



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: OUKO, SICHALE & KANTAL, JJA)

CIVIL APPLICATION NO. Nyr. 58 OF 2018

(UR NO. 42 OF 2018)

BETWEEN

ROBINSON KUTO & 3 OTHERS.....APPELLANTS

AND

JACKSON KARIUKI KAHUNGURA & 5 OTHERS.....RESPONDENT

(Application for stay of execution pending the lodging, hearing and Determination of an intended appeal from the judgment and decree of the Environment and Land Court of Kenya at Nakuru (Munyao J.) dated the 25th April, 2018)

in

Court ELC Cause No. 124 of 2014)

RULING OF THE COURT

The applicants, *Robinson Kuto, David Oduor Kilo, Joseph Kamau Thuo, Samson Mwangi, Karagita* being representatives of *Landing Beach Self Help Group* filed a motion dated 24th May, 2012 and sought the following orders:-

“1. Spent.

2. Spent.

3. That this honourable court be pleased to stay execution of this court’s judgment pending hearing and determination of the appeal preferred in the court of Appeal. (sic)

4. That Costs be provided for.”

Jackson Kariuki Kahungura, Ruth Wambui Chege, Hon. John Karanja Kihagi, Rachael Wanjiku Maina, Mutisya Mutuku and Attorney General were named as the 1st, 2nd, 3rd, 4th, 5th and 6th respondents respectively.

The motion was supported by the affidavit of *Robinson Kuto*, the 1st applicant herein sworn on 24th May, 2018 in which he deposed that he is a member of *Karagita Landing Beach Self Help Group*; that when he was sued by the 1st respondent, he knew that the 2nd respondent’s counsel would defend him in the suit; that in the judgment of *Munyao, J.* he has been ordered to pay over Ksh 8,000,000/-exclusive of costs; that the damage caused to the 1st respondent’s property is attributable to a mob; that he is a peasant fisherman and cannot raise the sum of Ksh.8,000,000/-; and finally, that he has an arguable appeal and has accordingly filed a Notice of Appeal dated 25th April, 2018.

In opposition to the motion, the 1st respondent swore an affidavit dated 6th July, 2018 on behalf of himself and on behalf of the 2nd respondent. He deponed that he is the owner of the land parcel LR. No. 396; that on 2nd May, 2014, the 1st applicant, and the 3rd, 4th & 5th respondents invaded his farm claiming that it was public property; that on 3rd May, 2014, the 1st applicant together with members of the public broke through the gate of his land so as to create a road of access; that he filed ELC No. 124 of 2014 and obtained an interim injunctive order; that on 25th April, 2018 he obtained a permanent injunctive relief and an award of Ksh.8,000,000/- as special damages and Ksh.500,000/- as general damages. He refuted the applicant's contention that the applicants have an arguable appeal.

On 24th July, 2018 the motion came before us for plenary hearing. Learned counsel, **Mr. Aim** holding brief for **Mr. Hari Gakinya** appeared for the applicants. Learned counsel, **Mr. Karanja** appeared for the 1st and 2nd respondents. There was however no appearance from the firm of **Odhiambo & Odhiambo** advocates for the 3rd and 4th respondents and from the offices of the Attorney General on behalf of the 5th and 6th respondents, inspite of service of hearing notices upon them on 22nd June, 2018 and 27th June, 2018 respectively.

In urging the motion, **Mr Aim** contended that the 1st applicant was condemned to pay a total of Ksh.8,500,000/- and hence the decree herein is essentially a money decree; that should the 1st applicant pay this sum, then the intended appeal would be rendered nugatory; that the 1st respondent has not given an indication that he has the ability to repay the decretal sum should the applicant's intended appeal succeed; further, that the 1st applicant does not have the ability to pay the 8,500,000/- and he is likely to be committed to civil jail; that there is a public interest in this matter and if stay is not granted, members of the public may not have access to Lake Naivasha Beach. It was his view that an order of stay will maintain the status quo.

On arguability, counsel maintained that the 1st respondent did not prove the damages incurred as no assessment report was produced save for receipts showing costs of erecting the structure/s on the land.

In opposing the appeal, **Mr. Karanja** contended that the intended appeal was not arguable; that the alleged status quo is an illegal one as inspite of injunctive reliefs having been granted in favour of the 1st respondent, the applicants acted in a contemptuous manner by forcefully entering the 1st respondents land.

The application before us is premised on **Rule 5(2)(b)** of this Court's rules. An applicant desirous of obtaining an order of stay under the said rule has to demonstrate that he/she has an arguable appeal which will be rendered nugatory, absent stay. In the case of **MULTIMEDIA UNIVERSITY & ANOTHER –VS- PROFESSOR GITILE N. NAITULI (2014) eKLR** this court whilst considering an application under Rule 5 (2) (b) expressed itself as follows:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR 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.*
- v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.*
- vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.*
- vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.*
- viii. An applicant must satisfy the Court on both the twin principles.*
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.*
- x. 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.*
- xi. 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.*
- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*
- xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”*

We have considered the motion and the supporting affidavit, the 1st respondent's affidavit in opposition to the motion, the oral rival

highlights made before us and the law.

On the nugatory aspect, the 1st applicant did not, in his affidavit sworn on 24th May, 2018 depone that the 1st respondent may not be able to repay the sum of Ksh.8,500,000/-, should the intended appeal be successful. In his address to us, **Mr. Aim** contended that the 1st respondent has not demonstrated that he is in a position to repay the decretal sum. We note that apart from this assertion made during the oral highlights, no such allegation was made against the 1st respondent in the supporting affidavit of the 1st applicant. Instead the 1st applicant contended that he is a poor fisherman and he is likely to be committed to civil jail as he is not possessed of financial muscle to be able to pay the sum of Ksh. 8,500,000. That may well be the case, but in an application premised on **Rule 5(2) (b)**, we are not to look at the applicant's financial ability (or otherwise) but rather the respondent's ability to repay sums paid to him should an intended appeal be successful.

Having come to the conclusion that the 1st applicant has not demonstrated that the intended appeal will be rendered nugatory, absent stay, we do not deem it necessary to go into a consideration as to whether the 1st applicant has demonstrated that he has an arguable appeal as both limbs have to be established in order for us to exercise our discretion in favour of an applicant in granting an order of stay.

The sum total of the above is that we find that the motion herein is bereft of merits. It is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

Dated at Nakuru this 21st day of November, 2018

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

.....

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