



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, SICHALE & KANTAI, J.J.A.)

CIVIL APPEAL NO. 16 OF 2018 (UR 15/2018)

JOSEPHINE KOKI RAYMOND APPELLANT

=VERSUS=

PHILOMENA KANINI MAINGI (Personal representative

of MAINGI MUSILA MUTAVA (Deceased1ST RESPONDENT

JOYCE NJOKI MBUGUA2ND RESPONDENT

(Being an application for stay of execution pending hearing and determination of an appeal against the order of the High Court of Kenya at Machakos (Angote ,J.) made on 26th January, 2017,

in

High Court Civil Suit No. 345 of 2011)

RULING OF THE COURT

The Applicant, Josephine Koki Raymond, (Applicant) comes before us by way of a Notice of Motion expressed to be brought under Rule 5 (2) (b) of the Court of Appeal Rules, substantively seeking an order to stay the execution of the orders made in the High Court, delivered on the 26th January, 2018, pending the hearing and determination of the intended appeal.

The application was triggered by the Judgment of the High Court (O.A Angote, J), dated the 26th day of January, 2018, in Machakos ELC Case Number 345 of 2011. The Judgment arose from a Plaintiff filed by the Applicant against the Respondents dated the 21st day of November, 2011. In the said plaintiff, the Applicant sought orders that she was the bona fide purchaser and owner of land parcel number DonyoSabuk/Komarock Block1/1339 (the suit property). That claim was resisted by a joint defence and counter-claim filed by the Respondents, contending that the suit property belongs to the 2nd Respondent.

The learned Judge after hearing the respective parties and their witnesses, made findings inter alia that the Agreement of 14th May, 2001 and the Affidavit sworn on 6th October, 2011, on which the Applicant had based her claim were forgeries; that it is the Applicant's husband who purchased the suit property from the 1st Respondent, and subsequently sold it to the 2nd Respondent, before he was given transfer by the 1st Respondent; that he was paid the full purchase price by the 2nd Respondent, but refused to vacate the land; that the 1st Respondent transferred the suit property to the 2nd Respondent, with the consent of the Applicant's husband and handed to the 2nd Respondent the original title documents, which the 2nd Respondent used to obtain a consent of the area Land Control Board for the said transaction. On that account, the judge dismissed the Applicant's claim with costs, and directed that she be evicted from the suit property

The Applicant was aggrieved and filed a Notice of Appeal dated the 26th day of January, 2018, intending to appeal against the whole of the said decision. This is the Notice of Appeal on which she has anchored this application. It is based on the grounds in the body and a supporting affidavit. There is no replying affidavit against it.

The application was disposed of by way of oral submissions, by learned Counsel Mr. Tamata, instructed by the Firm of J. M. Tamata & Company Advocates for the Applicant; and learned Counsel Mr. Gichachi, JFM, instructed by the Firm of Gichachi and Company Advocates for the Respondents.

In summary, the Applicant contends that the Intended Appeal is arguable, because the Judgment of the High Court is not only against the weight of the evidence adduced before it, but it is also irrational; that the judge asked himself wrong questions. That is why he arrived at a wrong decision; that there is a threat of eviction and if the stay order sought is not granted, the Applicant and her entire family will be evicted from the suit property, thereby rendering the intended appeal nugatory.

In reply, learned Counsel **Mr. Gichachi**, opposed the application through oral submissions, that the Applicant has no arguable appeal, notwithstanding that the intended appeal need not succeed; that fear of demolition of the structures standing on the land does not arise as the 2nd Respondent purchased the land together with all the structures now standing thereon; that the 2nd Respondent has suffered great prejudice as the Applicant has been enjoying both the full purchase price paid to her husband by the 2nd Respondent, and the use of the land to the exclusion of the 2nd Respondent; that no prejudice will be suffered by the Applicant if she were to be evicted as the status quo currently existing can be restored “*ante*” should she ultimately succeed on her intended appeal; and that the interests of justice to both parties dictate that the Applicant who has been using litigation to keep the 2nd Respondent from the use of the suit property is undeserving of the order sought from the Court.

Our invitation to intervene on behalf of the Applicant has been invoked under the Rule 5 (2) (b) of the Court of Appeal Rules procedures. The principles that guide the exercise of our mandate under this rule have now been crystallized by a long line of case law. These were ably summarized by the Court in *STANLEY KANGETHE KINYANJUI=VERSUS= TONY KETTER AND 5 OTHERS* [2013] eKLR; we find it prudent to reproduce them hereunder as follows:

- 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.**
- 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.**
- 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.**
- 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.**
- 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.**
- 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.**
- 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).**
- 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.**
- xi). Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's impecuniness, the onus shifts to the latter to rebut by the alleged evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.**

We adopt the above principles as stating the correct threshold to be applied in the determination of this application.

On arguability, we have given due consideration to the complaints the applicant intends to raise on appeal as contained in the draft Memorandum of Appeal and as summarized in her submissions highlighted above. Further that the Judge misdirected and prejudiced himself against her as he only considered the Respondent's case in the assessment of the evidence before him; that the Judge also did his own surmise, conjecture, proposition and theories as to how the 2nd Respondent was a bona fide purchaser; that the Judge also failed to make a finding of both fact and law that the Applicant parted with the purchase price and was given vacant possession of the suit property by the 1st Respondent, thereby creating a constructive trust in her favour.

We have given due consideration to the above intended complaints. It is our view that they are not frivolous as learned Counsel for the Respondents put it. Instead, and in our view, they raise arguable points, sufficient to invite the Respondents to respond to the matters raised therein, during the determination of the intended appeal, notwithstanding and as correctly submitted by learned Counsel, **Mr. Gichachi**, they need not ultimately succeed. We are therefore satisfied that the applicant has satisfied the first limb of the twin principle, under **Rule 5 (2) (b)** of the Rules of the Court.

Turning to the second limb, it is common ground that the Applicant and her family have been in possession of the suit property since the year 2005, when the 2nd Respondent allegedly purchased it. In the absence of a replying affidavit from the 2nd Respondent that there is no threat of demolition; that the fear of the suit property being disposed of during the pendency of the intended appeal is unfounded, and also that there is willingness on her part to re-transfer the suit property to the Applicant should she, (applicant) succeed in the intended appeal, the assertions made by learned Counsel **Mr. Gichachi** from the bar on behalf of the Respondents are not sufficient to oust the Applicant's fear that there is a real threat of disposal of the substratum of the intended appeal, thereby rendering it nugatory should it ultimately succeed. In light of the above reasoning, it is our finding that the Applicant has also satisfied this 2nd limb.

In the result, we find merit in the application and we are minded to make the following orders:

- (1) We allow the application erroneously dated the 15th day of February, 2018, but filed on the 1st day of February, 2018, in terms of prayer three (3) of the said application.
- (2) Costs of the application to abide the outcome of the intended appeal.

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR