



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 63 OF 2019

BETWEEN

BERNARD MWITI RINTARI.....APPELLANT

AND

ISAIAH MBAABU RUCHUIAKA.....RESPONDENT

(An application for stay of execution pending hearing and determination of appeal from the

Ruling of the High Court of Kenya at Meru (Mbugwa, J) delivered on 28th March 2019

RULING OF THE COURT

[1] On 28th March 2019, the High Court (Mbugwa, J.) delivered a ruling in which the learned Judge dismissed an application that had been lodged by Bernard Mwiti Rintari (the applicant herein). The applicant had sought leave to have the firm of Kiogora Mugambi & Co. Advocates come on record to appear for him in place of his former advocate and also to have his suit which had been dismissed on 26th June 2018 reinstated to hearing.

[2] The applicant who was dissatisfied with the ruling of 28th March 2019, lodged a notice of appeal, and moved the Court under a certificate of urgency for orders under Rule 5(2)(b) of the Court Rules seeking orders of stay of execution of the ruling and all consequential orders pending the hearing and determination of his intended appeal. The motion was supported by an affidavit in which the applicant averred that he has a good appeal with high chances of success, and that if the orders of stay are not granted, he would be rendered destitute and homeless, and his damage will not be compensable by an award of damages.

[3] Isaiah Mbaabu Ruchiaka (the respondent herein), who was the defendant in the dismissed suit, filed a replying affidavit in which he urged the Court to dismiss the application. He maintained that there was nothing to be stayed as the applicant's suit was dismissed and there is no order capable of execution.

[4] We have considered the motion before us. As it is brought under Rule 5(2)(b) of the Court of Appeal Rules, the applicant must satisfy the two requirements that have been laid down by this Court. (See *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd [2002]1EA 227*; *Ishmael Kagunyi Thande vs. Housing Finance Kenya Ltd., Civil Appl No. Nai 157 of 2006 (Unreported)*; *Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31*). The two requirements are first, that the applicant has an appeal which is arguable and not frivolous; and secondly, that the appeal would be rendered nugatory if an order of stay of execution is not issued.

[5] Regarding the issue whether the intended appeal is arguable and not frivolous, other than asserting that he has a good appeal with high chances of success, neither the applicant in his supporting affidavit, nor his counsel in arguing the motion, has stated any particular facts that engenders confidence in the success of his appeal. However, we take cognizance of the fact that the applicant has filed what looked like a draft memorandum of appeal (it had no court stamp), in which some 8 grounds of appeal have been set out. The grounds may not necessarily succeed, but they cannot be dismissed at this stage as not arguable. Indeed, only one arguable issue would be sufficient.

[6] On the question as to whether the intended appeal would be rendered nugatory unless the order of stay is granted, we concur with the respondent that the order sought to be stayed being one of dismissal of an application for reinstatement of a suit, there is nothing capable of execution, nor would failure to issue an order for stay of execution render the applicant's intended appeal nugatory.

Should the appeal be successful the suit will simply be reinstated.

[7] In order to succeed the applicant had to satisfy both requirements (see *Kenya Tea Growers Association & Another vs Kenya Planters &*

Agricultural Workers Union Civil Application Nai. No. 72 of 2001). Unfortunately, he has only satisfied one requirement and his motion fails.

The motion is accordingly dismissed with costs.

Dated and Delivered at Nairobi this 8th day of November, 2019.

M. K. KOOME

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR