IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. 64 OF 2017 (UR NO. 48/17)

BETWEEN

ALICE WAMBUI NJOROGE……..……....APPLICANT

AND

JACKSON KAMAU NDEGWA……..….RESPONDENT

(An Application for stay of execution pending Appeal from the Ruling of the High Court of Kenya at Nakuru, (Janet Mulwa, J.) dated 13th February, 2017

in

HIGH COURT CIVIL CASE NO. 112 OF 2008)

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RULING OF THE COURT

[1] The applicant seeks an order in essence that the execution of the Ruling or Order of **Mulwa, J**. made on **13th February, 2017** be stayed pending the hearing and determination of an intended appeal. The applicant who appears in person brought the application under sections **3A**, **3B** and **5** of the Appellate Jurisdiction Act. However, the applicant in essence seeks an order of stay of proceedings which the Court has jurisdiction to grant under **Rule 5(2) (b)** of the Court of Appeal Rules.

[2] The applicant intends to appeal from the Ruling of the High Court (Mulwa, J.) delivered on 13th February, 2017, in **High Court Civil Case No. 112 of 2008 - Alice Wambui Njoroge and Jackson Kamau Ndegwa** whereby the learned judge dismissed an application dated 2nd December, 2016, by the applicant herein seeking recusal of the learned judge from hearing HCCC No. 112 of 2008. It is apparent that the applicant had also made an earlier application dated 24th November, 2016, in the **HCCC No. 143** of **2011 Jackson Kamau Ndegwa & Another V. Housing Finance Company of Kenya and three others** for the recusal of the learned judge from dealing with the case.

[3] The applicant has not annexed the pleadings and the proceedings in the two suits. However, it seems from the documents filed by the applicant that HCCC No. 112 of 2008 relates to a dispute between him and **Alice Wambui Njoroge** over land **Reference No. Nakuru Municipality Block 12/224** while **HCCC No. 143** of **2011** relates to a dispute over the sale of the applicant's land (house) title **No. Nakuru Municipality/Block 3/852** by Housing Finance Company Limited in exercise of its statutory power of

sale. It is also apparent from the applicant's documents that, HCCC No. 143 of 2008 was dismissed for non- attendance on 20th February, 2017, and that the applicant has filed an application dated 21st February, 2017 for setting aside the dismissed order. That application is pending for hearing. Before the dismissal of the suit the applicant had raised several issues regarding the manner in which the learned judge handled the pending applications for contempt of Court when his application for recusal was still pending for hearing.

[4] Regarding HCCC No. 112 of 2008, the impugned ruling shows that the plaintiff's case was partly heard by Ouko, J. *(as he then was)* and concluded by Wendo, J. on 21st July, 2014. The hearing of the defence case (applicant's) resumed before Mulwa, J. on 26th September, 2015, when the applicant testified. The application by the applicant to file written statements of his witnesses was opposed and ultimately rejected by the court on the ground that it was made too late.

[5] The learned judge indicates in the impugned ruling that the applicant closed his case and both parties filed written submissions. Further hearing was scheduled for 27th September, 2016, for highlighting written submissions when the applicant indicated that he did not wish to highlight his written submissions. Thereafter, the learned judge reserved judgment for 27th September, 2016. It is then that the applicant brought an application for recusal of the trial judge.

[6] The learned judge considered the application and made a finding partly thus:

> **"The applicant has not stated any one reason or misconduct for which he wants me to recuse myself from delivering judgment in the case. This is an applicant who wants to delay justice yet he has not pointed out any specific prejudice against him in the whole proceedings, either before me or any other judicial officer."**

[7] In support of the application the applicant states, amongst other things, that the learned judge never allowed him to argue the defence case on the merits; that the learned judge compelled the applicant to give testimony which lasted barely 30 minutes and disbarred him from producing documents and calling witnesses; and that the learned judge made prejudicial and derogatory remarks to the effect that she knew the matter very well.

[8] The applicant has filed a draft memorandum of appeal citing the grounds of the intended appeal. The applicant has brought to the notice of the Court that the judgment in the suit is now scheduled for delivery on 18th May, 2017. To avoid the application being rendered futile, we have in the interest of justice suspended the date of delivery until after the delivery of this Ruling. The respondent has filed a replying affidavit containing the grounds on which the application is opposed. The applicant is required to demonstrate that the intended appeal is arguable and that unless the proceedings are stayed the intended appeal would, if ultimately successful, be rendered nugatory.

[9] The intended appeal is an interlocutory appeal. The allegations of bias or prejudice arose from the manner in which the learned judge conducted the defence case. The applicant's complaint is in essence that he was not given a fair hearing.

[10] As we have observed above the applicant has not annexed a copy of the proceedings particularly the part relating to the hearing of the defence case. By **section 83** as read with **section 84** of the **Evidence Act,** there is a presumption that a certified copy of the record of evidence in judicial proceeding is genuine and that the evidence was taken as indicated in the proceedings. It follows that, in the absence of a certified copy of the record of the evidence or admissions of defect in the record, the allegations of bias and prejudice made by the applicant have not been substantiated.

[11] Furthermore, the learned judge has in the ruling described what transpired at the trial - that the applicant gave evidence and filed written submissions. However, she dismissed the applicant's application to file written statements of the witness. The judge has given the reasons for the decision in the questioned ruling. In dismissing the application the learned judge was exercising a judicial discretion.

Absent of a complete copy of the record of the evidence to show otherwise, the version of the record contained in the ruling does not disclose bias or prejudice on the part of the judge.

[12] We find that on the basis of the material placed before the Court the applicant has not demonstrated that the intended appeal is arguable. Nor has the applicant demonstrated that the appeal will be rendered nugatory if the application is not allowed. In the event that the pending judgment of the Court will be against the appellant, the appellant will have an opportunity to file a substantive appeal based on the very grounds that he is now raising as grounds of an intended interlocutory appeal and other grounds.

[13] Finally, there is a policy of judicial reluctance to grant a stay of proceedings as an interlocutory relief. The applicant has an alternative remedy should the judgment turn against him. Granting the order, will have the effects of prolonging the litigation which has been pending in court for over seven years. That would be against the constitutional and judicial policy of expeditious disposal of judicial proceedings.

The application has no merit and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 2nd day of June, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

……..

JUDGE OF APPEAL

J. MOHAMMED

……..

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR