



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU, J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. 95 OF 2018

BETWEEN

JACKTON OGULA ADUOGO.....APPLICANT

AND

FRANCIS ODHIAMBO OTURU (Suing as the administrator of the estate of the late

SAMWEL OTURU ADUOGO.....RESPONDENT

(Application for stay of execution of the Judgment, decree and orders of the of the Environment and Land Court of Kenya at Kisumu (Kibuja, J.) dated 22nd November, 2017

in

ELC No. 830 of 2015)

RULING OF THE COURT

[1] This is a ruling in a notice of motion dated 24th October, 2018. The motion is brought under **Rule 5(2)(b)** of the Court of Appeal Rules, **section 3A and 3B** of the **Appellate Jurisdiction Act** and **Article 159** of the Constitution of Kenya.

[2] The applicant **Jackton Ogula Aduogo** seeks, *inter alia*, an order of stay of execution of the decree and judgment dated 22nd November, 2017 issued by the Environment and Land Court (Kibunja J.) pending the hearing and determination of an appeal that the applicant intends to pursue against the judgment. The application is anchored on grounds stated on the motion as well as an affidavit that has been sworn by the applicant. The applicant has also availed a copy of a notice of appeal that is dated 1st December, 2017 and lodged in the Environment and Land Court on the 7th December, 2017 against the judgment as well as a memorandum of appeal that is dated 19th January, 2018 in regard to the same judgment.

[3] In supporting the motion, **Mr. Onsongo** learned counsel who appeared for the applicant urged the Court that the appeal raises triable issues such as the issue of the respondent's *locus standi* to prosecute the suit, and also the issue of trust that was raised in the counter claim. In addition, there is the issue as to whether the deceased **Samuel Oturu Aduogo** and the Applicant had been gifted the portions of the suit property which they occupy. Counsel therefore maintained that the intended appeal is not frivolous but raises arguable issues. On the nugatory aspect, **Mr. Onsongo** pointed out that if the decree is executed, the applicant would be evicted from the premises subject of the intended appeal and therefore the subject matter of the appeal will be lost.

[4] The respondent, **Francis Odhiambo Oturu** is the one who initiated the suit in the Environment and Land Court, **in his capacity** as the administrator of the Estate of the late **Samuel Oturu Aduogo**. The subject matter of the suit was a parcel of land known as Kisumu /Bar/ 1762 (suit property), which the respondent claimed the applicant had irregularly caused to be subdivided into two parcels, and had one parcel registered in his name.

[5] In an affidavit sworn in response to the applicant's motion, the respondent contends that the application is misconceived, an afterthought and an abuse of the court process. This is because the applicant had filed a similar application seeking an order of stay of execution in the trial court, which application was dismissed on the 11th October, 2018, and therefore the applicant ought to have applied to have the orders dismissing that application set aside under Order 42 Rule 6 of the Civil Procedure Rules.

[6] The respondent maintains that the applicant has not demonstrated that he will suffer substantial loss nor has he demonstrated that he has an arguable appeal. Further, the respondent points out that the applicant has not provided any security for granting the orders sought, and that the application has been brought after an inordinate delay of 11 months. The respondent therefore urges the Court to dismiss the motion.

[7] The respondent has filed written submissions in which he argues that the applicant has failed to satisfy the two limbs required to be satisfied in an application for stay of execution. In support of his submissions, the respondent relies on two authorities that is; Nelson Andai Havi vs. Law Society of Kenya & 3 Others [2018] eKLR; and Kenya Airports Authority vs. Mitu Bell Welfare Society & Anor Civil Appeal No. 114 of 2013.

[8] We have considered this application and the contending submissions made before us. It is now well settled that in order for an application under **Rule 5(2)(b)** of the Court of Appeal Rules to succeed an applicant must satisfy the twin principles of arguability and the nugatory aspect. That is to say that the applicant must demonstrate that he has an arguable appeal; and secondly that if the order of stay is not granted, the intended appeal will be rendered nugatory. This has been reiterated by this Court severally, the case of Nelson Andai Havi vs. Law Society of Kenya & 3 Others (supra) cited by the applicant being one of the many cases.

[9] In this case the applicant has filed a memorandum of appeal in which he has raised several grounds. One of the grounds raised is the issue of the respondent's *locus standi* to prosecute the suit in the trial court. Another issue that we flag out is the issue of the existence of a trust. These are issues that are pertinent and arguable and cannot be considered frivolous. Needless to state that, in our view, the appeal does raise arguable issues.

[10] In regard to the nugatory aspect it is clear that the orders issued by the trial court have resulted in a decree that provides for nullification of the subdivision of the suit property and cancellation of the new subdivision titles Kisumu/Bar/2138 & 2139, and the eviction of the applicant and his family from the suit property. It cannot be said that the execution of such an order will not affect the applicants intended appeal or cause irreparable loss to the applicant. For, if the applicant loses possession of the suit property, possession may fall into the hands of a third party and the subject matter of the suit will be at risk.

[11] We are therefore satisfied that the applicant has met the requirement of demonstrating that his appeal may be rendered nugatory. As regards the respondent's complaint that the applicant filed his application after inordinate delay and that the application is an abuse of process of the court, we note that the applicant initially sought orders of stay of execution in the trial court, and that the ruling of the trial court in regard to that application was made on the 11th October, 2018, and it was thereafter that the applicant filed the application before us. The delay has therefore been satisfactorily explained. As has been stated severally by this Court, the jurisdiction of this Court under Rule 5(2)(b) of the Court Rules is an original jurisdiction, which is invoked by the filing of a notice of appeal under section 75 of the Appellate Jurisdiction Act. This jurisdiction is therefore not affected by the fact that a similar application has been dismissed by the lower court.

[12] For the above stated reasons, we allow the applicant's motion for stay of execution of the judgment issued on 22nd November 2017 pending the hearing and determination of the intended appeal. We direct that the costs of the motion shall be costs in the appeal; and that the applicant shall take all appropriate action to file his memorandum of appeal and record of appeal within 60 days from the date hereof, failing which the order of stay of execution shall lapse.

Those shall be the orders of the Court.

Dated and delivered at Kisumu this 19th day of June, 2019.

E.M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.