IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 211 OF 2018

BETWEEN

FLORENCE SEYANOI KIBERA also known as

DOROTHY SEYANOI MOSCHION.....APPLICANT

AND

DEBORAH ACHIENG ADUDA.....1ST RESPONDENT

RENE JOHNY DIERKX.....2ND RESPONDENT

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

Environment & Land Court (K. Bor, J.) dated 27th September, 2017

in

ELC No. 1047 of 2013)

RULING OF THE COURT

1. This ruling is in respect of an application by the applicant brought under **rules 5(2) (b), 42(1) and 47(1) and (2)** of the **Court of Appeal Rules.** The applicant seeks stay of execution of the decree given on 27th September, 2018 by the Environment and Land Court (K. Bor, J.) and an injunction to restrain the Director of Surveys and the Registrar of Titles, their agents, servants and/or assigns from entering upon, surveying, sub dividing, excising and transferring to the respondents one (1) acre or any portion of the applicant's parcel of land known as L.R. No. 5892/22 Karen, Nairobi (the suit land) pending hearing and determination of an intended appeal.

2. The brief facts that gave rise to this application are that by an agreement dated 16th February, 2012, the applicant, who is the registered owner of the suit land, agreed to sell to the respondents a portion of the suit land measuring one (1) acre at an agreed purchase price of Kshs.28,000,000/=.

3. The respondents paid a deposit of Kshs.10 million on the execution of the agreement and the balance was to be paid by agreed instalments thereafter. As per the sale agreement, the respondents were to take possession of the one (1) acre upon execution of the agreement and payment of the said deposit. It was also a term of the sale agreement that the property sold shall be free from any encumbrance.

4. The applicant did not however give the respondents possession of the said parcel of land. To the respondents' dismay, the applicant leased the entire suit land to a third party. The applicant also failed to refund the deposit of Kshs. 10 million.

5. The respondents filed a suit against the applicant seeking an injunction to restrain the applicant from disposing of the one (1) acre and for specific performance of the sale agreement failing which the Director of Survey and Registrar of Titles be directed to execute all the necessary documents to effect the transfer of the one (1) acre to them.

6. The applicant contended that due to the respondents' breach of the sale agreement, the same had been rescinded and the deposit forfeited in accordance with terms of the agreement.

7. When the respondents' suit came up for hearing, neither the applicant nor her advocates attended court. The suit was heard and the trial court entered judgment for the respondents and granted the orders sought by the respondents. The judgment was delivered on 27th September, 2017.

8. Subsequently, the applicant filed an application to set aside the said judgment stating, *inter alia*, that her advocate failed to attend court on 24tH July, 2017 for the hearing of the suit because he had wrongly diarised the hearing date as 24th July, 2018.

9. The learned judge was not inclined to exercise her discretion in favour of the applicant and rejected the application, thus prompting the applicant to move to this Court.

10. In her application before this Court, the applicant contends that the learned judge, in rejecting her application to set aside the default judgment, denied her an opportunity to be heard and unjustly penalized her for mistakes of her advocates; arbitrarily deprived her of her property contrary to **Article 40** of the **Constitution**; and unlawfully granted the respondents title to the property in dispute without any consideration. The applicant thus submitted that the intended appeal is arguable and unless this Court grants the orders sought the intended appeal shall be rendered nugatory.

11. The respondents opposed the application. Through a replying affidavit sworn by the 1st respondent, the respondents contended that the application before the Court was bad in law because the applicant had not filed a notice of appeal in respect of the judgment dated 27th September, 2017, she had only filed a notice of appeal from the ruling of 28th June, 2018. Consequently, this Court has no jurisdiction to stay execution of a judgment against which there is no notice of appeal or grant an order of injunction as sought.

12. Regarding the merits of the application, the respondents argued that the learned judge exercised her discretion judiciously and there was no legal basis for interfering with the ruling. In their view, the intended appeal is not arguable.

13. **Mr. Miyare**, learned counsel for the applicant, made brief submissions in respect of the application. He told the Court that the respondents had attempted to execute the decree by forcefully entering into the suit land, where the applicant lives with her family members. Unless the Court granted the orders as sought, the intended appeal, if successful, shall be rendered nugatory, counsel submitted. He referred the Court to the draft memorandum of appeal which, in his view, reveals that the intended appeal is arguable.

14. Regarding the applicant's failure to file a notice of appeal from the impugned judgment, Mr. Miyare told the Court that his law firm learnt about the judgment eight days after its delivery. Counsel did not however tell the Court whether any effort was made at all to file the notice of appeal.

15. On the other hand, **Mr. Oyomba**, learned counsel for the respondents, submitted that in the absence of a notice of appeal from the judgment sought to be stayed, the intended appeal is not arguable.

And regarding the ruling in respect of the application to set aside the default judgment, counsel submitted that the court did not make any positive order that could be stayed.

16. Mr. Oyomba added that the trial court in refusing to set aside the default judgment exercised its discretion appropriately; the intended appeal, if at all this Court finds that it is arguable, shall not be rendered nugatory because the suit land is ten (10) acres and the intended execution is only in respect of the one (1) acre that was sold to the respondents.

17. We have carefully considered the application, the affidavits on record and submissions by counsel. The principles upon which this Court determines an application of this nature are now well settled. An applicant must show that there is an arguable appeal and that unless the order(s) sought is granted, the intended appeal, if successful, shall be rendered nugatory.

18. It is equally settled that for this Court to assume jurisdiction to hear an application under **rule 5(2)(b)** of this **Court's Rules** there has to be a notice of appeal against the judgment intended to be stayed. In **SAFARICOM LIMITED v OCEAN VIEW BEACH HOTEL LIMITED & 2 OTHERS [2009] eKLR**, Omolo, J.A. held:

> ***"At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging of a Notice of Appeal. If there is no Notice of Appeal lodged, one cannot get an order under Rule 5(2) (b) because as I have already pointed out, the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the Notice of Appeal the Court of Appeal would have no business to meddle in the decision of the High Court."***

See also this Court's decision in **EQUITY BANK LIMITED v WEST LINK MBO LTD [2014] eKLR.**

19. In this application, it is conceded by the applicant that there is no notice of appeal against the impugned judgment delivered on 27th September, 2017, yet the applicant seeks, *inter alia*, stay of execution of the said judgment. The applicant however wishes to base her application on the notice of appeal filed on 9th July, 2018 from the ruling dated 28th June, 2018 where the learned judge dismissed the applicant's application to set aside the aforesaid default judgment. That is not acceptable; it is clearly against the Rules of this Court and contrary to numerous decisions of this Court.

20. In **NGURUMAN LIMITED v SHOMPOLE GROUP RANCH & ANOTHER [2014]** eKLR, this Court expressly stated that there is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of an earlier decision. That is

exactly what the applicant intends to do in this matter. See also **NAIROBI CITY COUNCIL v RESLEY [2002] E.A. 494.**

21. In the absence of a notice of appeal in respect of the judgment sought to be stayed, we find and hold that this Court has no jurisdiction to consider the application. In any event, there cannot be an arguable appeal if there is no appeal or even a notice of appeal.

22. Having arrived at that firm conclusion, we must down our tools, as Nyarangi, J.A. stated in **THE OWNERS OF THE MOTOR VESSEL LILLIAN "S" v CALTEX KENYA LIMITED [1989] KLR 1**. Consequently, we find this application lacking in merit and dismiss it with costs to the respondents.

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

W. OUKO (P)

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR