



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, JJ.A)

CIVIL APPLICATION NO. 209 „A? OF 2016

BETWEEN

CHRISTINE NTHAKYE WAMBUA.....APPELLANT

VERSUS

STEPHEN MBUTHI.....1ST RESPONDENT

MWANGANGI MBUTHI.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

(Application for stay of execution pending the hearing and determination of Appeal against the judgment of the High Court of Kenya at Garissa (Dulu J.,) delivered on 28th July, 2016

in

High Court Civil Appeal No. 16 of 2014)

RULING OF THE COURT

[1] Christine Nthakye Wambua (applicant) seeks an order of stay of execution of judgement and all consequential orders in Civil Appeal No. 16 of 2014, at the High Court of Kenya, Garissa, until the hearing and determination of an intended appeal. A brief recap of what has given rise to the instant Notice of Motion is this. The applicant, a resident of Mathuki village in Mwingi East District of Kitui County, was a proud owner of a donkey and its calf. Both donkey and its calf went missing on or about 19th August, 2011. The applicant started searching for her animals that had apparently and unknown to her strayed to a neighbour's compound. It was the following day, 20th August, 2011, that the applicant that learnt the beasts were spotted in the compound of her neighbours, that is Stephen Mbuthi and Mawangangi Mbuthi, who are brothers (1st and 2nd respondents respectively). Upon requesting the respondents to release the animals, the respondents claimed they were holding the animals for trespassing on their compound and according to the applicant, they declined to release them.

[2] This prompted the applicant to report the matter before the local chief. What was seemingly a minor dispute between neighbours that could have been resolved amicably for good neighbourliness, unfortunately escalated to a police report being filed by the applicant. As a consequence, the respondents

were charged before the Senior Resident Magistrate's Court at Mwingi with the offence of stealing stock contrary to the provisions of section 278 of the Penal Code. The particulars stated that on 19th August, 2011, both respondents jointly stole 2 donkeys valued at Ksh 12,000/ the property of Christine Wambua. Upon trial, the respondents were acquitted under **Section 215** of the **Criminal Procedure Code**. Upon their acquittal, they filed a civil suit before the same court seeking damages for malicious prosecution and false imprisonment. The civil suit was heard, and the learned trial magistrate dismissed the respondents' suit with costs.

[3] Aggrieved by the aforesaid order dismissing *their* suit, the respondents filed an appeal before the High Court in Garissa. The learned Judge, Dulu J., found in favour of the respondents and awarded them Ksh 100,000/= for malicious prosecution, costs of the appeal and the suit before the magistrates' court. This is the judgment that has provoked the present application that is brought under the provisions of **Rule 5 (2) (b)** of the Court of Appeal Rules. During the hearing of the instant application, learned counsel Mr. Musyoki appeared for the applicant. The respondents did not appear despite the fact that they were duly served with the day's hearing notice. The application therefore proceeded for hearing under **Rule 56 (2)** of the Court of Appeal Rules which provides that if on the day fixed for the hearing of an application, the applicant appears and the respondent fails to appear, the application shall proceed in the absence of the respondent.

[4] Learned Counsel for the appellant submitted that the appeal is arguable, for reasons that the applicant merely reported her missing animals that were found in the compound of the respondents. Counsel also stated that the learned Judge misapprehended the evidence that was uncontroverted, that was the fact that the respondents refused to release the animals and therefore the appellant had no choice but to report the matter to the law enforcement agencies. For that reason, there was no malice, actual or apparent that could have been imputed on the part of the applicant. On the nugatory aspect of the appeal, should the appeal be successful, counsel for the applicant submitted that the applicant who is indigent and has come to this court courtesy on *pro bono* legal services provided to her by counsel at the request of the Law Society of Kenya, is likely to be committed to civil jail in the event that stay is not granted. Lastly, in the event that the applicant pays the judgment debt with costs which is now going to almost half a million Kenya shillings, it is highly unlikely, the respondents who have already re-located from her neighbourhood would repay the same. Counsel therefore urged us to allow the application.

[5] We have given due consideration to this application, the supporting affidavit and the accompanying documents. What is constant in an application such as this one under **Rule 5 (2) (b)** are the twin issues of whether the intended appeal raises arguable ground(s) and the nugatory aspect of the appeal should it become successful after the hearing. In the oft' cited case of; **Butt Vs Rent Restriction Tribunal** [1982] KLR page 417, this Court while dealing with a similar issue of whether or not to grant an order of stay of execution it was held:

“1. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings

4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements...”

[6] On whether the success of the appeal will be rendered nugatory; the term “*nugatory*” has to be given its full meaning. It does not only mean worthless, futile or invalid; it also means trifling or frivolous, see

the case of;- **Reliance Bank Ltd v Norlake Investments Ltd** [2002] 1 EA 227 at page 232.

i) 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 reasonably compensate the party aggrieved.

ii) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.”

[7] Bearing in mind the above principles as well as the overriding objectives in the administration of justice as spelt out under **Section 3A of the Appellate Jurisdiction Act**, that is just, expeditious, proportionate and affordable resolution of appeals; we have addressed our minds to the issues of whether there are special circumstances that warrant granting or otherwise of an order staying execution. In this regard we recognize that the respondents like any successful litigant who has obtained a judgment is entitled to the realization of the fruits of their litigation, unless circumstances exist that justify denying them the immediate execution until the appeal is heard and determined. Consequently we have to establish whether there are arguable grounds.

[8] In doing so, we do not wish to go into the merit of the issues, arguments and material that was before the learned Judge, which will be handled perhaps by another Bench during the main appeal; it is that Bench that will have to make a determination on whether or not the claim of tort of malicious prosecution by the respondents was proved. For now a cursory look at the judgment, we have isolated certain issues which will be determined in the said appeal which we think are arguable. We are also cognisant of the fact that an arguable issue may not amount to a successful appeal. Those issues include whether, by reporting the loss of her animals to the chief, the applicant was driven by malice, spite and improper motives; whether by virtue of merely reporting the disappearance of her animals to the police, the applicant was responsible of the arrest, charging the respondents with the criminal charges and the subsequent dismissal of the charges; also what was the role played by the chief and the police. To us the aforementioned issues are not frivolous, they are arguable, and thus the applicant has surmounted the first hurdle.

[9] On the nugatory aspect of the orders issued requiring the applicant to settle the judgment debt, the applicant contended that execution of the said decree would have devastating effect on her and more significantly, she alleged that the respondents re- located from the area where they used to live and it will be next to impossible to find them. These allegations were not controverted as the respondents did not file any replying deposition to state otherwise. In this regard we are guided by the decision in; **Oraro & Rachier Advocates Vs Co-operative Bank of Kenya Limited**; Civil Application No. NAI 358 of 1999 (unreported), where it was held by this Court that; the balance of convenience tilts in favour of holding the execution of a judgment where circumstances as in the instant application permit, until the appeal is heard and determined.

[10] For the aforesaid reasons we are satisfied this application has merit. We allow the Notice of Motion dated 7th September 2016, but direct the applicant to file the record of appeal (if not yet filed) within 90 days from the date of this ruling failing which the orders herein shall stand vacated. Thereafter the appeal shall be given a priority date for hearing.

The costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 7th Day of April, 2017.

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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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