



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: HANNAH OKWENGU, F. SICHALE & J. MOHAMMED J.J.A)

CIVIL APPLICATION NO. 326 OF 2013 (UR. 240/2013)

BETWEEN

SALOME NAIVANUI KEEN .....1<sup>ST</sup> APPLICANT

HUDSON MWANGI THUKU .....2<sup>ND</sup> APPLICANT

KEVIN THUKU.....3<sup>RD</sup> APPLICANT

LUCY WANJIRU KIGOME.....4<sup>TH</sup> APPLICANT

JOSEPH THUKU.....5<sup>TH</sup> APPLICANT

SUSAN NYARUAI..... 6<sup>TH</sup> APPLICANT

KAHURO THUKU.....7<sup>TH</sup> APPLICANT

GITHINJI THUKU..... 8<sup>TH</sup> APPLICANT

VERSUS

ALICE WANJIRU WANJOHI administratrix of the Estate of FRANCIS

WANJOHI NDIRANGU (Deceased) .....RESPONDENT

(An application for stay of execution of the judgment and Decree of the High Court of Kenya at Nairobi (Ouko, J.) dated 11th February, 2013

in HCCC No. 56 of 2008)

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RULING OF THE COURT

### Background

1. This is an application by **Salome Naivanui Keen, Hudson Mwangi Thuku, Kevin Thuku, Lucy Wanjiru Kigome, Joseph Thuku, Susan Nyaruai, Kahuro Thuku and Githinji Thuku**, (the applicants) under Rule 5 (2)(b) of this Courts Rules for *inter alia*, a stay of execution of the judgment and decree of the High Court (Ouko, J as he then was) delivered on 11th February, 2013. The judgment was entered in favour of **Alice Wanjiru Wanjohi** administratrix of the Estate of **FRANCIS WANJOHI NDIRANGU** (Deceased) (the respondent).

The learned Judge dismissed the applicants' suit with costs and found that the respondent is entitled to ownership and exclusive possession of land parcels LR. 453/3/1 and LR. No. 453/3/2 (the suit property). The learned Judge ordered the applicants to vacate the suit property within 90 days from the date of Judgment failing which they would be evicted.

2. Aggrieved by that judgment, the applicants filed an application in the High Court dated 8th March, 2013 seeking orders of stay of execution pending appeal. In a ruling dated 8th November, 2013 the learned Judge (H. A. Omondi, J) dismissed the application with costs and stated as follows:-

**“I find that there are no good grounds to warrant issuing orders of stay, and the application is dismissed with costs to the respondent.”**

3. Undeterred, the applicants filed this application on 2nd December, 2013 seeking a stay of execution of the judgment and decree made on 11th February, 2013 pending the lodging, hearing and determination of the intended appeal.

4. The application was anchored on the grounds stated on the motion and the supporting affidavit sworn by **Hudson Mwangi Thuku** who averred on behalf of all the applicants *inter alia* that all the applicants were brought up on the suit property; that the suit property is registered in the name of **Francis Wanjohi Ndirangu** (deceased); that the use and occupation of the suit property by the applicants has been open and uninterrupted for well over 12 years; that in 2008 the respondent visited the suit property and demanded that the applicants vacate the suit property; that the respondent has not had the use or occupation of the suit property and will not suffer prejudice that cannot be compensated by way of damages should the intended appeal fail; that their intended appeal has high chances of success and that the respondent is in the process of executing the judgment and decree of the court; that the applicants are apprehensive that they will be evicted from the suit property; that the applicants will suffer loss and damage if a stay of execution is not granted as the applicants will be rendered homeless and destitute if their homes and rental properties erected on the suit property are demolished.

### **Submissions**

5. When the applicants said notice of motion came up for hearing, learned counsel, **Mr. P. Mwiti** appeared for the applicants while learned counsel, **Mr. E. M. Mwangambo** was holding brief for **Ms. Sheila Mugo** learned counsel for the respondent. **Mr. Mwiti** submitted that a record of appeal had been filed but the number was not available. Counsel relied on the written submissions and authorities dated 24th March, 2015 and urged this court to grant stay orders.

6. On the aspect of arguability, the applicants have set out in their draft memorandum of appeal several grounds of appeal *inter alia* that the learned Judge erred in fact in dismissing the applicants claim that they had lived in the suit property independently, openly and uninterrupted for over 12 years and in failing to find that the original owners of the suit property, Ngoris Ole Kararu and Anna Memisi had not passed on a good title to the late **Francis Wanjohi Ndirangu**.

7. On the nugatory aspect, counsel submitted that the applicants were born and have lived in the suit property for over 40 years and they will be rendered destitute and homeless if they are evicted from the suit property.

8. The respondent opposed the application and had filed an application dated 15th December, 2016 seeking to strike out the applicants' notice of appeal filed on 20th February, 2013 for failure to file a record of appeal within the stipulated time. **Mr. Mwangambo** submitted that there was no competent appeal before the court and that the purported record of appeal was filed on 6th May, 2016 one year after the documents were supplied by the Deputy Registrar in contravention of the provisions of Rule 82 of the Court Rules which require a record of appeal to be filed within 60 days; that there was no application for extension of time and the applicants' application cannot stand and a grant of stay orders, will therefore be in vain.

9. On arguability, counsel submitted that in the absence of an appeal, the court cannot consider the two limbs of Rule 5 (2) (b) of this Courts Rules and the application must therefore fail for lack of merit.

### **Determination**

10. We have considered the applicants' notice of motion, supporting affidavit, written submissions, authorities cited and the law.

11. On the respondent's contention that no appeal lies as the applicants filed the record of appeal out of time, this Court in **National Industrial Credit Bank Limited v Aquinas Francis Wasike & another, [2006] eKLR** stated that there was no reason for determining the validity or otherwise of a notice of appeal when considering an application under **Rule 5 (2) (b)**. What is important is that a notice has been filed.

In the case of **Safaricom Limited V Ocean View Beach Hotel Limited & 2 Others, Civil Application No. 327 of 2009** (UR) this Court stated that **Rule 5(2)(b)** 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 to be filed. The applicants having filed a notice of appeal dated 19th February, 2013, their application under **Rule 5(2)(b)** for stay of execution is properly before us.

12. In the case of **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others, [2013] eKLR**, 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.”

13. In determining the principles governing grant of stay of execution pending appeal to this Court, we are guided by the determination in the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others Civil Application Nai. 258 of 1999** (unreported) where the court stated as follows:

**“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case -----”**

14. 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 that the learned Judge erred in law and fact in dismissing the applicants’ assertion that they had lived in the suit property independently, openly and uninterrupted for well over 12 years.

15. 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.”**

With that caveat, we are satisfied that the issues raised by the applicant in the memorandum of appeal are arguable.

16. On the nugatory aspect, as this Court held in **Reliance Bank Ltd Vs. Norlake Investments Ltd [2002] I EA 227**, the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and 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.”**

17. 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**, 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.”**

18. 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.

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.

19. Accordingly, we allow the application dated 2nd December, 2013 and order that:-

**1. A stay of execution of the judgment and Decree of (Ouko, J as he then was) in HCCC No. 56 of 2008 delivered on 11<sup>th</sup> February, 2013 is granted pending the hearing and determination of the intended appeal.**

**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.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**