IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPLICATION NO. 119 OF 2018

BETWEEN

KOTON WANDABE.....1ST APPLICANT

RAYMOND NYERIS PLAL.....2ND APPLICANT

AND

LUCIA KIBUI MUCHIRI.....RESPONDENT

(Application from the judgment, Ruling and Order of Environment and Land Court of Kenya

at Kitale (Mwangi Njoroge, J.) dated 19th July, 2018

in

ELC No. 136 of 2007)

****

RULING OF THE COURT

[1] By a notice of motion dated 27th December, 2018 **Koton Wandabe** and **Raymond Nyeris Plal** who are the applicants seek orders under **Article 159(2)(d)** of the Constitution, **sections 1A**,**1B**, **3** & **3A** of the Civil Procedure Rules, Order 42 Rule 6 of the Civil Procedure Rules and **Rule 5(2)(b), Rule 41** and **47** of the **Court of Appeal Rules**. The orders sought are for an injunction and a stay of execution of the orders of the Environment and Land Court issued on 19th July, 2018 and 3rd December, 2018 in Kitale Environment and Land Court Case No. 136 of 2007, pending the hearing of an appeal that the applicants have lodged against the said orders.

[2] The genesis of the motion before us, is a suit that was filed against the two applicants in the Environment & Land Court, by **Lucia Kibue Muchiri** who is now the respondent. By a Judgment delivered on 19th July, 2018 the learned Judge of the Environment & Land Court delivered a judgment in favour of the respondent and issued orders *inter alia*, that the 2nd applicant gives vacant possession of **Pokot/Siyoi/2728** (the suit property herein), and surrender the title of that property to the land registrar within 7 days of the judgment, for cancellation; and that the 1st applicant transfers the suit property to the respondent, and sign all the relevant documents necessary to facilitate the registration of the suit property in the respondent's favour.

[3] Following that judgment of 19th July 2018, the applicants filed a notice of motion under **Order 42 Rule 6** of the Civil Procedure Rules, before the Environment and Land Court, seeking an order of stay of execution of the judgment that had been issued by the Environment and Land Court. This resulted in the second ruling dated 3rd December, 2018 which is also subject of the application before us. In that ruling the Environment and Land Court dismissed the applicant's motion for stay of execution contending that it had no merit. It is then that the applicants filed the motion now before us.

[4] The applicants' motion is supported by an affidavit sworn by the 2nd applicant and an affidavit sworn by **Mr. Akenga Collins** who is a partner in the firm of Akenga Kimutai & Associates, the advocates who are on record for the applicants. In brief it is contended that following the judgment of the Environment & Land Court the applicants filed a notice of appeal on 27th July, 2018 and subsequently filed an application in the Environment and Land Court for an order for stay of an execution pending appeal.

[5] The 2nd applicant explains that the application for stay of execution was determined by the Environment & Land Court on the basis of written submissions, and the ruling of the court was delivered without any notice to the applicants. Following the ruling of the Environment and Land Court the respondent has initiated the execution process, and the 2nd applicant is now apprehensive that they are at risk of being evicted from the suit property. The 2nd applicant further explains that they have applied for records of the proceedings to enable them file an appeal but the same had not been availed to them by the time of filing the application. The applicants are concerned that the respondent is a man of straw, and that if the decree is executed, the respondent will not be in a position to restore the applicants to the status in which they are, thus the applicants will suffer irreparable loss. In addition, the applicants explain that the intended appeal is arguable and has overwhelming chances of success.

[6] The respondent opposed the application through a replying affidavit that was sworn on 12th March, 2019. The respondent also filed written submissions which were duly highlighted by her counsel, Mr. Kiarie. In her replying affidavit, the respondent maintains that the applicants have already been evicted from the suit property and that she is already in possession of the 3½ suit property. She explains that the 2nd applicant was summoned by the OCS Kapenguria on 21st December, 2018; that the 2nd applicant pleaded to be given time to move from the suit property; and that thereafter the 2nd applicant moved his property to his own home which is in the same neighborhood.The applicant contends that he has since fenced the suit property, put structures and is preparing the land for cultivation.

[7] Learned counsel **Mr. Kiarie** urged the court to dismiss the applicant's motion, pointing out that some of the prayers sought were unnecessary. For instance, the applicant had sought leave of the court when that was not necessary as the court had jurisdiction. Counsel maintained that the applicants' motion had been overtaken by events as the eviction order was executed on the 9thJanuary, 2019 and the respondent is now in possession of the suit property. In support of the written submissions, the respondent relied on several authorities. The respondent also pointed out that the applicant had sneaked in a draft memorandum of appeal, but that notwithstanding, the intended appeal did not raise any arguable issues.

[8] We have considered the motion before us. It is clear that the motion is basically anchored under **Rule 5(2)(b)** of the Court of Appeal Rules. This means that in order for the applicant to properly invoke the court's jurisdiction there must be an appeal or a notice of appeal that has already been filed. In regard to the judgment of 19th July, 2018, the applicant has exhibited a notice of appeal which was lodged in the High Court registry on the 27th July, 2018, so this Court's jurisdiction seeking order of stay in regard to this judgment has been properly invoked.

[9] As for the order of stay in regard to the ruling of 3rd December, 2018, no appeal or notice of appeal has been filed. Instead the applicants seek leave to appeal that ruling out of time. In our view, the prayer seeking to have leave to appeal out of time, has been improperly brought together with the motion seeking the stay of the judgment of 19th July, 2018. We say this because the Court's jurisdiction in regard to the order of 3rd December, 2018 has not been properly invoked in the absence of an appeal or notice of appeal. The proper approach should have been for the applicant to first file a notice and seek leave of the Court to Appeal out of time, before bringing the application for stay.

[10] Secondly, and more importantly, the power of the Court in dealing with an application under **Rule 5(2)(b**) of the Court Rules is an original jurisdiction (See ***Ishmael Kagunyi Thande vs Housing Finance Co of Kenya Ltd. (2006] eKLR;*** and ***Equity Bank Limited vs West Link Mbo Limited [2013] eKLR.*** This means that it matters not that the lower Court or the High Court may have dealt with a similar application. The court in hearing an application under **Rule 5(2)(b**) is not sitting on appeal against the ruling made by the High Court in regard to the application for stay. In other words, the ruling that was made by the High Court on 3rd December, 2018 dismissing the applicant's motion for an order of stay of execution does not in any way fetter the powers of this Court in hearing the application for stay of execution of the judgment and orders made on 19th July 2018. In our view therefore, the intended appeal against the order made on 3rd December, 2018 is superfluous and unnecessary.

[11] In regard to the application for stay of execution of the judgment that was delivered on 19th July, 2018, under Rule 5(2)(b) of the Court Rules, the applicant must satisfy two twin conditions. These conditions have been reiterated by this Court in many cases, including, ***Reliance Bank Ltd (in liquidation) v Norlake Investments Ltd [2002] 1EA 227***; ***Stanley Kangethe Kinyanjui v Tony Ketter & 3 others 2013 eKLR;*** and ***Kenya Tea Growers Association & Anor v Kenya Planters and Agricultural Workers Union*** Civil Application Nai. No. 72 of 2001. The first condition is that the intended appeal is arguable and not frivolous, and the second condition is that unless the order of stay of execution is granted the appeal is likely to be rendered nugatory. These two requirements must both be established.

[12] In regard to the aspect of arguability the applicants have filed a draft memorandum of appeal in which various issues have been raised. The Court was urged that the draft memorandum ought not to be considered as the same is irregularly before the Court, having been brought in through a further affidavit that was filed without leave. Nonetheless, the Court cannot ignore the fact that even without considering the draft memorandum of appeal, the ruling of the Environment and Land Court dated 19th July 2019 which is before us addresses issues such as the validity of the consent of the Land Control Board, issue of limitation and issue of fraud. Clearly these are arguable issues and it cannot be said that the intended appeal is frivolous.

[13] On the nugatory aspect, we reiterate what this Court stated in ***Stanley Kangethe Kinyanjui v Tonny Ketter & 5 others*** (supra) that:

> ***"iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.***
>
> ***v) An applicant must satisfy the court on both of the twin principles.***
>
> **.....**

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] 1 EA 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."

[14] In this matter there are contested facts. The 2nd applicant maintains that he is still on the suit property but is at risk of being evicted, whilst the respondent maintains that the order has in fact already been executed and that the 2nd respondent has moved out of the suit property. A perusal of the affidavit sworn by the 2nd applicant in support of the motion, and the replying affidavit sworn by the respondent, reveals that it is not in dispute that an eviction order was issued on 11th December and that the OCS Kapenguria was entrusted with the order for purposes of execution.

[15] The respondent has deponed that although the 2nd respondent filed the motion in Court on 27th December, the respondent was not served with the motion until 5th February 2019 by which time the OCS Kapenguria had already executed the order by ensuring that the 2nd applicant had moved from the suit property. In the further affidavit the admissibility of which was questioned by the respondent, the 2nd applicant has not denied the respondent's allegation of late service, but has made a feeble attempt at denying the eviction by contending that he still utilizes the bottom part of the land.

[16] We are satisfied that the respondent's position that the 2nd applicant was actually evicted from the suit property is the correct position as her averment is supported by annexures confirming that the order of eviction was executed. The orders of 19th July 2019 had several aspects. These were: delivery of vacant possession by the 2nd applicant; surrender by the 1st respondent title to the suit property, to the Registrar of Lands for cancellation; and signing of transfer documents by the 1st applicant and transfer of the title to the suit property to the respondent. It is evident that it is only the aspect of vacant possession that has been executed.

[17] In our view although the 1st applicant still has title to the suit property, there is still a risk that the respondent who is now in possession of the suit property can part with possession. Moreover, unless an order of stay of execution is granted to prevent further execution in regard to the other aspects of the order, the applicants may lose title to the suit property and this may render their intended appeal nugatory if the title is vested into the hands of a third party. For these reasons we are satisfied that the applicant has satisfied the twin requirements of arguability and the nugatory aspect of the intended appeal.

[18] We therefore allow the applicants' motion to the extent of issuing orders staying any further execution of the orders of 19th July 2018. For the avoidance of doubt, we direct that pending the hearing and final determination of the appeal, title to the suit property shall remain with the 1st applicant; and that the order for cancellation of the 1st applicant's title and transfer of the suit property shall remain suspended until the appeal is determined. In order to further preserve the subject matter of the appeal and protect the interests of both parties we direct that the appellants shall not transfer, or charge the suit property or in any way interfere with the title to the suit property.

Costs of the motion shall abide the appeal.

Those shall be the orders of the Court.

Dated and delivered at Eldoret this 6th day of June, 2019.

E. M. GITHINJI

.....

JUDGE OF APPEAL

H. M. OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.