**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)**

**CIVIL APPLICATION NO. 86 OF 2019 (UR. 58/2019)**

**BETWEEN**

**USONIK FARM PURCHASE CO-OPERATIVE SOCIETY LTD.....APPLICANT**

**AND**

**JOAN ABURA & LYNETTE DAWA (AS ADMINISTRATORS OF THE**

**ESTATE OF ISABELLA AKUMU ABURA (DECEASED) …….....RESPONDENTS**

*(An application for stay of execution of the Ruling of the Environment & Land Court at Kisumu (**S. M. Kibunja, J.**) dated 12th June, 2019*

in

**ELC CASE NO. 28 OF 2014)**

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**RULING OF THE COURT**

On 23rd July, 2019 the applicant, **Usonik Farm Purchase Co-operative Society Ltd *"the applicants"*** filed a Notice of Motion dated 18th July, 2019. The motion was made pursuant to Rule 5 (2) (b) of this Court's Rules. The applicant sought the following orders, *inter alia*:

> **1. That there be temporary orders of stay of execution of that part of the ruling and orders of Hon. Mr. Justice S. M. Kibinja delivered on 12th June, 2019 in Kisumu Environment and Land Court Case No. 28 of 2014 directing the applicant to remove structures and vacate the parcel of land known as L.R. No. 6015/3 Nandi District within 90 days or they be forcefully evicted pending the hearing and determination of the intended appeal.**
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> **2. That costs of this motion be provided for.**

The motion was supported by the affidavit of **Joshua Kiplelgo Melly,** a member of the applicant sworn on 18th July, 2019. He deposed, where relevant, that the applicants had been granted permission by the late Jack Franklin Ojwang ***"Ojwang"*** to use a portion of his late mother, "Isabella Abura" Abura's farm hereinafter **"the suit land"** to grow maize in 2005. That in June 2007 Ojwang offered to sell 500 acres of the suit land to Kichaba Farmers' Co-operative Society at Kshs. 70,000 per acre. The offer was accepted and members incorporated the applicant for that purpose. Unfortunately, Ojwang died on 1st October, 2007 before the transaction was concluded. By then they had paid to him Kshs. 500,000/- as part purchase price but were nonetheless allowed by Ojwang's wife and sisters to continue using the suit land with the understanding that the sale would be finalized. That in September 2013 they were informed by the respondent that they had sold the suit land to one **Caroli Omondi**.

The respondents then filed a suit before the Environment & Land Court at Kisumu seeking permanent injunction to stop the invasion and erection of structures on the suit land by the applicants, demolition of the illegal structure erected thereon, eviction of applicants, general damages and costs. Consequent upon filing the suit, the respondents took out a motion seeking the same prayers as the main suit, save the claim for damages.

The grounds and the affidavit in support of the application were to the effect that the estate of the deceased was indebted to Agricultural Finance Corporation *(AFC)* and upon statutory notice, the respondent (being of the estate) resolved to sell 500 acres of the suit land to offset the debt. They identified a suitable buyer who made part payment and AFC released the original title to them after settling the debt.

However the transaction could not be completed due to the applicants' acts of trespass and leasing part of the suit land without the respondents' approval. That the applicants' activities had been reported to the Local Provincial Administration and the police and their request to the applicants to stop their activities on the suit land had not been heeded, hence the suit and the application.

As expected, the application was opposed on the same grounds as already set out at the beginning of this ruling. Having considered the application, the learned judge **(Kibunja, J)** allowed it and granted the injunction sought, ordered the applicants to vacate the suit land and remove all structures erected thereon within ninety (90) days and in default be evicted and the structures demolished. He also ordered the OCS Nandi Police Station to provide security during the execution of the default orders aforesaid.

The applicant was aggrieved by the ruling and intends to lodge an appeal and have indeed filed and served the requisite notice of appeal on the respondents. It is the position of the applicants that the learned Judge erroneously exercised his discretion in favour of the respondents by ordering their eviction prematurely notwithstanding that the prayers in the plaint were the same orders sought in the application hence they were condemned unheard. That upon their eviction and demolition of their structures, the substratum of the case will have been lost and there will be nothing left to determine and the purported trial will be a mere sham and academic exercise. That they have been in continuous occupation and utilization of the suit land for over 12 years and have known no other home. That they expected to harvest their maize crop in November 2019 and sugarcane in May 2020 but that will not be possible if the order to evict them is not stayed. They maintained that the learned Judge erred in failing to uphold the constitutional principles of fair hearing and the tenet that courts should aim at attaining substantive justice instead of undue regard to procedural technicalities. They were apprehensive that unless restrained by an order of this Court, the respondents will evict them and transfer the suit land to third parties before their intended appeal is heard and determined thereby put it beyond their reach in the event that their appeal was successful. That it will be in the interest of justice and fairness for the orders sought to be granted and that no prejudice will be occasioned to the respondents.

The application was opposed by the respondents. In a replying affidavit sworn by **Lynette Dawa** on 16th September, 2019 it was deposed that the applicants had not demonstrated any sufficient ground that warrants the grant of the orders sought. That the applicants had not sufficiently demonstrated that they had an arguable appeal given that they do not have a title over the suit land and they are in any event in illegal occupation thereof. That the suit land belongs to the deceased and can only be dealt with pursuant to the provisions of the Law of Succession Act and the applicants' continued occupation amounts to intermeddling with the estate of the deceased. That the learned Judge properly exercised his discretion in granting the orders as the applicant had no proprietary interest in the suit land. They cannot rely on an offer made to an unknown entity to claim proprietary interest, besides, the offer was not accepted so as to constitute a proper contract.

At the hearing of the motion, **Mr. Magut,** learned counsel appeared for the applicants while **Mr. Otieno,** learned counsel appeared for the respondents. Counsel relied on their written submissions which they briefly highlighted.

Mr. Magut pointed out that the applicant had already filed Civil Appeal No. 178 of 2019. Counsel referred us to the grounds raised in the memorandum of appeal and submitted that the evidence and facts as placed before this Court demonstrated that the applicants' intended appeal is arguable. That the applicants' defence before the trial court raised serious issues of law and fact which deserve the court's determination on merit. Counsel further submitted that the applicant entered the suit land in 2007 with the authority of Ojwang and had so far paid Kshs. 500,000/- towards the purchase price. Counsel contended that the prayers in the main suit were the same prayers granted in the application which in effect determined the suit at an interlocutory stage, thereby denying the applicant a fair hearing. In support of the arguable aspect of the appeal, counsel relied on the following authorities; **Dennis Mogambi Mang'are v Attorney General & 3 Others**,**Civil Application No. NAI 265 of 2011 (UR 175 of 2011); Miriam Muthoni Mahihu & 5 Others v African Safari Club Ltd, Civil Application No. NAI 239 of 2012** and **Kenya Tea Growers Association & Ano. v Kenya Planters & Agricultural Workers Union, Civil Application No. NAI 72 of 2001.**

On whether the appeal would be rendered nugatory, counsel submitted that the applicants will be forced to pull down their long term investments hence suffer irreparable loss. That the subject matter of the intended appeal, the suit land is at risk of being transferred to a third party thus putting it beyond their reach in the event the appeal succeeded. Counsel further urged us to consider the competing interests of both the applicants and the respondents as well as the economic implications of demolition of structures on the suit land and the eviction thereof of the applicants vis-à-vis the cost of reconstruction should the appeal and the pending suit be successful. Counsel relied on the cases of **African Safari Club Ltd v Safe Rentals Ltd, Civil Application No. NAI 53 of 2010** (unreported) and **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Ano., Civil Application No. NAI 74 of 2015 (UR 63 of 2015)** in his submission on this aspect of the application.

Mr. Otieno on his part submitted that the application offends public policy and seeks to legitimize commission of a criminal offence under the Law of Succession Act, as the conduct of the applicants amounted to intermeddling with the estate of the deceased. The applicants had no legal basis to lay claim on the suit land and only sought to maintain an advantageous position they obtained through flouting the law. He relied on the case of **Juja Coffee Exporters Ltd & 2 Others v Bank of Africa Ltd & 2 Others, (2019) eKLR** in support of this position**.** Counsel contented that the intended appeal was not arguable as there was only an offer and no agreement of sale or purchase price paid with regard to the suit land and in any event, the offer was never made to the applicants. The letter of offer was addressed to Kichaba Farmers' Co-operative Society Ltd and not the applicants. Further, it was a mere offer with no corresponding acceptance that would create a contractual relationship. Counsel referred us to **Mwongera Mugambi Rinturi & Ano. v Josephine Kaarika & 2 Others, (2011) eKLR** to emphasis this point. He was of the view that the appeal would not be rendered nugatory and as the orders sought would only serve to interfere with the administration of the estate of the deceased. That there was an order issued on 17th February, 2014 stopping the applicants from planting maize and sugarcane on the suit land but they chose to disobey the same. That the applicant had also failed to demonstrate that the respondents would not compensate them in damages in the event they succeeded in their appeal and or suit. Thus the appeal being rendered nugatory in the event of the order of stay not being granted had not been satisfied. In this regard, counsel relied on the cases of **Nairobi Metropolitan PSV Saccos Union Ltd v County of Nairobi Government (2014) eKLR; Salaries & Remuneration Commission v County Government of Kakamega & 4 Others (2019) eKLR;** and **Daniel Lomagul Kandei & 2 Others v Kamanga Holdings Ltd & 4 Others (2017) eKLR.**

We have anxiously considered the motion, the affidavits in support of and in opposition thereof, submissions by respective counsel and the law. The jurisdiction of this Court under Rule 5(2) (b) of the Court of Appeal Rules is now well settled. The jurisdiction is original,

unfettered and discretionary. The discretion though has to be exercised judiciously and with reason; not on the craze of impulse or pity. The rule is a procedural innovation designed to enable the Court to preserve the subject matter of an appeal where one has been filed or intended. An applicant seeking to benefit from this rule must first demonstrate that he has an arguable appeal, and secondly, that if the orders sought are denied, the appeal if successful will be rendered nugatory. In the case of **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others, (2013) eKLR,** this Court stated *inter alia*:

> ***"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.***
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> ***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.***
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> ***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.***
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> ***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.***
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> ***v). An applicant must satisfy the court on both of the twin principles.***
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> ***vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.***
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> ***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.***
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> ***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).***
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> ***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.***
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> ***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.***
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> ***xi). Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's impecunity, the onus shifts to the latter to rebut the allegation. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.***

We adopt the above parameters in considering this application. On the arguability aspect of the appeal, we have considered the grounds raised by the applicant in the Memorandum of Appeal, that number eleven. They range from the complaint that the prayers sought in the substantive suit were the very same prayers sought and granted in the application, mis representation made to the applicants by Ojwang, his wife and sisters, part payment of the purchase price, ignoring the principles of granting injunction set out in the case **of Giella vs Cassman Brown & Co. Ltd [1973] – CA 358**, failure by the trial court to accord the applicants a fair hearing, issuing contradictory orders and so on and so forth. These assertions are not frivolous nor idle. They certainly make an arguable case. As already stated an arguable point does not mean that it must succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. We are thus satisfied that the applicants have raised arguable points sufficient to invite the respondents' reaction and also deserving of the Court's consideration.

Turning to the second limb, the factors which can render an appeal nugatory have to be considered on case to case basis and in doing so, the Court is bound to consider the conflicting claims of both sides. It is common ground that the applicants are presently in occupation of the suit land and have developed the same by erecting several structures. They have also planted maize and sugarcane crops that are yet to mature. Yet the applicants were ordered to vacate the suit land and have the said structures and crops demolished or destroyed within 90 days from the date of ruling. They have raised the economic and financial constraints they are likely to face should the appeal and suit be successful at the end of the day. The crops would have been destroyed for good. They would also be forced to reconstruct the structures. Finally, there is the issue of the suit land being sold to a third party which will have the effect of putting it beyond their reach in the event that they succeed in this appeal and the suit. These fears are certainly genuine and well founded. We are satisfied that if the foregoing was to happen it will cause the applicants unnecessary hardship and render the appeal nugatorry. In **Reliance Bank Ltd v Norlake Investments Ltd (2002) E.A. 227**, this Court stated thus*:*

> ***"To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined."***

Based on the foregoing we are satisfied that the applicants have made a case for the grant of the orders sought. In consequence, we allow the same and order stay in terms of prayer 2 of the application dated 18th July, 2019; that is to say that, there shall be temporary orders of stay of execution of the ruling and order of Hon. Mr. Justice S.M. Kibunja delivered on 12th June, 2019 in Kisumu, Environment and Land Case No. 28 of 2014 directing the appellants to remove structures and vacate the parcel of land known as L.R. No. 6015/3 Nandi District within 90 days or they be forcefully evicted pending the hearing and determination of the intended appeal. Costs of this application shall abide the outcome of the appeal.

**Dated and delivered at Kisumu this 21st day of November, 2019**

**ASIKE-MAKHANDIA**

**……..**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**…….**

**JUDGE OF APPEAL**

**OTIENO-ODEK**

**……..**

**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR.**