



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 128 OF 2018 (UR. 108/2018)

BETWEEN

PRESBYTERIAN CHURCH OF EAST AFRICA (UTHIRU CHURCH)1ST APPLICANT

CHAIRPERSON- PCEA UTHIRU CHURCH.....2ND APPLICANT

-VERSUS-

WANYIRI KIHORO1ST RESPONDENT

MUGURE WANYIRI KIHORO.....2ND RESPONDENT

(Both suing as administrators of the Estate of Dr. Wanjiru Kihoro)

TOWN COUNCIL OF KIKUYU3RD RESPONDENT

HON. ATTORNEY GENERAL4TH RESPONDENT

(An application for stay of execution of the judgment and Decree of the

Environment and Land Court of Kenya at Nairobi (E. A. Obaga, J.)

dated 9th April, 2018 in ELC No. 884 of 2013)

RULING OF THE COURT

Background:

1. Before us is a Notice of Motion dated 27th April, 2018 expressed to be brought under Rule 5(2)(b) of the Court of Appeal Rules (the Court Rules). The **Presbyterian Church of East Africa (Uthiru Church)** and **Chairperson- PCEA Uthiru Church (the applicants)**, seek an order of stay of execution pending the hearing and determination of their appeal against the judgment and Decree of the Environment and Land Court, (ELC in Nairobi) (**E.A. Obaga, J**) who found in favour of **Wanyiri Kihoro** and **Mugure Wanyiri Kihoro (Both suing as administrators of the Estate of Dr. Wanjiru Kihoro)** (the 1st and 2nd respondents).
2. The application is founded on the grounds set out on the face of the motion and also on the averments deposed in the supporting affidavit of **Beatrice Wanjiku Mugo** (the 2nd applicant) who is a member and retired Elder and Chairperson of PCEA Uthiru Church.
3. In a nutshell, the 1st and 2nd respondents are the administrators of the Estate of the late Dr. Wanjiru Kihoro (deceased) who was the registered proprietor of LR No. Dagoretti.Uthiru/T 382 (the suit property). The deceased bought the suit property from one Ndibo Nthenge and the suit property was transferred to the deceased on 31st March, 1983.
4. The 1st and 2nd respondent filed suit against the applicants claiming *inter alia* judgment against the respondents jointly and severally and requisite orders for eviction and removal of the trespassers' goods and property; orders for removal of the restriction and caution

placed on the suit property by the 3rd respondent and the 2nd applicant respectively to allow the transmission of the suit property; orders for payment of general compensation to the 1st and 2nd respondents in respect of loss of use, rents and mesne profits from the property and apportionment among the applicants and the 3rd and 4th respondents, exemplary damages, costs and interest.

5. The applicants filed a defence and raised a counter claim in which they contended that the 1st applicant had acquired title to the suit property through adverse possession and that the title in respect of the suit property should be registered in the name of the 1st applicant.

6. The learned Judge entered judgment in favour of the 1st and 2nd respondents and ordered as follows:-

“a. An order of eviction directed at the third and fourth defendants from LR No. Dagoretti/Uthiru/T 382 and removal of structures thereon within 90 days from the date of this judgment.

b. An order directing the removal of the restriction and caution placed on LR. No. Dagoretti/Uthuru/T. 382 forthwith.

c. Compensatory damages of Kshs.5,000/= to be apportioned as follows:-

i. Kshs. 2,000,000/= to be paid by the second defendant

ii. Kshs.3,000,000/= to be paid jointly and severally by the third and fourth defendants.

d. Exemplary damages of Kshs.2,000,000/= to be apportioned as follows:-

i. Kshs.500,000/= to be paid by the second defendant.

ii. Kshs.1,500,000/= to be paid by the third and fourth defendants jointly and severally.

e. Interest on (c) and (d) to be apportioned in the manner stipulated therein.

f. Costs of the suit to be apportioned in the respective ratio.”

7. Aggrieved by that decision, the applicants filed a notice of Appeal dated 11th April, 2018 on the basis of which the instant application was filed on the grounds that their appeal is arguable and not frivolous and if the order sought is not granted the respondents will proceed to execute the Decree for eviction by demolishing the PCEA Uthiru Church (the Church) erected on the suit property which has stood on the suit property since 1975 and that the intended appeal would therefore be rendered nugatory.

8. The 1st and 2nd respondents opposed the application and filed a replying affidavit sworn by the 1st respondent and filed in court on 15th May, 2018. The 3rd and 4th respondents did not file any response to the application.

Submissions

9. When the application came up for hearing, learned counsel, **Mr. Ng'ang'a** and **Mr. Kamau** appeared for the applicants. Learned counsel **Mr. Wanyiri Kihoro** appeared for the 1st and 2nd respondents. Learned counsel **Mrs. Grace Gichuhi** appeared for the 3rd respondent while learned counsel **Mr. K. Onyiso** appeared for the 4th respondent. **Mr. Ng'ang'a** for the applicants submitted that the ELC in its judgement ordered the eviction of the applicants and the demolition of the Church which had stood on the suit property for over 43 years; that an appeal has been filed being Civil Appeal No. 303 of 2018. Mr Nganga argued that the applicants have an arguable appeal *inter alia* determination of when time starts running for adverse possession to take effect and whether a demand letter constitutes interruption to a claim for adverse possession. Counsel submitted that the draft memorandum of appeal sets out other arguable grounds of appeal.

10. On the nugatory aspect, counsel submitted that there was an eviction order and if executed the substratum of the appeal will be defeated and the appeal will be rendered nugatory; that the applicants are in possession of the suit property; that the applicants have satisfied the two limbs under Rule 5 (2)(b) of the Court Rules and that there would be no substantial prejudice to the respondents should the suit property be preserved pending the hearing and determination of the appeal.

11. Learned counsel for the 3rd respondent did not oppose the application and associated herself fully with the applicants' submissions.

12. Learned counsel, **Mr. Kihoro** opposed the appeal and submitted that pursuant to section 27 of the repealed Registered Land Act, title was *prima facie* evidence of ownership; that the applicants were given a stay of 90 days until June 2018 to remove the structures erected on the suit property but had failed to do so and the time given had since expired; and that the Church was opened in 1990 and it was not true that the applicants have been on the suit property for 43 years.

13. On his part, counsel for the 4th respondent left the matter to court as the same is a private dispute between the applicants and the 1st and 2nd respondents.

14. In reply, **Mr. Ng'ang'a** clarified that the permanent church was opened in 1990 but there had been a temporary church on the suit property before 1990. Counsel urged us to allow the application.

Determination

15. We have considered the application, the affidavits and the oral submissions by counsel and the law. The jurisdiction of this Court in applications of the nature as the one before us is donated by **Rule 5(2) (b)** of the Court of Appeal Rules. The jurisdiction is original and discretionary.

In the case of **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others, Civil Application No. Nai 31/2012**, this Court stated inter alia;

“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 of appeal 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.”

16. In considering the application, we shall bear in mind these principles. On the issue of arguability, the applicants have set out several grounds in their draft memorandum of appeal including inter alia when time starts running for a claim of adverse possession to take effect and whether time against a claim for adverse possession stops running upon issuance of a demand letter by the registered proprietor.

17. The court is minded to avoid going into the merits of the intended appeal as this will be the preserve of the bench that will hear and determine the main appeal.

In the case of **Dennis Mogambi Mang'are V. Attorney General & 3 Others Civil Application No. NAI. 265 of 2011 (UR 175/2011)** this Court stated as follows:-

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

We are therefore satisfied that in the circumstances of this case the applicant has an arguable appeal.

18. On the nugatory aspect, as this Court held in **Reliance Bank Ltd Vs. Norlake Investments Ltd [2002] I EA 227**, the factors which could render an appeal nugatory are to be considered within the circumstances of each particular case and that in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated as follows:-

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

19. In the instant case, counsel for the applicants submitted that the substratum of the appeal will be lost should the eviction order be executed.

In the case of **Mukuma vs Abuoga [1988] KLR 645**, in which 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.”

20. From the circumstances of the application before us, we find that *prima facie*, there are grounds which merit serious consideration. The applicants have demonstrated that the appeal is arguable and will be rendered nugatory if the orders sought are not granted and the appeal succeeds.

As stated in **Ishmael Kangunyi Thande V Housing Finance Company of Kenya Limited, Civil Application No. Nai 157 of 2006** (unreported) in order to succeed in an application under **Rule 5(2)(b)** of the Court Rules the applicants have to establish not only that his appeal is arguable, but also that it is likely to be rendered nugatory if the orders of stay of execution is not granted and the appeal succeeds.

21. In the case of **African Safari Club Limited V Safe Rentals Limited, Nairobi Civil Appeal (Application) No.53 of 2010** (Unreported), this Court stated:-

“... with the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put hardship on scales. ... We think that the balancing act as described in the analysis of the parties before us, is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing in so far as is practicable. ...

We believe that the rules of procedure including rule 5 (2) (b) have considerable value in terms of administration of justice but new challenges brought about by the enactment of the oxygen principle brings into focus the fundamental purpose of civil procedure which is to enable the court deal with cases justly and fairly.”

22. Accordingly, we allow the application dated 27th April, 2018 and order that:-

1. A stay of execution of the Decree and Judgment of E. A. Obaga, J in Nairobi ELC Case Number 884 of 2013 delivered on 9th April, 2018 is granted pending the hearing and determination of Civil appeal No. 303 of 2018.

2. The costs of this application to abide by the outcome of the appeal.

Dated and delivered at NAIROBI this 22nd day of March, 2019.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.