



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & G.B.M. KARIUKI J.J.A.)

CIVIL APPLICATION NO. 86 OF 2016

BETWEEN

ELIZABETH WAIRIMU THIMBA 1ST APPLICANT

KENNETH MAITAMEI THIMBA 2ND APPLICANT

TERESE WANJIRO THIMBA 3RD APPLICANT

AND

WINFRED NJOGU MBUTHIA OBJECTOR

JAMES MUNENE THIMBA 1ST DEFENDANT/RESPONDENT

MARY WANJIRU KARIMI 2ND DEFENDANT/RESPONDENT

(An application for an order of injunction against the respondent in dealing with land parcels Nakuru Municipality Bloc 26/13, 26/14 and Bahati Wendo Block 2/60 (Ruguru) which are subjected to the appeal preferred by the applicants against the Ruling of the High Court of Kenya, Nairobi (Ndungu, J) delivered on day 16th day of February 2016

in

H.C.SUCCESSION CAUSE NO. 81 OF 2002)

RULING OF THE COURT

1. On 25th February 2016, Messrs Elizabeth Wairimu Thimba, Kenneth Maitamei Thimba and Teresia Wanjiru Thimba (who are hereinafter referred to as “the applicants”) lodged in this Court an application by way of a notice of motion dated that day. The application sought an order of injunction against Messrs Wilfred Njogu Mbuthia, James Munene Thimba and Mary Wairimu Karimi (who are hereinafter referred to as “the respondents”). The applicants sought in the application an order to restrain the respondents from dealing with the land parcels known as Bahati/Wendo Block 2/60 (Ruguru Farm), Nakuru Municipality Block 26/13 and Nakuru Municipality Block 26/4 pending the hearing and determination of the applicants’ appeal against the decision of the High Court (Ndungu J) delivered on 16th February 2016 in a notice of motion by the applicants in H.C. Succession Cause No.81 of 2002 (in the Estate of the Late Teresia Wanjiru Wangera, deceased). The applicants also sought in the notice of motion leave to appeal

against the ruling of Mulwa J declining to enlarge time for the applicants to file a notice of appeal against the ruling of Emukule J delivered on 5th December 2014. The High Court (Ndungu J) dismissed the applicants' notice of motion on 16th February 2016 on the ground that it had no merit.

2. Aggrieved by the dismissal, the applicants gave on 22nd February 2016 Notice of Appeal dated 19th February 2016 manifesting their intention to lodge appeal against the order dismissing their notice of motion.

3. The motion before us is supported by an affidavit sworn on 25th February 2016 by Elizabeth Wairimu Thimba. A replying affidavit sworn on 4th April 2016 was filed on 20th June 2016 by Githui John, an advocate of the High Court of Kenya who avers that he is "seized of the matter" and is "instructed by the respondents" for whom he has been acting since 2005. We do not encourage advocates to swear affidavits on behalf of their clients for the simple reason that it would be embarrassing for an advocate to be at the Bar as counsel as well as in the witness box as a likely witness at the same time. Only in very rare circumstances where the matters deposited to are purely formal should an advocate swear on affidavit on behalf of a client. The applicants have also filed a list of authorities to buttress their application.

4. When the application came up for hearing on 27th June 2016, **Mr. Tombe** appeared for the applicants while **Mr. Githui** appeared for the respondents.

5. Mr. Tombe urged the court to grant the injunction sought so as to stop alienation or transfer of the three properties aforementioned. He drew our attention to the fact that the applicants have filed a notice of appeal; that the Grant of Letters of Administration in the Estate of Teresia Wanjiru Wangera has been confirmed; that the applicants contest the orders relating to the three properties; that the applicants' appeal is arguable; that the appeal will be rendered nugatory if the properties are sold before it is determined; and that the application has merit.

6. On his part, Mr. Githui, the respondents' counsel, opposed the application and referred us to the replying affidavit. He pointed out that the estate of the late Teresia Wanjiru Wangera was distributed in the year 2013; that the distribution was not appealed; that time to appeal against the distribution ran out in 2013; that no notice of appeal was given to appeal against the decision of Mulwa J; that time to give notice of appeal in relation to the decision of Mulwa J has run out; that a draft of a notice of appeal in respect of Mulwa J's order is of no effect; that the High Court exercised its discretion properly in declining to give extension of time to the applicants and that the application has no merit and should be dismissed with costs.

7. We have duly perused the applicants' notice of motion and the replying affidavit. We have also duly considered the rival submissions of counsel.

8. The application is premised on rule 5(2)(b) of the Court of Appeal Rules. Under the rule, the Court has jurisdiction in civil proceedings where a notice of appeal has been lodged in accordance with rule 75 to order a stay of execution, an injunction (such as is sought by the applicants) or a stay of any further proceedings on such terms as the Court may think just. This Court has developed principles to guide it in exercise of its independent and discretionary jurisdiction in considering whether to grant the orders under rule 5(2)(b). The principles are designed to balance two parallel propositions, first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and, secondly, that a litigant who is aggrieved by a decision must not be denied his right to challenge the impugned decision to the next higher court (see **Butt v. Rent Restriction Tribunal** [1982] KLR 417 and **Kenya Shell Ltd v. Kabiru & Another** [1986] KLR 410. These principles require an applicant to satisfy the Court first that he has an arguable appeal. To do so, an applicant must show that the appeal is not frivolous, that is to say, that the appeal is arguable. It is now settled that an applicant need not demonstrate arguability of an appeal by demonstrating a plethora of arguable points. It is sufficient even if there be only a solitary arguable point. The court will, in considering arguability of the appeal normally eschew from delving too much into the merits or otherwise of the appeal lest this prejudices the intended appeal or embarrasses the Bench that shall hear it. It should, however, be noted that an arguable appeal is not necessarily one that is bound to succeed. It is sufficient that an applicant has an appeal that is arguable

even if it be on a single point of law.

9. The second limb of the twin principle that an applicant must satisfy is that if the order sought if not granted, the appeal, if successful, shall be rendered nugatory. In short, the success of the appeal would be Pyrrhic victory if the order sought is not granted.

10. Applying these principles, have the applicants satisfied the criteria to warrant the grant of the injunction they seek under rule 5(2)(b)? When Mulwa J declined to enlarge time to enable the applicants to appeal against the ruling of Emukule J, the applicants did not give a notice of appeal or seek to appeal against Mulwa J's Ruling. As it turns out, the order by Mulwa J remains unchallenged. The applicants seek leave to appeal against Mulwa J's order refusing enlargement of time to appeal the ruling by Emukule J of 8th February 2013 in which the court determined the beneficiaries and distributed to them the estate of Teresia Wanjiru Wangera, deceased. No notice of appeal was given in respect of the determination of the beneficiaries and distribution of the estate to the beneficiaries.

11. Mulwa J declined to enlarge time to file notice of appeal. There was nothing to stop the applicants from giving notice of appeal to challenge the order (of Mulwa J) declining to enlarge time. Instead, the applicants applied for leave to appeal against Mulwa J's ruling which was dismissed by Ndungu J. If we were to allow the application and stop the transfer of the three properties, and if the applicants' appeal were to succeed, it would result in the order of Ndungu J being reversed and as a result, the applicants would manage to obtain leave to appeal against the ruling of Mulwa J dated 9th July 2015. The judgment of Emukule J would remain unimpugned. That is the judgment that determined the beneficiaries and distribution of the estate. We would be acting in vain. First, the appeal would not be turned into Pyrrhic victory. If, therefore, the appeal would not be rendered nugatory if injunction is not granted, why would the application be allowed? In short, the twin principles are not satisfied. The applicants have not shown that their appeal concerns the determination of the beneficiaries and distribution to the latter of the three aforementioned properties. It seems that after the judgment by Emukule J on 5th December 2014, the applicants did nothing until 9th July 2015 when they applied to Mulwa J for enlargement of time to appeal against the said judgment. Seeing no merit in the application for enlargement of time, Mulwa J dismissed it whereupon the applicants applied on 14th July 2015 to Ndungu J for leave to appeal the ruling by Mulwa J. Dilatoriness on the part of applicants seems to have led to the state of affairs they found themselves in.

12. On our part, we find no merit in the application in as much as it does not meet the threshold of the twin principles for applications under rule 5(2)(b). In the circumstances, we dismiss the application with costs.

Dated and delivered at Nairobi this 24th day of March, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR