



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, VISRAM & J. MOHAMMED JJ.A)**

**CIVIL APPLICATION NO. 181 OF 2018 (UR. 147/2018)**

**BETWEEN**

ELIAS MBAU NDUNGU.....1<sup>ST</sup> APPLICANT  
PAUL IRUNGU KAMAU.....2<sup>ND</sup> APPLICANT  
JOHN MUNENE NYANGAH.....3<sup>RD</sup> APPLICANT  
JENNIFER GATHONI.....4<sup>TH</sup> APPLICANT  
FLORENCE WAKONYO.....5<sup>TH</sup> APPLICANT  
SAMUEL WAMBUGU.....6<sup>TH</sup> APPLICANT  
MARY NJERI.....7<sup>TH</sup> APPLICANT  
RAPHAEL MUIRU.....8<sup>TH</sup> APPLICANT  
JOHN NGUGI NJUGUNA.....9<sup>TH</sup> APPLICANT  
FLORENCE MURIITHI.....10<sup>TH</sup> APPLICANT  
GEORGE KIURA MUGO.....11<sup>TH</sup> APPLICANT  
RAPHAEL NDIRANGU MATU.....12<sup>TH</sup> APPLICANT  
JACINTA W. KARANJA.....13<sup>TH</sup> APPLICANT  
JAMES KAMAU KITATI.....14<sup>TH</sup> APPLICANT  
VIRGINIA W. MUGERA.....15<sup>TH</sup> APPLICANT  
PAUL NGANGA NDERITU.....16<sup>TH</sup> APPLICANT  
HENRY GITAU NDIRANGU.....17<sup>TH</sup> APPLICANT  
DORIS K. MAITIMA.....18<sup>TH</sup> APPLICANT  
JOSEPH MUNYAO KATIKU.....19<sup>TH</sup> APPLICANT  
LUCY WANGARI KAMAU.....20<sup>TH</sup> APPLICANT

VERSUS

GRACE JENDEKA LUSIOLA.....RESPONDENT

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

Environment and Land Court of Kenya at Nairobi (K. Bor, J.) dated 30th May, 2018

in

ELC No. 650 of 2012)

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**RULING OF THE COURT**

**Background:**

1. Before us is a Notice of Motion dated 22nd June, 2018 expressed to be brought under Rule 5(2)(b) of the Court of Appeal Rules. **Elias Mbau Ndungu & 19 Others** (the applicants) seek an order of stay of execution of the judgment and decree of the Environment and Land Court (E&LC) in Nairobi, (K. Bor, J) pending the hearing and determination of the intended appeal.

2. The application is founded on the grounds set out on the face of the motion and also on the averments deponed in the supporting affidavit of the 1st applicant on behalf of the other 19 applicants. A brief background is that the applicants bought various plots from **Kenneth Gikonyo Mungai** who had purchased **Ruiru/Ruiru East Block 2/4842** (the suit property) from **Grace Jendeka Lusiola** (the respondent) and constructed their permanent residential homes on the plots excised from the suit property. The respondent who is the registered proprietor of the suit property filed E&LC case No. 650 of 2012 seeking a permanent injunction to restrain the applicants or their agents from remaining on or continuing occupation of the suit property; a mandatory injunction to compel the applicants to vacate the suit property and in default she be at liberty to evict them and demolish the structures erected on the suit property; and an order directing the Thika District Land Registrar to remove the caution registered against the suit property by the applicants and general damages for trespass; any other relief that the court may deem fit; and costs of the suit.

3. It was the applicants' claim that they purchased portions of the suit property from **Kenneth Gikonyo Mungai**; that they were shown the original title deed in respect of the suit property and a sale agreement between **Kenneth Gikonyo Mungai** and the respondent; that on the basis of these documents they signed sale agreements with **Kenneth Gikonyo Mungai's Company, Phibs Investments** which issued them ownership receipts upon payment of the agreed purchase price for their respective plots; and that they registered a caution against the suit property to protect their interest in respect of their respective portions of the suit property.

4. The learned Judge held that the respondent had proved her case on a balance of probabilities and ordered as follows:-

**1. That a permanent injunction be and is hereby issued restraining the defendants, their servants, agents and/or employees from remaining on or continuing in occupation of the property.**

**2. That a Mandatory injunction be and is hereby issued compelling the defendants, their servants, agents and/or employees to immediately and unconditionally vacate the property for the plaintiff's use and occupation and in default the plaintiff is at liberty to evict the defendants and demolish all structures on the property.**

**3. That an order is hereby issued directing the District Land Registrar Thika to remove the Caution registered against the property by the defendants.**

5. Aggrieved by that decision, the applicants filed this application on the grounds that they have an arguable appeal with good prospects of success; that they are apprehensive that the respondent will commence execution proceedings and demolish the permanent residential homes erected on their respective portions of the suit property where they have lived for about 10 years; that in the event execution proceeds, the intended appeal will be rendered nugatory.

6. The respondent opposed the application by filing two Notices of Preliminary Objection on 6th September, 2018 and 10th December, 2018. In the Notice of Preliminary Objection filed on 6th September, 2018, the respondent claimed that the applicant's Notice of Motion filed on 22nd June, 2018 is *sub judice* as a similar application by the applicants was pending before the E&LC. In the Notice of Preliminary Objection filed on 10th December, 2018, the respondent claimed that the Notice of appeal filed by the applicants on 19th June, 2018 was filed out of time without leave. The respondent has not filed a Replying Affidavit to this application.

**Submissions**

7. When the application came up for hearing, learned counsel, **Mrs. C. M. Kinyua** and **J. B. Mwangi** represented the applicants. There was no appearance for the respondent. The court record indicated that counsel for the respondent had been served with the hearing notice. **Mrs. Kinyua** relied on the grounds on the face of the applicants' application and the supporting affidavit by the 1st applicant. She urged that in view of the non-appearance by counsel for the respondent and no replying affidavit having been filed in opposition, the application should be allowed as prayed with costs.

**Determination**

8. We have considered the application, the supporting affidavits and the submissions by counsel and the law.

9. 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 Vs. 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.*”**

10. 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, *inter alia* whether the applicants were innocent purchasers for value without notice.

11. 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. The respondents counsel did not attend to argue the preliminary objection.

12. In the case of **Dennis Mogambi Mang’are V. Attorney General & 3 Others Civil Application No. NAI. 265 of 2011 (UR 175/2011** states as follows;-

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

In the circumstance of this case, we are satisfied that the grounds raised by the applicants, *inter alia*, whether the applicants were innocent purchasers for value without notice demonstrates that the applicants have an arguable appeal.

13. 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.”***

14. In the instant case, the 1st applicant deponed in his supporting affidavit that the applicants are apprehensive that the respondent will proceed and execute the decree and demolish the residential homes erected on the suit property which would cause irreparable loss and render the intended appeal nugatory.

15. We are guided by 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.”***

We are satisfied that if building constructed on the suit land by applicants are demolished, the applicants will suffer substantial loss which will render the intended appeal nugatory.

16. 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.

17. Accordingly, we allow the application dated 22nd June, 2018 and order that:-

***1) A stay of execution of the judgment and Decree of 30th May, 2018 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 8<sup>th</sup> day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

**ALNASHIR VISRAM**

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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**