



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 184 OF 2018 (UR. 150/2018)

BETWEEN

JOSEPH MWANGI KAMAU (administrator of the  
Estate of **WILSON KAMAU ITUME (Deceased)**).....**APPLICANT**

-VERSUS-

JACOB NGIGI KANINI.....**1<sup>ST</sup> RESPONDENT**

**THIKA LANDLESS CO-OPERATIVE**

**SOCIETY LIMITED**.....**2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR, THIKA**.....**3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL**.....**4<sup>TH</sup> RESPONDENT**

*(An application for the stay of execution of the judgment, decree, order and an injunction of the of the Environment and Land Court of Kenya at Nairobi, (K. Bor, J.) dated 7th May, 2018 pending hearing and determination of the intended appeal*

in

**ELC No. 72 of 2012)**

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**RULING OF THE COURT**

**Background:**

[1] Before us is a Notice of Motion dated 26th June, 2018 expressed to be brought under Rule 5(2) (b) of the Court of Appeal Rules.

**Joseph Mwangi Kamau, (the applicant)** the administrator of the Estate of **Wilson Kamau Itume (Deceased)** (the applicant herein), seeks an order of stay of execution pending the hearing and determination of his intended appeal against the judgment and Decree delivered by the Environment and Land Court (E&LC) at Nairobi, **(K. Bor, J)** on 7th May, 2018 in favour of **Jacob Ngigi Kanini** (the 1st respondent).

[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 the applicant. The 1st Respondent claimed to be the registered owner of **LR. No. THIKA MINICIPALITY/BLOCK 24/1299** (the suit property) as it was allocated to him by the 2nd respondent by virtue of ballot No. 24756 in respect of plot No. 1256 dated 4th September,

1994. The applicant contended that the suit property was allocated to his deceased father who was lawfully issued with a title deed.

[3] The 1st respondent in his suit before the E&LC sought the cancellation of the applicant's title over the suit property, a declaration that the suit property belonged to him and a permanent injunction to restrain the applicant from interfering with the suit property together with general damages for trespass and costs of the suit.

[4] The learned Judge in her judgment dated 7th May, 2018 held that the 1st respondent had on a balance of probabilities proved his claim and granted prayers as pleaded in the amended plaint

[5] The applicant was aggrieved by that decision and filed the instant application on the grounds that he has an arguable appeal which raises triable issues and is not frivolous and if the order sought is not granted the respondents would proceed to execute the decree. The applicant urges that the subject matter be preserved so that the intended appeal is not rendered nugatory in the event that the appeal succeeds.

[6] The 1st respondent opposed the application and filed a replying affidavit on 8th October, 2018 contending, *inter alia*, that the application is frivolous, vexatious, bad in law, misleading and does not reveal the material facts and is thus an abuse of the court process.

### Submissions

[7] When the application came up for hearing before us, **Mr. William Kipkorir Arusei** appeared for the applicant while **M/s. A.w.Wamuyu** appeared for the respondent. **Mr. Arusei** for the applicant relied on the grounds on the face of the motion and the applicant's supporting affidavit. Counsel submitted that the E&LC in its judgment dated 7th May, 2018 ordered cancellation of the transfer of the suit property to the applicant; a declaration that the suit property belongs to the 1st respondent; and a permanent injunction restraining the applicant and the 2nd respondent, their servants and/or agents from interfering in any manner with the suit property; damages for trespass, costs and interest thereon. Counsel submitted that for the learned Judge to order cancellation of the applicant's title, the minimum threshold should have been reached but this was not done since there was no evidence adduced by the Registrar and the 1st respondent did not prove his case on a balance of probabilities; and that the applicant had an arguable appeal. On the nugatory aspect, counsel submitted that the applicant was apprehensive of the possibility of eviction and that damages would not be an adequate remedy. Counsel urged us to allow the application.

[8] Learned counsel for the respondent, **Ms Wamuyu**, opposed the appeal and relied on the replying affidavit of the 1st respondent dated 5th October, 2018. Counsel submitted that the learned Judge rendered her judgment after considering evidence and that the applicant has no arguable appeal; that the respondent proved that he was the rightful owner of the suit property; that the applicant contravened a court order issued on 16th October, 2013 restraining and barring him from carrying on any further construction on the suit property.

### Determination

[9] We have considered the application, the affidavits, the oral submissions by counsel as well as 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.”*

[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*, that there are two rival titles in respect of the suit property and the validity of both titles is in contention.

[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. This Court has stated on numerous occasions that an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration. A single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable. We are satisfied that in the circumstances of this case the applicant has an arguable appeal.

[12] 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.”*

[13] In the instant case, counsel for the applicant depones in his affidavit in support of certificate of urgency that the applicant is apprehensive of a possible eviction as a decree flowing from the impugned judgment has been extracted; and that damages would not be an adequate remedy in the circumstances of this case.

[14] 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.”*

We are satisfied that in the circumstances of this case, the applicant has demonstrated that his appeal if successful will be rendered nugatory if we decline to grant the orders sought.

[15] From the circumstances of the application before us, we find that the applicant has demonstrated that the appeal is arguable and that it will be rendered nugatory if the orders sought are not granted in the event that the appeal succeeds.

[16] Accordingly, the applicant has demonstrated both limbs of the requirements of Rule 5(2)(b).

[17] Accordingly, we allow the application dated 26th June, 2018 and order as follows:-

*1) A stay of execution of the judgment and Orders of 7th May, 2018 is granted and the cancellation of the title deed in respect of LR No. Thika Municipality/Block 24/1299 is stayed 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

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

**DEPUTY REGISTRAR**