



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPLICATION NO. 97 OF 2016 - KISUMU

BETWEEN

PHELESIA ADOYO OTIENO1ST APPLICANT

MOSES AYAGA ADHINGA2ND APPLICANT

AND

DAVID OUMA OKORE1ST RESPONDENT

NORAH ADHIAMBO ODHIAMBO 2ND RESPONDENT

(Being an Application for stay of execution from the Ruling and Order of the High Court of Kenya at Kisumu (Kibunja, J) dated 9th day of November, 2016 in Kisumu Elc Case No. 159 Of 2014)

RULING OF THE COURT

1. In a ruling delivered on 9th November 2016, the Environment and Land Court at Kisumu (S. M. Kibunja, J.) cited the 2nd applicant for “*contempt of court for disobeying [a] court order dated 23rd June 2014*” and further ordered that a warrant for his arrest be issued.
2. Apprehensive that he will be arrested, the 2nd applicant by his motion before us dated 15th December 2016, seeks an order to stay execution of that ruling in its entirety pending the hearing and determination of his appeal against it being Civil Appeal No. 111 of 2016 at Kisumu.
3. Learned counsel for the 2nd applicant, Mr. G. N. Awino, referred us to the record of the application and submitted that the applicant has an arguable appeal that will be rendered nugatory unless we grant the orders sought. He referred to the draft memorandum of appeal and argued that there is a question of service of the order that requires interrogation at the hearing of the appeal; that in any event it was not satisfactorily demonstrated to the lower court that the applicant did anything, after the issuance of the order complained of, in violation of the order. He submitted that the finding by the Judge that the applicant planted sugarcane on the suit property after the order was made on 23rd June 2014 was not well founded as it was based on a letter of little probative value from an Assistant Chief.
4. Opposing the application, Mr. T. T. Tiego, learned counsel holding brief for Mr. S. M. Onyango for the

respondents, submitted that the 2nd applicant's appeal is not arguable and has no chance of success; that the 2nd applicant was served with the order given on 23rd June 2014 and was aware of subsequent extensions of that order by the court; that it was established that in defiance of that order, the applicant planted sugar cane on the suit property, an uncontested fact confirmed by the Assistant Chief; that in any case, the applicant's application should not be entertained before he purges the contempt by removing or uprooting the cane from the suit property.

5. We have considered the application and the submissions by counsel. In an application of this nature, an applicant should demonstrate that he has an arguable appeal and that if the orders sought are not granted the appeal will be rendered nugatory. In **Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006** this Court stated:

“The jurisdiction of the Court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the Court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

6. As regards the question whether the applicant has established an arguable appeal, we are unable to conclude that the applicant's appeal is frivolous. Mindful as we are that an arguable appeal is not one that must necessarily succeed, (See **Dennis Mogambi Mong'are vs. Attorney General & others [2012] eKLR**), we do not think the issue to be canvassed at the appeal regarding whether it was demonstrated that the applicant planted the sugar cane on the suit property subsequent to or prior to the issuance of the order given 23rd June 2014 is frivolous. We think the applicant has an arguable appeal.

7. As to whether the intended appeal will be rendered nugatory unless we grant the orders sought, we think it will. Consistently with the objective behind Rule 5(2)(b) of the Rules of this Court, which, as stated by Githinji, JA. in **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011** is the ***“preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”***, we are persuaded that we should grant the orders sought. We accordingly grant prayer (c) of the application dated 15th December 2016. The ruling of the court dated 9th November 2016 is hereby stayed pending the hearing and determination of Civil Appeal No. 111 of 2016, Kisumu. Costs of the application shall abide by the outcome of the appeal.

Orders accordingly.

Dated and delivered at Kisumu this 10th day of February, 2017.

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

.....

DEPUTY REGISTRAR