



THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & GATEMBU, J.J.A)

APPLICATION NO. 125 OF 2017 (UR 96 OF 2017)

BETWEEN

**JOHN NJUGUNA WANG'OMBE** (*Suing as the Legal Representative of the Estate of*

**WANG'OMBE MUIGAI**).....**APPLICANT**

VERSUS

**CHARLES NGURE KIBE** (*Suing as the Legal*

*Representative of the Estate of KIBE MUNGAI*).....**RESPONDENT**

*(An application for stay of proceedings in Nairobi Environment and Land Case No. 337 of 2011 and or execution of the judgment thereon delivered on the 15th May, 2015 by the Hon. Lady Justice L. Gacheru, J)*

in

**ELC NO. 337 OF 2011 (OS)**

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**RULING OF THE COURT**

1. By a notice of motion dated the 5th June, 2017 **JOHN NJUGUNA WANG'OMBE** (the applicant) seeks, *inter alia*, orders for stay of proceedings and execution of the judgment delivered by the Environment and Land Court (Gacheru, J). In her judgment, delivered on the 15th May, 2015, the learned Judge allowed an originating summons filed by **CHARLES NGURE KIBE** (the respondent) and held that **WANG'OMBE MUIGAI**, who was the father of the applicant, held all that parcel of land known as GATAMAYU/KAMUCHEGE/360, in trust for his brothers **KIBE MUNGAI**, who was the father of the respondent, and **NGURE MUIGAI**.

The learned judge ordered that the said parcel of land be divided in equal shares between the estates of **WANG'OMBE MUIGAI** and **KIBE MUNGAI**, since **NGURE MUIGAI** died without leaving any beneficiaries.

2. Aggrieved by that judgment, the applicant who was acting in person in the lower Court lodged a Notice of Appeal on the 28th May, 2015. However, it was not until the 8th February, 2017 when he appointed advocates to act for him that a letter was written to the lower Court requesting for copies of proceedings and judgment. When the matter came up for hearing before us, Nick Omari learned counsel appeared for the applicant. On whether the appeal is arguable counsel submitted that the learned judge held that the property was held in trust without any evidence to support that finding. Counsel contended that there was no analysis in the judgment and that the learned judge shifted the burden of proof to the applicant. On the nugatory point counsel submitted that the respondent has already started the execution process in line with the decision of the trial court. Counsel contended that the registrar has been directed to subdivide the land into two. He further contended that the applicant is living on the land, whereas the respondent has never been on the land. In conclusion counsel submitted that if the subdivision is carried out, it would be impossible to reverse.

3. Ms. Mubangi, learned counsel appeared for the respondent, submitted that the notice of appeal is not competent. She argued that there was

no arguable appeal since all the evidence was considered in the judgment.

Counsel contended that there was no appeal since the proceedings were sought in 2017 way after the judgment was delivered on 15th May, 2015 and that the execution process was going on since 2016. On the 2nd limb counsel argued that the intended appeal cannot be rendered nugatory since the subdivision can be reversed.

4. As rightly noted and argued by both counsel, it is now well settled how this court exercises its jurisdiction under **Rule 5 (2) (b)** of this court's rules. As we always do in the circumstances, we follow the two laid down principles. First, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal that merits to be heard (see ***Githunguri vs. Jimba Corporation Limited (1988) KLR 838***); and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. See ***Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd., Civil Application Number Nai. 93/02 (UR)***. Lastly, both limbs must be demonstrated to exist before one can obtain relief under **Rule 5 (2) (b)**. (See ***Republic vs. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31***).

5. We have applied the principles to the present circumstances. In considering whether the appeal is arguable, we have considered the applicant's submissions, arguments as well as the draft memorandum appeal. We have also looked at the impugned trial court's decision the basis for the intended appeal. In the case of ***Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001*** this court addressed what is considered to be an arguable appeal thus,

***“He (the applicants) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision.”***

It is trite too that demonstration of the existence of even one arguable point will suffice in favour of the applicants. (See ***Kenya Railways Corporation vs. Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012*** and ***Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 Others, Civil Appeal No. NAI. 256 of 2013***).

6. From the memorandum of appeal and the submissions made by learned counsel for the applicant, we are of the view that the applicant has failed to demonstrate that he has an arguable appeal. From the draft memorandum of appeal and the submissions by the applicant it appears that the main ground of appeal is that the learned judge erred in holding that the land was held in trust without any evidence oral or documentary. However, looking at the Originating Summons, affidavit in support and the annexures thereof they more or less support the contention by the respondent that **WANG'OMBE MUIGAI** held the land in trust for his brothers. Further, from the evidence of PW4 (who was the area chief), as captured in the judgment, he stated that a dispute was heard between the parties and it was determined that **WANG'OMBE MUIGAI** held the land in trust for his brothers. The chief further testified that the matter was referred to the District Officer who agreed with the decision of the chief. We are of the view that this evidence by the chief who was an independent witness supported the conclusion arrived at by the learned judge of the existence of a trust. And in the absence of any other oral or documentary evidence, we think that the issue of trust is not an arguable point in the intended appeal.

7. From the foregoing it is clear to us that the applicant has failed to satisfy the first limb of the test for grant of relief under **Rule 5 (2) (b)**, we therefore do not find it necessary to consider the second limb because the two limbs must both be demonstrated to exist before an applicant can be granted relief. The result of the foregoing is that we do not find merit in the application dated 5th June, 2017 and we accordingly dismiss it. Costs of this application to abide by the outcome of the intended appeal.

***Dated at Nairobi this 9th day of November, 2018.***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is the True copy of the original.*

**DEPUTY REGISTRAR**