



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 61 OF 2018

BETWEEN

JAMES THOMAS ANDAFU.....APPLICANT

VERSUS

JOSEPH MAKOKHA AKHULUNYA.....RESPONDENT

(Being an application for stay of execution pending the lodgement, hearing and determination of an intended appeal from the Judgment and Decree made by the Environment and Land Court at Kakamega, (N. A. Matheka, J) dated 17th May, 2018

in

ELC CASE NO. 619 OF 2014)

Formerly CC No. 41 “B” of 2006 (O.S)

RULING OF THE COURT

[1] Before us is a Notice of Motion dated 6th June, 2018 expressed to be brought under Rule 5(2) (b) of the Court of Appeal Rules. **James Thomas Andafu**, (the applicant), seeks an order of stay of execution pending the hearing and determination of the intended appeal against the judgment and Decree made by the Environment and Land Court, (Matheka, J) on 17th May, 2018 in favour of **Joseph Makokha Akhulunya** (the respondent).

[2] The application is founded on the grounds set out on the face of the motion and also on the averments deponed in the applicant’s supporting affidavit.

[3] The learned Judge in her judgment found that the respondent herein had proved his case on a balance of probabilities; that he was entitled to land parcel number **Butsotso/Indangalasia/248** (the suit property) by way of adverse possession; that the applicant’s right to own the suit property has been extinguished by lapse of time; and that the suit property should therefore be transferred to the respondent. The learned Judge made the following orders:-

“1. A declaration that the defendant’s/respondent’s proprietary interests in the said land have been extinguished by virtue of the plaintiff’s/applicant’s adverse possession of the same.

2. That the title deed issued in the names of James Thomas Andafu as the sole proprietor of land parcel No. Butsotso/Indangalasia/248 be cancelled and or revoked and the same be transferred to the plaintiff/applicant herein as the sole proprietor.

3. That costs to be borne by the defendant.”

[4] Aggrieved by that decision, the applicant filed the instant application on the grounds that he has an arguable appeal with good prospects of success; that he is apprehensive that the respondent will commence execution proceedings; and that in the event execution proceeds, the intended appeal will be rendered nugatory.

[5] The respondent opposed the application and filed a Replying Affidavit on 27th August, 2018 on the grounds that the intended appeal has no chances of success and has no arguable points of law; that the orders being sought for stay of execution are not specific and that the decree has already been presented to the Land Registrar in Kakamega for purposes of execution.

Submissions

[6] When the application came up for hearing, **Mr Masake** was holding brief for **Mr Ashiruma** for the applicant while **Mr Onsando** appeared for the respondent.

Mr Masake submitted that the applicant has proved that he has an arguable appeal; that the applicant and his counsel were not aware of the date the judgment was to be delivered as they were not served with a notice of the delivery date of judgment; that the result of the judgment was to revoke the title which is in the applicant's name and transfer it to the respondent; that if the judgment is executed the respondent will lose his property and the appeal will be rendered nugatory.

Mr Onsando submitted that there was sufficient evidence that the applicant was duly served with the notice of the delivery of the Judgment and appeared in court; that counsel for the applicants were served with the notice of the delivery of the judgment but did not appear in court; that the Decree has already been executed and the title Deed has been presented to the Deputy Registry for purposes of revoking it in compliance with the Decree; that there is therefore nothing to stay and the applicant will not suffer prejudice if the decree is executed. Counsel urged us to dismiss the application.

Determination

[7] We have considered the application, the Affidavits, the submissions by counsel and the law.

[8] The jurisdiction of this Court in applications of the nature as the one before us is donated by **Rule 5(2)(b)** of the Court of Appeal Rules. The jurisdiction is original and discretionary. In the case of **Stanley Kang'ethe Kinyanjui Vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012**, this Court stated inter alia;

“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

[9] In considering the application, we shall bear in mind these principles. On the issue of arguability, the applicant has set out several grounds under this limb including; whether in the circumstances of this case, the respondent was entitled to the suit property by way of adverse possession.

[10] The court is minded to avoid going into the merits of the intended appeal, as this will be the preserve of the bench that will hear and determine the main appeal. We are satisfied that the applicant has an arguable appeal. For instance there is an issue whether in the circumstances of this case the respondent's claim of adverse possession over the suit property was proved on a balance of probabilities.

[11] On the nugatory aspect, as this Court said in **Reliance Bank Ltd Vs. Norlake Investments Ltd [2002] I EA 227**, the factors which could render an appeal nugatory are to be considered within the circumstances of each particular case and that in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated as follows:-

“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.”

[12] In the instant case, the applicant's counsel depones in paragraph 3 of the certificate of urgency that the applicant is exposed to imminent execution proceedings which will render the intended appeal nugatory

[13] From the circumstances of the application before us, we find that *prima facie*, there are grounds which merit serious consideration. The applicant has demonstrated that the appeal is arguable and will be rendered nugatory if the orders sought are not granted and the appeal succeeds. To preserve status quo pending appeal, the order relating to cancellation of title Deed and transfer of the land to the respondent should be stayed.

[14] Accordingly, we allow the application and order as follows:-

1) A stay of execution of the Judgment and Orders of 17th May, 2018 is granted, and the cancellation of the title Deed and transfer to the respondent of title No. Butso/Indangalasia/248 is stayed pending the hearing and determination of the intended appeal.

2) Costs of this application to abide by the outcome of the appeal.

Dated and delivered at Kisumu this 18th day of October, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR