018 together with annexures thereto.

It was canvassed by way of oral submission. Learned counsel **Miss Susan**, instructed by the firm of S.J. Nyang & Co. Advocates appeared for the applicant, while learned counsel **Philip Wambugu**, instructed by the firm of Philip Henry Associates appeared for the respondents.

It is the applicant's submission that he is dissatisfied with the Judgment of the High Court in Succession Cause No. 364 of 1993, delivered on

the 2nd October, 2017; that he timeously filed a notice of appeal dated 10th October, 2017, intending to appeal to the Court of Appeal against the whole of that decision; that the intended appeal raises triable issues; that, he was an adopted son of the deceased and was therefore entitled to a share of the deceaseds' estate; and lastly that the intended appeal will be rendered nugatory if the orders sought are not granted.

In opposition to the application, **Mr. Wambugu** submitted that the Judgment intended to be stayed is fully executed as the applicant has already been evicted from the suit property. Counsel therefore urged us to dismiss the application with costs.

In reply to the respondents' submission, **Miss Susan** submitted that although the applicant had indeed been physically evicted from the suit property, the permanent structures he had constructed thereon were still intact and should be preserved pending the hearing and the determination of the intended appeal.

Our invitation to intervene has been invoked under the provision of law cited above. These provide as follows:

“3(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under any law.

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.

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.

(2) 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).

(3) 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.”

Section 3 enshrines the appellate jurisdiction of the Court, while **sections 3A** and **3B** of the Act, enshrine the overriding objective principle of the Court. Rule 4 which deals with extension of time for appellate purposes has no application to the application under consideration, while **Rule 47(1) (2)** is simply a procedural rule governing the processing of applications that need urgent disposal. The core rule that ought to have been cited by the applicant for accessing the above substantive reliefs is **Rule 5(2) (b)** of the rules of the Court. It provides as follows:

“(b) In any civil proceedings, where notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

The failure to so cite the said rule does not *per se* preclude us from invoking it in the determination of the application as this is the rule of the Court on which the principles that guide the exercise of the Court's jurisdiction to either grant or withhold the reliefs sought by the applicant herein are anchored. Authority for us to invoke its application herein, notwithstanding, the applicants failure to so cite it as an access provision, is well founded on the provision of **Article 159(2)(d)** of the Kenya Constitution 2010, which enjoins us not to render justice based on technicalities but on substantial justice. The second is the inherent power of the Court as enshrined in Rule 1(2) of the rules of the Court 2010. See **Equity Bank Limited versus West Link Mbo Limited** [2013] eKLR, wherein, Musinga, JA *inter alia* stated as follows:-

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate....

inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion.”

The Supreme Court in the case of **Board of Governors, Moi High School, Kabarak & Another versus Malcolm Bell** [2013] eKLR *inter alia* added the following:

“...inherent powers are endowments to the Court such as will enable it to remain standing, as a Constitutional authority, and to ensure its internal mechanisms are functional; it includes such powers as enable the Court to regulate its internal conduct, to safeguard itself against contemptuous or disruptive intrusions from elsewhere, and to ensure that its mode or discharge or duty is conscionable, fair and just.”

As for the principles that guide the Courts’ jurisdiction under sections 3A and 3B of the Act, see the case of **Abok James Odera T/A. J. Odera & Associates’ versus John Patrick Machira T/A Machira & Co. Advocates** [2013] eKLR wherein the said principles were stated 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 (UR) (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”.

The principles that guide the Court in the exercise of its mandate under Rule 5(2)(b) are 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 the 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 enshrined in this provision in order to earn a relief under the said rule. These are, first, that 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 a 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 principles, in light of the rival submissions set out above. It is our finding that, we are properly seized of the application as there is a valid notice of appeal on record and which was timeously filed. We wish to re-echo the principles highlighted above that, in order to succeed on his application, the applicant has to satisfy the twin principles that govern the granting of relief under **Rule 5 (2) (b)** of the rules of the Court, namely, that the intended appeal is arguable; and second, that if the relief sought is not granted, the intended appeal will be rendered nugatory.

In support of the first ingredient, the applicant relies on the draft Memorandum of Appeal annexed to the application. In summary, the applicant intends to urge on appeal that the Judge not only misapprehended the evidence tendered before court but also misapplied the law to the said evidence and thereby arrived at a wrong conclusion when she ruled that the applicant was not a bona fide beneficiary to the estate of

the deceased. It is now trite that only one arguable point suffices to satisfy the first limb of the above principles. Second, that such an arguable point need not be one that will ultimately succeed, but one which will make a tribunal properly directing its mind to the facts before it, to invite the opposite party to respond to the said point. In the instant application, any appellate tribunal properly directing its mind to the Succession courts' ruling that the applicant was not a *bona-fide* beneficiary to the estate of the deceased, a position intended to be contested by the applicant on appeal, will definitely invite the respondents to respond to the said complaint. In light of the above reasoning, we are satisfied that the applicant has satisfied the first limb of the twin principle that the intended appeal is indeed arguable.

Turning to the second ingredient, it has been conceded by the applicant that he has already been evicted from the suit property. The decree has therefore been executed. It matters not that permanent structures belonging to the applicant are still standing on the suit property. The issue of their preservation pending appeal does not form part of the prayers sought in this application. In fact the issue of the existence of the permanent structures on the suit property was never raised in the applicant's supporting documents, but by his counsel from the bar. What was raised at paragraph 21 of the supporting affidavit was threatened eviction. It is therefore our view that, the presence of permanent structures on the suit property does not therefore count towards the determination as to whether the threshold for the 2nd ingredient has been satisfied. The applicant's fear as deposed to in paragraph 21 of the supporting application was over threatened eviction which by his own counsel's admission has already been executed. It is a requirement that for any relief to issue under **Rule 5 (2) (b)** of the rules of the Court procedures, both ingredients must be satisfied. Herein, only one ingredient has been satisfied. The application therefore fails on this account. It is accordingly dismissed.

Considering that the litigation giving rise to this application involves a succession dispute, we direct each party to bear its own costs.

Dated and delivered at Nairobi this 22nd day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR