IN THE COURT OF APPEAL

AT KISUMU

CORAM: GITHINJI, WARSAME & M'INOTI JJ.A.

CIVIL APPLICATIONNO. 95 OF 2017

BETWEEN

DAVID OSCAR OWAKO.....APPLICANT

AND

CHEMILIL *SUGAR CO* LTD.....1ST RESPONDENT

KIBOS SUGAR CO LTD.....2ND RESPONDENT

MUHORONI SUGAR CO LTD

(In Receivership).....3RD RESPONDENT

JOSEPH KENY]On behalf of

DANIEL LELEI]kamalambei

SIMON SERONY]Society.....4TH RESPONDENT

JOSEPH CHEPSIROR]On behalf of

DAVID KIMELI] Tuwapsul

STEVEN YEGO] Society.....5TH RESPONDENT

WIlLIAM LANGA'T J On behalf of

DAVID BOFN MUSA J Barmareng Society.....6TH RESPONDENT

KAMALAMBU FARMERS CO. LTD.....7TH RESPONDENT

KARATILI FARMERS CO. LTD.....8TH RESPONDENT

(An application for stay of execution pending the hearing and

determination of an intended appeal from the ruling and order

of the High Court at Kisumu (Majanja, J.) dated 25th July 2017

in

HCCC NO.38 OF 2009)

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RULING OF THE COURT

On 25th July 2017, the High Court at Kisumu, ***(Majanja. J.),*** **dismissed** with costs an application by the applicant, ***David Oscar Owako,*** in which the applicant had applied for recusal of the learned judge. The applicant, who actsin *propria persona*, as he did in the court below, filed a notice of appeal on 2nd August 2017 and followed it up with the application now before us, in which heseeks an order for stay of proceedings in the High Court, pending the filing,hearing and determination of his intended appeal.

Before the hearing of the application, we drew the attention of the applicant to the evident fact, which is in the public domain, that Majanja, J. is no longer based at the High Court in Kisumu and that there appeared to be no compelling reason why his suit should not proceed to hearing before the judges now in Kisumu, against whom he had not raised any objection. However, the applicant was adamant on proceeding.with this application., rather than pursue the hearing of his suit in the High Court.

The background to this application is fairly straight forward. On 9th April 2009, the applicant filed a suit against the respondents claiming that in 2008, the 4th , 5th , 6th , 7th and 8th respondents unlawfully invaded and took over his farm, ***L.R. No. 10817/3,*** in which he was engaged, in large-scale sugarcane production. He pleaded further that in the same year, the said trespassers fraudulently delivered to the 1st , 2nd and 3rd respondents huge quantities of sugarcane from his farm, which was credited to them. Accordingly, he prayed for a declaration that he was the lawful owner of the delivered sugarcane and that he was entitled to the payment therefor. He also prayed for an order for eviction of the trespassers from his farm. The respondents duly filed their defences denying the applicant's averments, but the suit somehow went into limbo, with no action taken towards its hearing and determination, save for a multiplicity of interlocutory applications.

On 25th October 2016, the learned judge, after taking note of the period the matter had stalled in court, fixed the same for pre-trial directions on 15th November 2016, which date was ultimately moved to 20th December 2016. On the latter date, the learned judge gave directions on the hearing and determination of the suit, including the filing and service of witness statements by the parties. He warned the parties that failure to comply with his Order would result in the dismissal of the suit or the striking out of the defences, as the case may be. Lastly, the learned judge scheduled the suit for mention on 3rd February 2017 to confirm compliance with his orders and fixed the substantive hearing on 21st March 2017.

On the date of the mention, the applicant had not complied with the orders made on 20th December, 2016, prompting the learned judge to make good his warning that he would dismiss the suit in the event of noncompliance. On 10th February 2017, the applicant applied for reinstatement of his suit but before the application could be heard, he applied for recusal of the learned judge. The grounds upon which the application was based was that the applicant apprehended that he would not get a fair hearing before the learned judge, who was prejudiced against him. The applicant deposed in the affidavit in support of the application to many extraneous issues, but the relevant ones were that the learned judge had dismissed his suit on flimsy grounds; that he had refused to hear four interlocutory applications by the applicant; and that he had corrupt vested interests in the applicant's matters.

The respondents opposed the application through grounds of objection in which they contended that the application was scandalous, in bad faith and totally lacking in merit because the dismissal of the applicant's suit was caused by his own failure to abide by the clear directions that were given by the court. They added that the applicant had not placed any material before the court on the basis of which bias on the part of the learned judge could be inferred. After hearing the parties, the learned judge dismissed the application as earlier stated, leading the applicant to approach this Court for stay of proceedings.

The applicant filed written submissions dated 12th July 2018 in support of his application, which he orally highlighted on 17th July 2018. Although the appellant's notice of appeal was specific that he was aggrieved by the ruling dated 25th July 2017 and as is vividly clear from the ruling the learned judge dealt only with the issue of his recusal, the appellant went at length into extraneous issues, including urging us to issue an order of stay execution of taxed bill of costs which has nothing to do with the notice of appeal or the ruling by the learned judge. Although the applicant argued the application as though it was the real appeal, we do not intend to be drawn into issues that are extraneous to the ruling, the subject of the notice of appeal, or to the applicable principles under rule ***5(2)(b),*** of the Court of Appeal Rules, namely whether there is an arguable appeal that will be rendered nugatory, if we do not stay the proceedings in the High Court.

As far as is germane to this application, the applicant submitted that the learned judge was biased against him and that is why he struck out his suit. He prayed that the struck out suit be reinstated and heard by his three preferred judges of this Court, whom he named, rather than by the High Court. He added that by dint of ***Article 50*** of the Constitution, the learned judge was obliged to be independent and impartial and to ensure fairness in the proceedings.

The 1st and 3rd respondents, who were the only respondents interested in the application, opposed the same through their learned counsel, ***Mr. Otieno*** who submitted that the application was totally bereft of merit. He contended that the issues raised by the applicant had nothing to do with the ruling, the subject of the intended appeal and that the intended appeal was not arguable because it was intended to intimidate and blow-beat the judge, whilst the applicant had not presented any material on the basis of which he could have recused himself.

As we have already intimated, to entitle the applicant to an order of stay of proceedings, he must satisfy us that his intended appeal is arguable and that unless, we grant the orders he seeks, it will be rendered nugatory if it *succeeds. (See* ***Jaribu Holdings Ltd v Kenl4a Commercial Bank Ltd CA No.*** **314 of** ***2007).*** With respect, the applicant has not demonstrated the arguable appeal that he intends to present before this court. There are no draft grounds of appeal demonstrating how the learned judge erred by refusing to recuse himself.

The only material put forth by the applicant to demonstrate bias on the part of the judge is his refusal to hear the interlocutory applications and the dismissal of the suit upon the applicant's failure to comply with the directions that the learned judge had given to expedite the hearing

and determination of the suit, which was pending for about 7 years. The test whether a judge should recuse himself or herself is an objective test. It is based on whether in the circumstances there is a reasonable apprehension in the mind of a reasonable, fair-minded and informed member of the public that the judge will not be impartial. While we appreciate as stated, for example, in ***Kenya Railways Corporation v. Edermann Properties Ltd*** ***CA No. Nai. 176 of 2012,*** that an arguable appeal is not necessarily one that must succeed when it is ultimately heard, in the circumstances under which the learned judge exercised his discretion to dismiss the suit, particularly against the backdrop of a suit that had remained unheard for far too long and the applicant's non-compliance with the clear and unequivocal directions on filing of witness statements to expedite the disposal of the suit, an informed and fair-minded member of the public could not possibly conclude that the learned judge was biased.

Secondly, even assuming that the applicant's intended appeal is arguable, he has not demonstrated how it will be rendered nugatory, particularly taking into account the fact that Majanja J. is no longer based in Kisumu. Instead of listing his application for reinstatement of the suit for urgent hearing and determination, the applicant asks us to stay proceedings, thus occasioning further delay in the disposal of the matters before the High Court, so that he can pursue a rather academic appeal.

In the final analysis, the applicant has not satisfied us on any of the considerations pursuant to which an application under rule 5(2)(b) of the Court of Appeal Rules is granted. Accordingly, this application has no merit and the same is dismissed with costs to the 1st and 3rd respondents. It is so ordered.

Dated and delivered at Kisumu this 25th day of October 2018

E.M.GITHINJI

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JUDGE OF APPEAL

M.WARSAME

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JUDGE OF APPEAL

K.M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.