



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & OKWENGU, J.J.A.)

CIVIL APPLICATION NO. 336 OF 2018

BETWEEN

TABITHA WOTHAYA NDIGIRIGI.....APPLICANT

AND

MOHAMMED MUTUKU MUTISYA NZIOKA.....1ST RESPONDENT

JOSEPH MACHUKA OKARU.....2ND RESPONDENT

MAIMA NYAKINYWA MOHAMMED.....3RD RESPONDENT

JOYCE TERESA AKINYI OCHIENG.....4TH RESPONDENT

RICHARD KABIRU NGUNJIRI.....5TH RESPONDENT

(Being an Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Environment and Land Court at Nairobi, (K. Bor, J.) dated 11th day of October, 2018 in Environment & Land Court Cause No. 301 Of 2010 As Consolidated With Cause No. 369 of 2011)

RULING OF THE COURT

[1] By a notice of motion dated 16th November, 2018, **Tabitha Wothaya Ndigirigi**, the applicant filed this motion seeking an order of stay of execution of the judgment and decree dated 11th October 2018 in **Nairobi, ELC Case No. 301 of 2010** as consolidated with **Case No. 369 of 2011** (K. Bor, J) pending the hearing and determination of the applicant's intended appeal.

[2] The trial Judge had ruled in the judgment that the disputed land known as L.R No. 209/12734 (suit property), belongs to **Richard Kariru Ngunjiri (5th respondent)** who was the 5th defendant in the suit, and that the applicant who was the plaintiff in the suit had failed to prove any fraud or misrepresentation. In addition, the trial judge ordered the 1st and 2nd respondents who were the applicant's partners to pay the applicant a sum of Kshs.1,500,000/- as well as Kshs.500,000/-, as damages. The applicant who has filed a Notice of Appeal against the said judgment, now seeks an order to stay execution of the judgment pending the hearing and determination of her intended appeal.

[3] The applicant's motion is supported by an affidavit in which she avers that her intended appeal is arguable and has high chances of success as she intends to raise substantial issues of law. The intended grounds of appeal include; the High Court erred by failing to adjudicate the issues raised before it; the learned Judge exercised her discretion wrongly; and that the learned Judge misapprehended the facts and applied wrong legal principles to the prejudice of the applicant.

[4] Only the 5th respondent filed a replying affidavit in opposition to the motion. In the affidavit, the 5th respondent averred that the decree arising from the judgment of the ELC was such that the only party capable of executing it was the applicant; that contrary to the applicant's contention that she would suffer irreparable damage if the judgment is executed, it is an order of stay of execution that would make it impossible for her to claim the damages awarded to her; that no positive order was issued compelling the applicant to do anything to warrant an order of stay; and that the applicant was not coming to the Court with clean hands.

[5] When the application came up for hearing, the applicant and the 5th respondent's made submissions before the Court. The applicant

submitted that a criminal court had found that there was forgery in the sale of the suit property; that the damages awarded by the learned Judge were not commensurate with the loss; and that the trial Judge failed to appreciate that under land laws, a title can be nullified if it is proved that it was acquired through fraud, forgery or misrepresentation.

[6] In arguing that the appeal would be rendered nugatory unless the order of stay of execution was issued, the applicant contended that she would suffer irreparable damage if the respondents were to execute the orders granted in the judgment, as the 5th respondent could proceed to dispose of the suit property before her appeal is heard.

[7] The 5th respondent in his submissions urged the Court to dismiss the applicant's stay of execution application reiterating that the applicant's motion does not meet the threshold for the grant of orders of stay of execution since the judgment by the learned Judge was entered in favour of the applicant, and that there were no orders in his favour that could be stayed. Further, the 5th respondent also submitted that the applicant's intended appeal does not have high chances of success as the applicant failed to prove its arguability.

[8] Under **Rule 5(2)(b)** of this Court's Rules, the applicant has to satisfy the twin requirement, first, of demonstrating that she has an arguable appeal, and secondly, showing that the appeal shall be rendered nugatory if successful, should the order for stay of execution not be granted. This was the position held by this Court in **R v Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31** wherein this Court delivered itself thus;

“The law as regards the principles that guide the court in such an application brought pursuant to Rule 5(2)(b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb.”

[9] The applicant contends that she is deserving of the order sought. She argues that the learned Judge misapprehended the facts of the case and wrongly applied the legal principles of the law. The learned Judge in his judgment made a finding that the 5th respondent was the absolute and indefeasible owner of the suit property as the applicant failed to tender any evidence demonstrating that the 5th respondent acquired the title fraudulently or through misrepresentation. There is an arguable appeal as to whether the learned Judge misapprehended the facts and applied the wrong principles. This single issue is sufficient to satisfy the requirement that the intended appeal is not frivolous but is arguable. As was held in the **R v Kenya Anti-Corruption Commission** (*supra*), it is the satisfaction of requirement for the arguability of the case and not the chances of the intended appeal succeeding that is of primary consideration.

[10] As regards the nugatory aspect, it is clear that the applicant's concern is the trial court's finding in favour of the 5th respondent on the order that the 5th respondent is the absolute and indefeasible owner of the suit property. This means that unless an order of stay of execution is issued, the 5th applicant will be at liberty to use the suit property and the title, and even transfer it or part with possession, and this will render the applicant's intended appeal if successful nugatory as the suit property may be in the hands of a 3rd party as at the time of the conclusion of the intended appeal. The fact that the applicant was awarded damages does not change the position, as the subject of the applicant's suit was primarily the suit property, and any disposition of the suit property is likely to adversely affect the applicant.

[11] We therefore come to the conclusion that the applicant has met the twin requirements for granting the order for stay of execution under **Rule 5(2)(b)** of the Court Rules. Accordingly, we grant the motion and issue orders as follows:

- (i) That an order of stay of execution shall issue as prayed for in prayer 3 of the motion to the extent of restraining all the respondents by themselves or their agents, or servants from selling the suit property, alienating, disposing, charging or in any way interfering with the suit property pending the hearing and determination of the intended appeal.
- (ii) The applicant shall file and serve the intended appeal within 90 days from the date hereof.
- (iii) Costs of this motion shall be in the appeal.

Dated and delivered at Nairobi this 22nd day of November, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR