



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MURGOR, JJA)

CIVIL APPLICATION NO. NAI 202 OF 2018 (UR.162 OF 2018)

BETWEEN

JAMES MUGO WAWERU.....APPELLANT/APPLICANT

VERSUS

BERNARD KEIROH KAMAU.....RESPONDENT

(Application for stay of execution of the Judgment and order of the Environment and Land Court at Nairobi (K. Bor, J.) Dated 17TH April, 2018 in ELC No. 215 of 2014

RULING OF THE COURT

Before us is a notice of motion dated and filed on 12th July, 2018, premised on **section 3A & 7** of the Appellate Jurisdiction Act Cap 9 Laws of Kenya, **Rules 4,5(2)(b) 42& 43(1)** of the Court of Appeal Rules. Substantively the applicant seeks an order of stay of execution of the Judgment and decree of the ELC (**Hon. Lady Justice K. Bor.**), issued on 17th April, 2018 in Nairobi ELC No. 215 of 2014 pending the hearing and determination of the intended appeal, together with an attendant order for provision for costs. It is supported by grounds in its body, a supporting and further affidavit together with annexures thereto. It has been opposed by a replying affidavit deposited by **Bernard Keiroh Kamau** on 7th March, 2019, and filed on 8th March, 2019.

The application was canvassed by way of oral submissions. Learned counsel **Mrs. Caroline Chege**, appeared for the applicant, while learned counsel **Mr. Gachie S. Mwanzia** appeared for the respondent.

Miss Chege submitted that the applicant was aggrieved by the impugned Judgment by the ELC (**K. Bor, J.**) of 17th April, 2018 and timeously filed a notice of appeal on 23rd April, 2018, applied for a certified copy of the Judgment and proceedings for the intended appellate process and served both processes on the respondent as mandated by the Rules; that the stay of execution granted by the ELC lapsed on 28th July, 2018, thereby exposing the applicant to imminent eviction; that the intended appeal is arguable as borne out by the draft memorandum of appeal annexed to the application.

It was also counsel's submission that the ends of justice herein would demand that the *status quo* as at now be maintained pending the hearing and determination of the intended appeal; that the applicant stands to suffer irreparable harm should the relief sought from court be withheld. The appeal will also be rendered nugatory as the applicant's imminent eviction from the suit property would have been executed by the time the intended appeal will be disposed of; that no prejudice will be suffered by the respondent who has allegedly not been on the land since 1992 when he allegedly purchased it and who can therefore wait for the determination of the intended appeal, which in counsels view , will go a long way in crystalizing the respective parties claim for proprietary rights over the suit property.

Opposing the application, **Mr. Gachie**, submitted that the intended appeal is without merit as the appellant failed to prove his claim before the ELC; that granting stay of execution as sought by the applicant would deny the respondent the fruits of the judgment. It would also perpetuate the applicant's illegal occupation of the suit property wrongly withheld from the respondent for years. Alternatively, should the Court be inclined to grant the relief sought, then the respondent seeks a conditional stay whereby the applicant would be required to be making monthly deposits of Kenya shillings twenty thousand (Kshs. 20,000) into an interest earning account approved by the Court to represent *mesne* profit during the pendency of the intended appeal.

In reply, **Mrs. Chege** submitted that financial constraints the applicant currently faces cannot allow him to accede to a conditional stay along the lines suggested by the respondent.

Our invitation to intervene has been invoked under the provisions of law cited above. **Section 7** of the Act and **Rule 4** of the Court of Appeal Rules (CAR), which deal with extension of time are misplaced. **Rules 42 & 43** are merely procedural. **Section 3A** enshrines the overriding objective principles of the Court namely, to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. See the case of **City Chemist (NB1) Mohamed Kasabuli** suing for and on behalf of the **Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008)**. Second, to embolden the Court to be guided by a broad sense of justice and fairness and to give the court greater latitude to overcome any past technicalities in the discharge of Court proceedings. See the case of **Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil**

Application No. Nai 293 of 2009.

The substantive provision of the law for accessing the relief sought is **Rule 5(2)(b)** of the Rules of the Court. It provides:

“in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

As construed by this Court on numerous occasions, the exercise of that mandate is purely discretionary. The applicant has therefore invited us to exercise our discretionary jurisdiction under the above rule to issue orders staying the execution of the Judgment and decree of the ELC (**Hon. Lady Justice K. Bor, J**) issued on 17th April, 2018 in Nairobi ELC No. 215 of 2014, pending the hearing and determination of the intended appeal. The principles on which the Court acts in the exercise of its discretionary mandate under the said rule, though none was cited to us by either party, are as crystalized by the Court itself in numerous pronouncements. The principle is that, the Court has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be rendered nugatory if the interim relief sought were denied.

The common thread running through the numerous pronouncements by the Court and which is now trite were aptly summarized by the Court in **Stanley Kangethe Kinyanjui versus Tonny Keter & 5 others** [2013] eKLR, as follows:-

- (i) In dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court. See Ruben & 9 others V. Nderitu & Another [1989] KLR 459.*
- (ii) The discretion of this Court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.*
- (iii) The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another V. Thornton & Turpin [1963] Ltd [1990] KLR 365.*
- (iv) In considering whether an appeal will be rendered nugatory, the Court must bear in mind that each case depend on its own facts and peculiar circumstances. David Morton Silverstein V. Atsango Chesoni, Civil Application No. Nai 189 of 2001.*
- (v) An application must satisfy the Court on both of the twin principles.*
- (vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal raised. Damji Pragji Mandavia V. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.*
- (vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. Joseph Gitahi Gachau & Another V. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.*
- (viii) In considering an application brought under Rule 5(2)(b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra).*
- (ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd V. Norlake Investments Ltd [2002] 1EA 227 at Page 232.*
- (x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.*
- (xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases V. Kinyua, [1990] KLR 403.*

The applicant relies on the annexed draft memorandum of appeal in which he intends to raise eight (8) grounds of appeal to demonstrate that the intended appeal is arguable. In these, the applicant intends to argue that the learned Judge erred in law and fact when she:

- (i) misdirected herself both on the facts and the law and thereby arrived at a wrong decision on the matter.*
- (ii) failed to find that the applicant’s share certificate issued on 31st December, 1982 was acquired first in time and therefore had primacy over that of the respondent issued on 27th March, 1995.*

(iii) failed to find that the respondent's certificate of lease reissued on 29th July, 2013 was acquired illegally, unprocedurally or through a corrupt scheme.

(iv) ignored the significance of the orders issued by a coordinate court, in Nairobi HCCC No. 3017 of 1990 James Mugo Waweru & others Versus Karura Farmers Co. Ltd & others, whereby Karura Farmers Co. Ltd was inter alia, restrained from depriving the applicant among others membership in the company and most importantly interfering with the suit premises to the detriment of the applicant.

(v) ignored and or failed to properly appreciate: first, the applicant's submission. Secondly, principles and the threshold for proof of an adverse possession claim; and thirdly for rendering an erroneous judgment both in law and in fact thereby occasioning a miscarriage of justice to the applicant.

Although we are not required to set out more than one ground to show that the intended appeal is arguable, in our view, the grounds highlighted above are all arguable irrespective of their ultimate success. We are therefore satisfied that the applicant has satisfied the first prerequisite for granting relief under the above rule.

Turning to the second prerequisite, it is not disputed that the order of stay granted twice in favour of the applicant by the ELC court has since lapsed. The applicant is therefore genuinely apprehensive of imminent eviction from the suit property on which he deposes he has lived on for many years, a position confirmed by the respondent's own deposition in paragraph 12 of the replying affidavit in which he has deposed as follows:-

“That the applicant cannot be heard to argue that these promises are his family's residence when they have been occupying them illegally for years without paying any mesne profit.”

In addition to the above deposition, the applicant's assertion that he is a beneficiary of the decree in HCCC No. 3017 of 1990, Mugo Waweru & others versus Karura Farmers Co. Ltd & Others, which was also not controverted by the respondent. It is therefore our view that the intended appeal would be rendered nugatory should the applicant ultimately succeed in his intended appeal after the imminent eviction from the suit property would have long been executed. Second, the possibility of the respondent disposing of the suit property to 3rd parties as soon as he is granted vacant possession in the exercise of his undoubted crystalized proprietary right over the suit property by putting it out of reach of the applicant cannot be ruled out, especially when there is no undertaking from the respondent's depositions that he will not part with possession of the suit property should he be put in possession until the intended appeal is heard and determined. All we have on record is an assurance from the bar by counsel on record for the respondent that there is no threat of execution yet, as the bill of costs is yet to be taxed and that they are willing to hold on. This being a statement from the bar, it does not give rise to a binding legal obligation capable of being sanctioned as between the disputing parties in the event of any breach, on the party of any defaulting party.

In light of the above reasoning, we are also satisfied that the threshold on the 2nd prerequisite has been satisfied. We therefore find merit in the application. It is allowed in terms of prayer (2) thereof. The costs of the application to abide the outcome of the appeal.

Dated and Delivered at Nairobi this 24th day of May, 2019.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.