



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 78 OF 2018 (UR 52 OF 2018)

BETWEEN

RASHID K TOO.....APPLICANT

AND

FRED I IMBATU.....RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal from the judgment and decree of the Environment and Land Court of Kenya at Eldoret (Odeny, J.) dated 12th July, 2018)

in

ELC CASE NO. 242 OF 2015)

RULING OF THE COURT

1. By a notice of motion dated 13th August, 2018, brought under **Rule 5(2)(b)** of the **Court Rules**, the applicant **Rashid K Too**, seeks an order for stay of execution of the judgment/decree delivered on 12th July, 2018, in Eldoret ELC No. 242 of 2015, pending the hearing and determination of an intended appeal.
2. The judgment of the Environment and Land Court, arose from a suit which had been filed by the respondent **Fred I Imbatu**, against the applicant seeking an order of specific performance compelling the applicant to sub-divide land parcel known as **Kapkangany/Kaimosi/1924** (suit property), and transfer the disputed portion measuring 3.8 acres to the respondent. The applicant filed a defence to the suit in which he denied the respondent's claim, accused the respondent of fraud and urged the court to dismiss his suit.
3. Upon hearing the suit, the learned judge delivered a judgment in which she found in favour of the respondent and granted an order of specific performance as sought. The applicant intends to challenge this judgment. He has filed a notice of appeal dated 26th July, 2018. The applicant has also exhibited a memorandum of appeal in which he has listed nine grounds that he intends to use to challenge the judgment.
4. This being an application for stay of execution under **Rule 5(2)(b)** of the **Court Rules**, the principles that guide such an application are now well laid out. In **Kenya Kazi Security Services Limited vs Kenya National Private Security Workers Union [2013] eKLR**, this Court reiterated what it stated in: **Ishmael Kagunyi Thande vs Housing Finance Company of Kenya limited, Civil Application No. Nai. 157 of 2006** (unreported):

“The jurisdiction of the court under Rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that discretion. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

5. In **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 others, Civil application No. Nai 31/2012**, this Court stated as follows:

“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 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 fresh hold that an intended appeal is arguable.”

6. In considering this application, the issue is whether the applicant has satisfied these two conditions concerning the presence of an arguable appeal and the fact that if the order of stay that is sought is not granted the intended appeal may be rendered nugatory. As concerns the arguability of the appeal, the applicant has exhibited a memorandum of appeal that raises twelve grounds upon which he faults the judgment of the trial court. It is obvious that these grounds raise several issues that cannot be said to be frivolous. For instance, the first grounds assails the propriety of the alleged agreement upon which the order of specific performance was anchored, contending that the provisions of section 3(3) of the Contracts Act, were contravened. Ground two raises the issue of the propriety of the sale due to the absence of the Land Control board Consent. In our view, this is sufficient to demonstrate that the applicant’s intended appeal raises arguable issues.

7. The applicant contends that unless the order of stay is granted, the disputed land shall be subdivided and transferred to the respondent and that would lead to the eviction of his family which comprises of thirty children and three wives who live and plough the land.

8. The respondent contends, that the applicant would in fact not suffer any substantial loss as he will still remain with over 38 acres after subdivision and transfer of the disputed land. The respondent maintains that to the contrary he is the one who stands to suffer as he secured a Bank loan to buy the disputed land which loan continues to attract interest. The respondent urged that if the court is inclined to grant the application, then the applicant should be ordered to deposit security for costs calculated at 22.5% of the respondent’s loan amount.

9. From the evidence that was adduced before the lower court, and the facts deponed to in the contending affidavits before us, it is apparent that apart from the disputed portion, subject of the order of specific performance issued by the court, the applicant still has more land and therefore the impression that he gives that his family will be destitute is not accurate. The disputed portion is in fact land that the applicant had attempted to dispose of. In the premises, the applicant has not satisfied this Court that his appeal would be rendered nugatory if the order of stay of execution is not granted. As stated in **Ishmael Kangunyi Thande vs Housing Finance Company of Kenya Limited (supra)**, in order to succeed the applicant has 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. Having failed to establish that his appeal would be rendered nugatory, the applicant’s motion must fail. It is accordingly dismissed with costs.

Those shall be the orders of the Court.

DATED and delivered at Eldoret this 7th day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.