



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, GATEMBU & MURGOR, J.J.A)

CIVIL APPLICATION NO. 26 OF 2019

BETWEEN

KAYDEE QUARRY LIMITED APPLICANT

AND

HUSSEIN ALI BENYOKA (Suing on his own behalf and

also as the Administrator of the Estate of Benyoka Mwakoyo..... RESPONDENT

(Being an application for stay of Execution of the Judgment of the Environment and Land Court of Kenya at Mombasa, pending the hearing and determination of an intended appeal from the ruling of the Honourable Lady Justice N.A. Matheka delivered on the 29th March, 2019.

in

Environment and Land Court Case No. 48 of 2016)

RULING OF THE COURT

1. The applicant, Kaydee Quarry Limited, seeks an order to stay execution of a judgement of the Environment and Land Court at Mombasa in ELC No. 48 of 2016 delivered on 29th March 2019 by which the applicant was restrained from utilizing, quarrying, alienating, selling or dealing with the unregistered parcel of land measuring approximately 4.94 acres situated at Kokotoni within Kaliang’ombe Adjudication. The court also ordered the applicant to vacate the property. The applicant is aggrieved by that judgement and lodged a notice of appeal on 3rd April 2019.
2. In the affidavit in support of the application before us, Vijay Mohanlal Khimji Patel a director of the applicant deposes that the applicant entered into a lease dated 12th May, 1978 for an indefinite term with one Benyoka Makoya, who held himself out as the owner of 1.5 acres of the property; that on 19th February 1978, it entered into a lease for an indefinite term with Stephen Benyoka Makoya who held himself out as owner of 3.44 acres of the property; that since 1978 the applicant has been running mining operations on the property in which it has invested in excess of 100 million shillings. The effect of the judgement delivered on 29th March, 2019 is that the applicant will no longer be authorized or able to continue its operations and stands to suffer irreparable damage.
3. Mrs. Kasmani, learned counsel for the appellant submitted that at the hearing of the intended appeal, the applicant will demonstrate that the Judge of the Environment and Land Court fell into error in failing to appreciate that the respondent had no authority to file suit without a confirmed grant of probate; that the Judge failed to recognize that the property is unalienated government land and erroneously ordered the applicant to vacate.
4. Learned counsel argued that unless we stay execution of the judgement pending the appeal, the intended appeal will be rendered useless if successful.
5. Although the application and notice of hearing had been duly served on the respondent, there was no appearance for the respondent at the hearing of the application with the result that the application was not opposed.
6. To succeed in the application before us, the applicant must satisfy us that the intended appeal is arguable, and that if we do not accede to its request and grant the orders it seeks, the intended appeal will be rendered nugatory. In ***Ishmael Kagunyi Thande v Housing Finance of***

Kenya Ltd Civil Application No. Nai 157 of 2006 this Court stated:

“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 jurisdiction. 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.”

7. Based on the draft memorandum of appeal to which counsel referred, we are satisfied that the intended appeal is not frivolous. There is for instance the issue whether the learned Judge appreciated that the property is unalienated government land; and whether the respondent had authority to institute suit in the face of the claim that there was no confirmed grant of probate. The intended appeal is indeed arguable.

8. As to whether the intended appeal will be rendered nugatory unless we grant the orders that are sought, the applicant states that it has been in possession of the premises since 1978 and has made substantial investment. Considering that the object of Rule 5(2)(b) is the **“preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”** [per Githinji JA, in **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011**], we are persuaded that if the order of stay of execution is not issued and the appeal ultimately succeeds, the applicant will have in the meanwhile been evicted from the premises, and the appeal will have been rendered nugatory as the premises may thereafter be in the hands of another party

9. We accordingly allow the application dated 8th April 2019 in terms of prayer 2 of the same and order that there will be a stay of execution of the judgment of the ELC delivered on 29th March 2019 pending the hearing and determination of the intended appeal.

10. The costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Mombasa this 25th day of July, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR