



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPLICATION NO. 49 OF 2017 (UR 31/2017)

BETWEEN

ROSE NAFUNA WANYAMA APPELLANT

AND

NUSRA NASAMBU CHIBANGAFIRST RESPONDENT

AGATON WANYAMA alias MARKSECOND RESPONDENT

(Application seeking stay of execution of the Judgment delivered by (Mukunya, J.) dated 6th of April, 2017

in

E & L COURT NO. 129 OF 2012)

RULING OF THE COURT

[1] By a notice of motion dated 3rd May, 2017, the applicant, **Rose Nafula Wanyama**, has moved this Court for orders of stay of execution of the judgment and decree of the Environment and Land Court (**Mukunya,J.**) issued on 6th April, 2017. The applicant was the plaintiff in the suit before the Environment and Land Court. The subject of the suit was ownership of a property known as W. Bukusu/E. Siboti/264 (*suit property*) which she claimed as the sole heir and beneficiary of the estate of her late husband **Wayeye Chibanga**.

[2] In his judgment, the learned judge dismissed the applicant's suit, and ordered that the caution she had lodged against the title to the suit property be removed and the suit property be transferred in accordance with the Land Control Board consent. Being aggrieved by that judgment, the applicant filed a notice of appeal and moved this Court for orders of stay of execution of the judgment as aforesaid.

[3] In support of the motion, the applicant swore an affidavit in which she maintains that her appeal that raises very weighty legal issues, is likely to be rendered nugatory unless the orders of stay of execution is granted, as the respondent is likely to execute the decree. The applicant has exhibited a draft memorandum of appeal that indicates that the judgment of the learned judge will be challenged on eight grounds.

[4] **Mr. Wamalwa**, counsel for the applicant, has urged the Court to grant the orders sought maintaining that the appeal is arguable as it raises issues regarding inheritance rights, and that the caution having been removed, the applicant who has been in possession of part of the suit property is exposed as the suit property can be sold.

[5] The application was opposed by the respondents, **Nusra Nasambu Chibanga** and **Agaton Wanyama alias Mark** who were the defendants in the Environment and Land Court. In her replying affidavit Nusra Nasambu Chibanga, the 1st respondent maintained that the applicant's motion is incompetent, misconceived, incurably defective and an abuse of the Court process. Further that the applicant is guilty of laches and indolence, having brought the application after an unreasonable delay; that the applicant is yet to serve the notice of appeal; and that the intended appeal has absolutely no chances of success as it does not raise any arguable issues nor has the applicant demonstrated how his intended appeal would be rendered nugatory.

[6] **Mr. Were**, counsel for the respondents, reiterated that the applicant has not demonstrated any loss that she is likely to suffer if the application is not granted; that the intended appeal is not arguable as the applicant has not demonstrated any legal interest; and that in any case the Environment and Land Court is not the appropriate court to determine the issue of inheritance. The Court was thus urged to dismiss the application.

[7] This being an application for stay of execution of a judgment under **rule 5 (2) (b)** of the **Court Rules**, it is trite that the applicant must satisfy the two conditions under that rule, which are firstly that the appeal is not frivolous but raises arguable issues, and secondly that unless the order of stay of execution is granted, the appeal is likely to be rendered nugatory. (**Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – (2002) I EA 227, Exclusive Estates V. Kenya Posts & Telecommunications Corporation And Another [2005] 1 E.A.**)

[8] In regard to arguability, we have perused the draft memorandum of appeal that was availed by the applicant. We note that the applicant has raised 8 grounds and that, one arguable ground is sufficient(**Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001.** In this case, the grounds raised include the issue whether the 2nd respondent who is registered as the registered proprietor of the suit property was holding the suit property in trust for the applicant's husband. This ground is sufficient to meet the requirement of arguability.

[9] In regard to the nugatory aspect, it is evident that the subject of the applicant's suit is the suit property that the applicant had sought to protect by lodging a caution against the title. As the decree of the Environment and Land Court includes the removal of the caution, we concur with the applicant that there is nothing to prevent the respondents from selling the suit property, and, should that happen the appeal would be rendered nugatory as the suit property will end up in the hands of a third party. Land being an emotive issue it is only fair that the applicant be given an opportunity to exhaust her legal rights.

[10] For the above reasons we allow the application and issue an order for stay of execution pending appeal for a limited period of 12 months within which period the applicant must file and serve the record of appeal and prosecute her appeal. Costs of this application shall be in the appeal.

Dated and delivered at Eldoret this 27th day of July, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.