



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E.M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. 83 OF 2016 (UR 57/2016)

BETWEEN

PAULINE YEBEI.....1ST APPLICANT

SAMUEL KUTTO.....2ND APPLICANT

AND

ESTATE OF KIPROTICH ARAP

LETTING represented by

ANDREW KIPROTICH KIPRONO.....RESPONDENT

(An Application for stay of execution of the judgment and decree of the High Court of Kenya at Kitale, Environment and Land Court, (Obaga, J.)

dated 23rd September, 2014 and for extension of time to file an appeal

against the ruling and order of the said court delivered on 25th June, 2015

in

ELC No. 9 of 2014)

RULING OF THE COURT

Background

1. This is an application by **Pauline Yebei** and **Samuel Kutto** expressed to be brought under **Order 42, Rule 6** of the **Civil Procedure Rules, Rules 1(2), 4, 5(2)(b)** and **47** of the Court of Appeal Rules and **Article 159(2) (d)** of the Constitution of Kenya.

2. The Notice of motion seeks:

1) An order that the execution of the judgment and decree of the Environment and Land Court (Court) made on 25th June, 2015, be stayed pending the hearing and determination of the intended appeal.

2) An extension of time to file an appeal against the ruling and order of the said court made on 25th June, 2015.

3. The learned Judge made a declaration that **LR No. Chepsiro/Kibuswa Block 1(Kapchelanget/40)** (suit property) belongs to **Kiprono Philip Leting** and that the applicants have no proprietary interest in the same. The Learned Judge also issued a permanent injunction restraining the applicants from cultivating the suit property.

4. The applicants filed a Notice of Motion dated 23rd March, 2015 to set aside the Judgment delivered on 23rd September, 2014. The application was dismissed on 25th June, 2015 for lack of merit.

5. On 28th July, 2015, the applicants filed a Notice of Motion seeking a stay of execution, pending appeal from the ruling delivered on 25th June, 2015. The application was dismissed with costs to the respondent on 13th October, 2015.

6. Aggrieved, the applicants filed this Notice of Motion.

Submissions By Counsel

7. When the application came up for hearing, Mr. Teti, learned counsel for the applicants relied on the Memorandum of Appeal and submitted that the applicants have an arguable appeal as they were never served with summons to enter appearance and file their defence and that the learned Judge dismissed the applicants' defence at an interlocutory stage without according them an opportunity to adduce evidence in support of their case.

8. On the nugatory aspect, counsel submitted that the applicants have been on the suit land since 1967 and are still in possession; that a warrant of arrest in execution of the impugned decree has been issued against the applicants; that if execution proceeds, the applicants will be arrested and evicted and the suit property may be sold as the respondents have taken prospective purchasers to view the suit property.

9. On the application for extension of time to file and serve the record of appeal out of time, counsel submitted that the delay in filing the Record of Appeal was occasioned by their erstwhile lawyers who failed to file the Record of Appeal within the stipulated period; that parties should not be punished for the mistakes of their counsel and that the applicants are keen on pursuing their appeal and have instructed another firm of advocates to represent them in this application and in the pending appeal.

10. Mr. Ndarwa, learned counsel for the respondent opposed the application and submitted that the applicants do not reside on the land; that there has been inordinate delay on the part of the applicants in seeking an order of stay of execution and they are not therefore deserving of the orders sought.

11. Counsel argued that the applicants have no arguable appeal and that the appeal will not be rendered nugatory; that in the unlikely event that the intended appeal succeeds, costs can be refunded and the appeal will therefore not be rendered nugatory. Counsel urged us to dismiss the application.

Determination

12. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2) (b) are well settled as was observed by this Court in the case of **ISHMAEL KAGUNYI THANDE VS. HOUSING FINANCE KENYA LTD., CIVIL APPLN NO. NAI 157 OF 2006 (unreported)**:

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two

principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that 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 that appeal will be rendered nugatory.”

13. We have considered the application, the grounds in support thereof, the replying affidavit filed on behalf of the respondents, the submissions by counsel and the law.

14. Regarding the issue of extension of time, the 1st applicant in his supporting affidavit averred that their erstwhile advocates despite instruction to file the record of appeal, failed to do so. Counsel for the applicants urged the Court not to punish the applicants for the mistakes of their counsel that the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known unfettered and is only subject to it being granted on terms as the Court may think just. In **Muchugi Kiragu Vs. James Muchugi Kiragu & Another; Civil Application No. Nai 356 of 1996**, this Court stated:-

“Within this context, this Court has on several occasions granted extension for time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it.”

In the circumstances of this case, we find that the circumstances are excusable and the respondent will not suffer prejudice.

15. According to the draft Memorandum of appeal, the applicants contend that their statement of defence was dismissed at an interlocutory stage of the proceedings without the benefit of the evidence that was to be presented by the appellants. The learned Judge found that the applicants, though served did not enter appearance or file defence. The 2nd applicant in his affidavit in support of the Motion denied that they were served. We are satisfied that the applicants have an arguable appeal *inter alia* whether the applicants’ statement of defence was dismissed at an interlocutory stage without the learned Judge considering the evidence adduced by the applicants.

16. As to whether the intended appeal, if successful, will be rendered nugatory unless we grant the orders sought, from our consideration of the Notice of Motion and submissions, we note from the affidavit sworn by counsel for the appellant in support of the urgency that a warrant of arrest in execution of the decree in **Kitale ELC No. 9 of 2014** has already been issued and the applicants are in imminent danger of arrest. Accordingly, in the circumstances of this case, the balance tilts in favour of granting a stay of execution of the judgment delivered on 23rd September, 2014 and preserving the suit property.

17. We are persuaded that the applicants have satisfied the twin conditions for the grant of a stay of execution pending the hearing and determination of the intended appeal. Accordingly, the Notice of Motion dated 10th October, 2016 is allowed. The execution of the order issued on 23rd September, 2014 is stayed in terms of prayers 2 & 3 of the Notice of Motion. We direct that:

- 1. There shall be no dealing whatsoever with the suit land by either party pending the hearing and determination of the intended appeal.**
- 2. Time within which to file and serve the record of appeal on the respondent by the applicants be and is hereby extended in terms of prayer 3 of the application.**
- 3. The applicants be and are hereby granted leave to file and serve the Record of appeal within 21 days from the date hereof.**
- 4. Costs of the Motion in the Appeal.**

Dated and delivered at Eldoret this 15th day of June, 2017.

E.M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

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DEPUTY REGISTRAR