



IN THE COURT OF APPEAL

AT NAIROBI

ICORAM: WAKI, NAMBUYE & MURGOR, JJA

CIVIL APPLICATION NO. 159 OF 2018

BETWEEN

**FREDRICK KAGIA KIMANI (Suing as an administrator**

**of the Estate of HENRY KIMANI KAGONYE.....APPLICANT**

AND

**DAMARIS WANJIKU GACHOKA .....RESPONDENT**

*(Being an application for injunction and stay of execution pending determination of an intended appeal from the Judgment and Decree of (P.M. Njoroge) dated 26<sup>th</sup> February, 2018 In*

MILIMANI NAIROBI E.L.C. CASE NO. 570 OF 2008)

RULING OF THE COURT

Before us is a Notice of Motion dated 24<sup>th</sup> May, 2018, brought *under Rule 1 (2), 5(2) (b) of the Court of Appeal Rules*, seeking orders that:

(1) **“Pending the lodging, hearing and determination of the intended appeal to this Court:**

**(a) This Honourable Court be pleased to stay the Judgment and Orders of**

**Justice P.M. Njoroge delivered at the Environment and Land Court on 26<sup>th</sup> February, 2018 in ELC NO. 570 of 2008;**

**(b) The respondent by herself, her servants, agent and anybody claiming through the respondent be restrained from interfering with, alienating, sub-dividing, trespassing, evicting or otherwise dealing with all that parcel of land known as MUGUGA/GITARU/1994 or any part of it;**

**(c) The costs of and incidental to this application do abide the result of the appeal”**

The application is supported by the grounds on its body and a supporting affidavit deposed by **Fredrick Kagia Kimani**, together with the annexures thereto. It is opposed by a forty three (43) paragraph replying affidavit of the respondent, **Damaris Wanjiku Gachoka**, deposed on the 28<sup>th</sup> July, 2018.

It was canvassed by way of oral submissions through learned counsel for the appellant, **Mr. James Nyiha** of **Nyiha, Mukoma & Company Advocates** and skeleton written submissions filed on behalf of the respondent dated 25<sup>th</sup> July, 2017, which were adopted and highlighted by learned counsel for the respondent, **Miss Kariuki**, of **Wekesa & Simiyu Advocates**.

Rising to support the application, learned counsel **Mr. James Nyiha** submitted that the applicant was aggrieved by the Judgment and Decree of the Environment and Land Court ELC, **P.M. Njoroge, J** dated 26th February, 2018; that he timeously filed a Notice of Appeal dated 8<sup>th</sup> March, 2018, intending to appeal to this Court against the entire Judgment of the trial Court; that he intends to raise eight (8) grounds of appeal as contained in the intended memorandum of appeal annexed to the supporting affidavit, which in counsel’s view demonstrates that the intended appeal is arguable.

The arguable points the applicant intends to raise on appeal are *inter alia* that the learned Judge of the Superior Court erroneously took into

consideration an unsworn affidavit not tested through cross-examination; failed to consider the maps tendered in evidence by both the District Land Registrar and the District Land Surveyor; failed to consider the provision of section 18 of the Land Adjudication Act; and also that the Judge failed to take into consideration material particulars.

Turning to the second ingredient, counsel submitted that the applicant is apprehensive that the respondent may dispose of the property to 3<sup>rd</sup> parties which would render the intended appeal nugatory.

Counsel cited the case of *Dickson Muricho Muriuki versus Timothy Kagundu Muriuki & 6 others [2013] eKLR*, *Francis Oriosa Orango versus Joseph Mato Ngoko [2009] eKLR*; in the matter of the *National Land Commission [2015] eKLR*; *Kenneth Nyaga Mwige versus Austin Kiguta & 2 others [2015] eKLR*; *The Land Registration Act No. 3 of 2012* and *Land Adjudication Act Cap 284*, all in support of the applicant's submissions that the Judge erroneously relied on affidavit evidence not tested in cross-examination; failed to consider evidence of maps and provisions of law cited to him by the applicant and therefore arrived at an erroneous conclusion in the matter which should not be allowed to stand. Opposing the application, learned counsel **Miss Kariuki** cited the case of *Anthony Gachara Ayubu versus Francis Mahinda Thinwa [2014] eKLR*; *Rajesh Pranjivan Chudasama versus Sailesh Pranjivan Chudasama [2014] eKLR* and *Standard Chartered Financial Services Limited & 2 Others versus Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited & 2 others [2016] eKLR*, all in support of their submissions that the intended appeal is not arguable; firstly, for lack of a substratum as land parcel number Muguga/Gitaru/1994 was subdivided long ago and titles issued to 3<sup>rd</sup> parties; secondly, the issues intended to be raised in the intended appeal as appear in the draft memorandum of appeal were never canvassed before the High Court; thirdly, for lack of *locus standi* in the applicant to pursue the intended appellate rights for the same reason that the substratum of the intended appeal is non-existent; and lastly for the applicant's non-disclosure both to the High Court and before this Court that the substratum of the intended appeal no-longer exists.

Turning to the issue as to whether the intended appeal will be rendered nugatory should the appeal ultimately succeed, Counsel relied on the case of *Western College of Arts and Applied Sciences versus Oranga and others [1976] KLR 63* and *Nelson Andayi (it) Havi versus Law Society of Kenya & 3 others [2018] eKLR*, in support of their submissions that reliefs sought under **Rule 5(2) (b)** of the Court of Appeal Rules cannot issue as there is no positive order issued by the Court capable of being stayed. All that the trial Court did was to dismiss the applicant's claim which in counsel's view is a negative order.

The jurisdiction of this Court under Rule 5(2) (b) of the Court's Rules is said to be original, independent and discretionary. (See *Githunguri versus Jimba Credit Corporation Limited No. (2) [1988] KLR*). It is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the appeal where one has been filed or is intended (see the case of *Equity Bank Ltd versus West Link Mbo Ltd, Civil Application No. 78 of 2011 (UR) 2013 eKLR*. The jurisdiction arises where the applicant has lodged a notice of appeal (see the case of *Safaricom Ltd versus Ocean View Beach Hotel Ltd and 2 others, Civil application No. 327 of 2009 (UR)*. As a matter of law and practice, the applicant is obligated to satisfy the twin principles, first, the appeal or the intended appeal is arguable and second, that if the stay sought is not granted, the appeal/intended appeal as the case may be will be rendered nugatory. See the *Githunguri* case (supra). An arguable appeal or intended appeal is not one which must succeed, but is with reference to one which raises a *bona fide* issue worth the consideration of the Court (See *Kenya Tea Growers Association and Another versus Kenya Planters Agricultural Workers' Union, Civil Application No. Nai 72 of 2001 (UR)*. It need not raise a multiplicity or any specific number of such points. A single arguable point is sufficient to earn an applicant such a relief (see *Damji Premji Mandavia versus Sara Lee Household & Body Care (K) Limited, Civil Application No. Nai 176 of 2012* and *Ahmed Musa Isamel versus Kumba Ole Ntamorua & 4 others, Civil Appeal No. Nai. 256 of 2013*.

As for the second limb, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible (see the case of *Stanley Kangethe (it) Kinyanjui versus Tony Ketter 75 others, C.A. No. 31 of 2012* where in this Court stated *inter alia* thus:

**“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 be reasonable to compensate the party aggrieved”.**

Both limbs must be established before a party can succeed. See *Republic versus Kenya Anti-Corruption Commission & 2 Others, 2009 KLR 31* and the *Githunguri* case.

We have considered the record in light of the rival submissions highlighted above, as well as principles of law that guide the Court in the exercise of its mandate under Rule 5(2) (b) of the Rules of the Court. On jurisdiction, we are satisfied that we are properly seized of the application as there is a valid notice of appeal on record.

On the argueability of the intended appeal, we have perused the intended grounds of appeal and find that issues pertaining to the weight to be attached to affidavit evidence not tested on oath in cross-examination; whether both the facts of the case and the law relied upon by the opposing parties were properly appreciated by the Judge; whether the substratum of both the High Court proceedings and the intended appeal are extinct, are all matters that are arguable, in our view. The applicant therefore surmounts the first of the twin principles.

As for the second limb on the intended appeal, there is no demonstration on the part of the applicant as to how the intended appeal will be rendered nugatory. In any event, there was no positive order issued by the High Court capable of being stayed as the order issued by the trial Court was a dismissal order. See *Nairobi Metropolitan PSV Saccos Union Limited & 24 others versus County of (it) Nairobi Government & 3 others [2014] eKLR*, where it was held that there is no jurisdiction to grant a relief under the rule 5(2)

(b) where the High Court's order is either a dismissal or a striking-out order, or alternatively where the Court did not order either party to do something or to refrain from doing something.

The position in law is that both limbs must be satisfied before the relief sought can issue. See *Republic versus Kenya Anti-Corruption Commission & 2 Others, 2009 KLR*

**31, Reliance Bank Ltd versus Norlake Investments Ltd [2012] IEA 227.** Since the applicant has only succeeded on the first limb, the orders prayed for in the application cannot issue. The application is therefore dismissed with costs to the respondent.

***Dated and Delivered at Nairobi this 9<sup>th</sup> Day of November, 2018.***

**P.W. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**Deputy Registrar.**