IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM, WAKI, KARANJA & KIAGE, JJA)

CIVIL APPLICATION NYR. NO. 97 OF 2016

BETWEEN

JULIUS WAHINYA KANG'ETHE……..1ST APPLICANT

JULIANA WARIGI KANG'ETHE.....2ND APPLICANT

VERSUS

MUHIA MUCHIRI NG'ANG'A……..…… RESPONDENT

(Being an application for stay of execution of the orders of the Environment and Land Court Nakuru (Munyao, J.) dated 9th November, 2016

in

E. L. C. CASE NO. 253 of 2012)

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RULING OF THE COURT

1. The notice of motion dated 13th December 2016 seeks two substantive orders under **Rule 5(2)(b)** of the rules of this Court, as follows:

> **"2. THAT there be a stay of execution of the orders of Hon. M. Sila (sic) issued on 9th November, 2016 to the effect that the applicants vacate the parcels of land to wit NYANDARUA/NANDARASI/2307 & 2308 and give possession of the parcels of land to the respondents, pending the hearing and determination of the intended appeal.**
>
> **3. THAT there be a stay of all and/or further proceedings in Environment and Land Court, Case No. 253 of 2012 pending the hearing and determination of the intended appeal."**

2. It was taken out by two of the six defendants against whom conditional orders for setting aside an *ex parte* judgment were issued by the Environment and Land Court **(Munyao Sila J.)** and our presumption is that the four other defendants were satisfied with the orders issued against them. The orders issued against the two applicants before us, who are husband and wife, were in respect of an application made on

3rd March 2016 for setting aside an *ex parte* judgment delivered by that court on 27th February 2016. It was a regular judgment made after hearing the respondent herein (the plaintiff in the suit) in the absence of all the defendants who failed to attend despite the hearing date having been taken by consent of the parties in court. The trial court was not persuaded by the reasons advanced by the applicants' counsel to explain their absence and was not prepared to interfere with the *ex parte* judgment. However, in the interests of justice, the court decided to hear the applicants on condition that they vacate the two portions of the disputed land registered in their names and give possession to the respondent pending the hearing and determination of the suit. That order was made because the applicants had expressed their inability to comply with an earlier conditional order requiring them to deposit part of the sum of Sh. 2,352,000 awarded to the respondent as special damages for trespass. Thrown away costs of Sh. 20,000 were also awarded against them and a default clause was spelt out.

3. The orders sought before us may only issue if the applicants satisfy us on the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. Those are the age-old principles which were ably summarized in the case of ***Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR*** as follows :

> ***i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.***
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> ***ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***
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> ***iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.***
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> ***iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.***
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> ***v) An applicant must satisfy the court on both of the twin principles.***
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> ***vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.***
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> ***vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.***
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> ***viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.***
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> ***ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.***
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> ***x) 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.***
>
> ***xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim.***

4. Learned counsel on both sides appreciated those principles and sought to apply them to their respective arguments. For the applicants, **Mr. Paul Njuguna,** referred us to a draft memorandum of appeal raising no less than 13 grounds questioning the exercise of discretion by the trial court. He emphasized in particular: that the mistake made by the applicants in failing to attend court on the hearing date was made by their advocate and such mistake or inadvertence should not have been visited on the applicants as was stated in the cases of ***Chemwolo vs. Kubede [1982-88] KAR 103*** and ***Joseph Njuguna Muniu vs. Medicino Giovani [1998]eKLR***; that the onerous conditions imposed on the applicants were a departure from settled principles on the judicial exercise of discretion as laid out in a long line of authorities including ***Pithon Waweru Mana vs. Thuku Mugiria[1983] eKLR*** and ***Butt vs. Rent Restriction Tribunal Civil Application No NAI 6 of 1979;*** and that the decision of the trial court trampled on the applicants' constitutional rights to fair hearing and the right to own property. On the nugatory aspect, counsel submitted that if the applicants, who hold Titles to the disputed land which they have occupied for more than 15 years were thrown out before the appeal is heard, there would be no need of proceeding with the intended appeal.

5. In response, learned counsel for the respondent, **Mr. Waiganjo Mwangi**, submitted firstly , that the motion was filed after the period within which the impugned orders were to take effect and there was therefore nothing to stay since judgment had taken effect and any order for stay would serve no purpose as was stated in the case of ***Moses Njue Gachoka vs Faith Muli [2015] eKLR;*** that the trial court exercised its discretion judiciously by considering and rejecting the explanation given for non attendance at the hearing and even then bending backwards to allow the application on terms which the applicants trashed by non compliance twice over; that the respondent filed the suit in 1988 and has been patiently waiting for more than 18 years for its hearing and determination; and that the delivery of vacant possession would not affect the intended appeal since the applicants are not resident on the disputed portions of the land which they utilized only for agricultural purposes and can always get them back if they were successful in their appeals.

6. We have considered the application, the submissions of counsel and the law. We must first deal with the contention by Mr. Mwangi that the application was incapable of consideration or grant due to non compliance with the default clause and effluxion of time. The ***Gachoka case (supra)*** was cited in aid of the submission and it is therefore necessary to examine it. This Court, differently constituted, was dealing with an intended appeal against a ruling granting a conditional stay of execution of the judgment and decree of the High Court. The conditional stay was to the effect that the applicant should deposit in court the sum of Kshs.1 million as security for the judgment sum, and in default of making the deposit within 30 days, the application for stay would automatically be deemed to have been dismissed. No deposit had been made by the time of filing or hearing the notice of motion.

7. The court found, in the first place, that the applicant had not demonstrated an arguable appeal on how the learned judge erred in the exercise of his discretionary power in granting a conditional stay. In the Court's view:

> "***Inability to satisfy the judgment sum or deposit part of the judgment sum as security does not per se raise an arguable appeal***."

8. In the second place, the Court reasoned as follows:

> "***Both learned counsel conceded that no deposit had been made to date. The significance of this is that the applicant's application for stay before the High Court stands dismissed there not having been a review of that order; the issue before us is therefore whether there is anything to stay through the present application. The order that now exists in the High Court is a negative order dismissing the applicant's application for stay. That being the case, there is no positive order made on 15th May, 2015 the execution of which this Court can stay."***

8. Those are the findings relied on by the respondent but, with respect, the two cases are distinguishable.

The default clause imposed on the applicant in this matter was as follows:-

> "***The judgment of 17 February 2016 is therefore hereby set aside on two conditions. First is the condition on giving vacant possession of the premises, and second is the condition on payment of thrown away costs. These conditions to be met in 30 days. In default, the judgment to stand and may be executed against the party in default."***

It was not an order for dismissal of the application for stay, which is negative, but an order precipitating judgment and decree, the execution of which would commence forthwith, any intended appeal notwithstanding. The positivity of the default clause is amenable to the orders sought in the application before us and we find nothing to emasculate our original jurisdiction to consider it. We reject the technical objection.

9. Is the intended appeal arguable? It is certainly not frivolous. It will challenge the manner in which the trial court exercised its discretion considering the precedent set in the case of ***Joseph Njuguna Muniu (supra)*** where, in sworn affidavit, counsel plainly admitted mistakes which the trial court accepted as excusable and set aside the default judgment. Whether the conditions imposed by the trial court were onerous or not is also not an idle proposition, nor is the issue whether the court made final merit findings in an interlocutory matter contrary to principle. As stated earlier, the applicants have laid out 13 grounds in their memorandum but one *bona fide* arguable ground would avail them.

10. What would happen if we declined to grant the orders sought, and the applicants succeeded in the main appeal? In our view, nothing irreversible. All the two applicants are giving up is physical possession of portions they evidently cultivated only, since they reside elsewhere. They will retain the Title documents they hold and so there is no danger of alienation of the disputed parcels. With an appropriate order for maintenance of the *status quo* by non interference with the Titles by the applicants and non permanent developments of the land by the respondent should he take possession, the intended appeal would not be rendered nugatory. We are inclined, in the circumstances of this case, to make such an order pending the hearing and determination of the intended appeal, and now do so. The application is otherwise dismissed as it has fallen short of satisfying the two limbs as by law required. The costs of the application shall be in the intended appeal.

Orders accordingly.

Dated and delivered at Nyeri this 5th day of April, 2017.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR