

IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), NAMBUYE & SICHALE, JJA]

CIVIL APPLICATION NO. 50 OF 2018

JOSEPHAT GACHERU RUGIRI.....APPLICANT

=VERUS=

AMOS KIBATA GITHEKO.....1ST RESPONDENT

LOISE GACHIKU KINUTHIA.....2ND RESPONDENT

(Being an application for stay of execution and or stay of further proceedings of the ruling and order of the Environment and Land Court, (Hon. Lady Justice Gacheru J.)

Delivered on the 16th February 2018

in

Thika ELC Appeal No. 6 of 2017)

RULING OF THE COURT

The Applicant **Josephat Gacheru Rugiri** (the Applicant) comes before us by way of a Notice of Motion filed against the Respondent, **Amos Kibata Githeko** and **Loise Gachiku Kinuthia** (the Respondents). It is expressed to be brought under **Rule 5 (2) (b)** and **Rule 47 of the Court of Appeal Rules**, for the following orders:

“ 1. Spent

2. THAT the Honourable Court be pleased to stay the execution of the order of the Environment and Land Court before Hon. Lady Justice Gacheru, issued on the 16th February, 2018 and or the order of, the Subordinate Court in Milimani CMCC No. 6798 of 2016 issued on 21st October, 2016 pending the hearing and determination of the appeal filed against the said order;

3. THAT the Honourable Court be pleased to issue an injunction directed against the 1st and 2nd Respondents whether by themselves or through any of their agents, restraining, each or all of them, from trespassing, entering, selling, charging, disposing of, dealing with, and or interfering with land parcel numbers Kabete/47) pending the hearing and determination of the appeal filed against the said ruling of the Environment and Land Court, Hon. Lady Justice Gacheru J. issued on the 16th February, 2018 and or pending the hearing and determination of Appeal No. 6 of 2017.

4. THAT if the 2nd Respondent shall have taken up possession, pursuant to the order of the Environment and Land Court issued on the 16th February, 2018, then this Honourable Court be pleased to order the eviction of the 2nd Respondent from Kabete/Lower Kabete/3162, 3163 and 3163 (previously known as Kabete/Lower Kabete/47) pending the hearing and determination of the appeal against the order of the Thika Environment and Land Court issued on the 16th February, 2018 and or the order of the Subordinate Court issued in Milimani CMCC No. 6798 of 2016.

5. THAT The costs of this application to abide the outcome of the appeal against the order of the Thika Environment and Land Court of 16th February, 2018”.

The motion is dated and filed on the 26th day of February, 2018. It is based on the grounds on its body and a supporting affidavit. It is opposed by a replying affidavit of the 2nd Respondent, deposed and filed on the 15th day of May, 2018.

The application was triggered by the orders of the Thika, Environment and Land Court (ELC), (**Gacheru J.**), delivered on the 16th day of February, 2018, in Civil Appeal No. 6 of 2017. The orders intended to be impugned were made pursuant to a ruling resulting from the determination of two opposing applications. The 1st was dated the 2nd day of November, 2016, filed by the Applicant seeking various reliefs. It was opposed by a replying affidavit filed by the 2nd Respondent, dated the 22nd day of November, 2016. The second application was dated the 8th day of November, 2016, filed by the 2nd Respondent, also seeking various reliefs. It was opposed by a replying affidavit filed by the Applicant and the 1st Respondent respectively.

Both

applications were heard and determined jointly, resulting in the orders intended to be impugned. In summary, the Judge made findings that the dispute was over the original L.R Number Kabete/Lower Kabete/47 (the original suit property); that the said original suit property had subsequently been subdivided, resulting in L.R Numbers Kabete/Lower Kabete/3161, 3162, 3163 and 3164 respectively (the resulting suit parcels); that the 2nd Respondent was in possession of the suit property prior to the alleged purchase of the same by the Applicant; that the Applicant has never been in possession of the suit property; that the suit property had been a subject of litigation in several Court cases; that the Applicant was not in possession of any registration document such as a Certificate of Title as proof of his proprietary rights over the suit property; that on the facts before her, she was satisfied that the 2nd Respondent had been in possession of the suit property for over fifty (50) years; that staying the orders of the Subordinate Court granted on the 1st day of November, 2016 would result in substantial loss to the 2nd Respondent, and lastly that there was no danger of any threat of disposal of the suit property by the second Respondent. On that account, the Judge dismissed the Applicant's application in its entirety, but allowed that of the 2nd Respondent.

The applicant was aggrieved. He lodged a Notice of Appeal, dated the 19th day of February, 2018, intending to appeal against the whole of the said ruling. It is on the said Notice of Appeal that he has anchored this application apparently premised on the twin principles as enshrined in Rule 5 (2) (b) of the Court of Appeal Rules, though the prayers as framed appear duplex, the duplex nature of the prayers notwithstanding, are obligated to determine the application on its merits as the noted defect is both severable and curable under Article 159 (2) (d) of the Kenya Constitution 2010, leaving only matters falling under Rule 5 (2) (b) of the Courts for our consideration.

The application was disposed of by way of oral submissions, by learned Counsel **Mr. L.M Nyang'au** appearing for the Applicant, while learned Counsel **F.M. Njanja**, appeared for the 2nd Respondent. There was no appearance for the firm of **A.G.N Kamau** Advocates for the 1st Respondent, who had been served. The Court being satisfied that they had due notice of the hearing date, allowed the learned Counsel present to prosecute the application, hence this ruling.

In support of the application, learned Counsel **Mr. Nyang'au** reiterated the contents of the intended Memorandum of appeal, and submitted that the intended appeal is arguable as the learned Judge erred when: she upheld the decision of the Subordinate Court issued without jurisdiction; she made assumptions not supported by any evidence; she held that the Applicant had never been in possession of the suit parcels and therefore would not suffer any substantial loss; she misunderstood the Applicant's alternative prayer for an injunction against the 2nd Respondent as amounting to an order of eviction; she made pronouncements on the merits of the appeal by holding that the 2nd Respondent was in possession of the suit parcel. Also that although the 2nd Respondent was not a party to the proceedings in the Subordinate Court, she was nevertheless the successful party. The Judge also refused to grant the order of stay on the ground of alleged existence of purported fraud on the part of the Applicant, when fraud had neither been pleaded nor proved against the Applicant; and lastly when she granted orders not based on any pleadings nor known in law.

Turning to the second limb of the twin principle, Counsel rehashed the history of the litigation resulting in the intended appeal, and then submitted that the applicant purchased the land while vacant; that he was a bona fide purchaser for value, without notice; and that he has been in occupation and possession of the suit property since purchase; and also that he has a title in his name which can be availed if required.

To buttress the above submissions, Counsel relied on Stanley Kangethe Kinyanjui =versus= Tony Ketter & 5 Others [2003] eKLR and Double Clean Limited & 4 Others =versus= Jambo Holdings & 20 Others [2016] eKLR all for the principles that guide the exercise of the Court's mandate under **rule 5 (2)**

(b) of the Rules of the Court.

Rising up to oppose the application with regard to the 1st limb, learned Counsel **F.N. Njanja**, reiterated the content of the replying affidavit and submitted that the intended appeal is not arguable, as both the motion as well as the preceding proceedings with regard thereto were based on fraud and deception; that the property in dispute belongs to the 2nd Respondent; that the 1st Respondent had acquired it irregularly through succession proceedings which have since been reversed; that the Applicant cannot purport to exercise proprietary, possessionary and occupationary rights over the suit property which he does not have as he has no title to the suit property; that it is the 2nd Respondent who has all along been in occupation and possession of the suit property; that she was temporarily evicted from the suit property when the Applicant took out fraudulent proceedings purporting to evict the 1st Respondent from the said land, when in effect he was evicting the 2nd Respondent as the 1st Respondent has never been in possession of the suit property; that when the 2nd Respondent raised objection to that eviction, the Applicant hastily withdrew the proceedings, apparently in a bid to defeat her objection but then the Subordinate Court when apprised of the correct state of affairs vacated the eviction order and reinstated the 2nd Respondent back into possession and occupation of the suit property.

Turning to the 2nd limb, Counsel submitted that upon the 2nd Respondent being reinstated to possession and occupation of the suit property is when the Applicant unlawfully, illegally and forcefully evicted her and demolished her structures; that there are contempt of Court orders proceedings pending against the Applicant; that the Applicant is therefore before this Court with unclean hands; that granting the order sought would be tantamount to shielding a wrong doer who is facing contempt of Court Order proceedings; that no prejudice will be suffered by the applicant if the order sought is declined as he neither has a title to the suit property nor is he in occupation of the same.

In reply, learned Counsel **Mr. Nyang'au** submitted that the title in the name of the 1st Respondent was being exhibited in Court for the first time. He also conceded that the applicant has posted his agents on the suit property but not for purposes of keeping out the 2nd respondent but illegal invaders and potential squatters. Also reiterated that the title document in favour of the Applicant is available

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 as was ably summarized in **STANLEY KANGETHE KINYANJUI=VERSUS=TONY KETTER AND 5 OTHERS**[2013] eKLR. These are reproduced 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 *bonafide* 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 alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. **International Laboratory for Research on Animal Diseases v Kinyua**, [1990] eKLR 403.

We have reconsidered the above principles. We agree these represent the correct principles that guide the Court in the exercise of its mandate under rule 5 (2) (b) of the Rules of the Court. We adopt and embrace them fully as the threshold to be met in the determination of this application.

On arguability, we note from the content of the Applicant's supporting documents, as well as the thread running through the submissions by learned Counsel **Mr. Nyang'au**, that the Applicant seeks to protect his proprietary rights in the suit property. As submitted by learned Counsel **Mr. Njanja**, and conceded by learned Counsel **Mr. Nyang'au**, no document of title bearing the Applicant's name as the owner of the suit property has been exhibited for our perusal and verification. When challenged on this, learned counsel, **Mr. Nyang'au** simply stated that the title document is available and it can be availed.

We have considered that response in the light of the above guiding principles. We find nothing in the said principles that can permit us to either call for or wait for further evidence before deciding either way on the competing interests as currently presented before us in this application. We are obligated by virtue of the above principles to confine our considerations on the facts as presented before us by the respective parties. We find no basis to depart from this well beaten path. On the facts as presented, we find no evidence of title in favour of the Applicant capable of attracting an interim order of the nature sought from us, notwithstanding that the arguable points intended to be raised by the Applicant on appeal are in our view arguable, though they need not ultimately succeed. We therefore agree with the 2nd Respondent's argument that the Applicant cannot purport to seek protection of that which he does not possess. There is therefore nothing before us on the basis of which the intended arguable points can be anchored. This argument therefore has no legs on which to stand in the absence of a title document on the basis of which the Applicant seeks to protect his proprietary rights.

As for the 2nd limb, there is nothing to rebut the 2nd Respondent's assertion that she has all along been in possession of the suit property and that she has no intention of disposing it off. Secondly, there is also un rebutted assertion by the 2nd respondent that the said suit property is currently a subject of litigation in other proceedings whose ultimate final determination is unknown. The danger of its disposal in the immediate near future, in our view, appears remote. This is in addition to the Applicant's own admission that he has posted own agents to ward off invaders and illegal squatters which affords additional sufficient protection for him. This limb also fails.

In the result, and for the reasons given in the assessment, the threshold set by **rule 5 (2) (b)** of the Rules of the Court has not been satisfied. The application is therefore dismissed with costs to the 2nd Respondent.

Dated at Nairobi this 8th day of June, 2018.

W. OUKO (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR