



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: KIHARA KARIUKI (PCA), GATEMBU, MURGOR, JJA**

**CIVIL APPLICATION NO. 91 OF 2016 KISUMU**

**BETWEEN**

**ALICE KHISA.....APPLICANT**

**AND**

**LUTULI ALEX WANYONYI**

**NYONGESA PAUL (Suing under the power of Attorney for,**

**on behalf of and for the benefit of WEKESA RAPHAEL**

**WANYONYI LIANA.....RESPONDENT**

***(An Application for stay of execution pending appeal against the Judgment of Mukunya, J. delivered on 14th September, 2016***

***in***

**BUNGOMA H.C. LAND & ENVIRONMENT CASE NO. 185 OF 2013**

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**RULING OF THE COURT**

1. In her application presented to this Court on 16<sup>th</sup> November 2016, the applicant seeks a temporary injunction to restrain the respondent from evicting her, her family and workers from her house which she says is situated on Title Number Ndivisi/Ndivisi/1036 pending the hearing and determination of her intended appeal from the judgment of the Land and Environment Court at Bungoma delivered on 29<sup>th</sup> September 2016. Although she invoked the provisions of the Civil Procedure Act and the Civil Procedure Rules alongside Sections 3, 3A and 3B of the Appellate Jurisdiction Act, we have considered her application as an application under Rule 5(2)(b) of the Court of Appeal Rules.

2. The background to the application, in brief, is that the respondent, Lutuli Alex Wanyonyi Nyongesa, was one of five plaintiffs before the lower court who instituted suit against the applicant, among other defendants, seeking a permanent injunction to restrain them from interfering with the use and enjoyment of a property known as Title Number Ndivisi/Ndivisi/632 measuring approximately 4.56 hectares. In that suit, the respondent and his co plaintiffs asserted that they were the registered proprietors of that parcel of

land and that the applicant and her co defendants had wrongfully encroached on that parcel, cultivated the same and carried out wanton destruction of trees on the basis that they have a proprietary interest over the property.

3. Although the defence filed by the applicant in the lower court is not part of the record of the application before us, it is apparent from the judgment of the lower court that the applicant claimed that she had lived on the property since 1994 having been given the property by her father in law.

4. After hearing the parties, the learned trial Judge was not persuaded that the applicant had a legitimate claim. Basing his finding on the evidence of a Provincial Surveyor who testified before him, the learned Judge found that the applicant's "*averment that she has lived on the suit land since 1994(plot 2219) cannot be true as the title for Ndivisi/Ndivisi/1032 was closed on subdivision on 13/7/2009 while land parcel Ndivisi/Ndivisi/632 was also distributed via a Succession cause in Nairobi on 14/10/2009.*"

5. Mr. Adiso Kasim, learned counsel for the applicant, referred us to the application and affidavit in support sworn by the applicant on 16<sup>th</sup> November 2016 and submitted that the applicant has demonstrated that she is entitled to the orders that she seeks; that on appeal, the applicant will establish, among other things, that the Judge erred in relying entirely on the evidence of the Surveyor; and that the learned Judge overlooked uncontroverted evidence that the applicant was given the land by her father in law and started living on the property since 1994. Counsel indicated that the applicant has already lodged the appeal in Kisumu Civil Appeal No. 100 of 2016.

6. Opposing the application, learned counsel for the respondent Ms. Annet Mumalasi, referred us to the replying affidavit sworn by the respondent on 16<sup>th</sup> January 2017 and submitted that the applicant has not demonstrated that she has an arguable appeal that will be rendered nugatory unless the application is granted; that the documents on which the applicant relies were not part of the trial court record; and that although the applicant has expressed an intention to appeal the judgment of the lower court, there is in fact no appeal. In that regard counsel referred us to the decision of this Court in **Khairunnisa Mohamedali Harunani & another vs. Niranjan Zaverchand Shah Shushila & 2 others [2016] eKLR** for the proposition that "*the Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75*" and that no notice was shown in this case.

7. Counsel went on to say that even if the applicant were to succeed in the intended appeal, damages would provide adequate compensation for the applicant's house.

8. We have considered the application and the respective submissions by both counsel. The grant or refusal of relief under Rule 5(2)(b) of the Rules of this Court is a matter of judicial discretion. Githinji JA, in **Equity Bank Limited vs. West Link Mbo Limited Civil Application No. NAI 78 of 2011**, stated that:

***"It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance. ... It is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."***

9. The principles on which that discretion is exercised have been stated in many cases. In **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd Civil Application No. NAI. 157 of 2006** for instance, this Court stated that:

***"The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show 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 the appeal will be rendered nugatory."***

10. What we have to decide is whether the applicant's application meets the required standard to justify

the exercise of this Court's discretion in her favour.

11. With a view to demonstrating that her appeal is arguable, the applicant says that the learned trial Judge erred in relying on the evidence of the Surveyor and in failing to consider her evidence regarding the circumstance under which she occupied the property. To that end she says that her appeal, being Civil Appeal No. 100 of 2016, is pending hearing and determination before this Court. We are not prepared to say, at this stage, that the applicant's appeal is frivolous. There is for instance the question whether he evaluated the applicant's evidence and whether he relied entirely on the evidence of the surveyor, and if so, whether he was justified in doing so. An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the Court. It is sufficient if a single *bonafide* arguable ground of appeal is raised. (See **Stanley Kangethe Kinyanjui v Tony Ketter and 5 others (2013) eKLR**).

12. Regarding the complaint by the respondent that there is no appeal, we have verified that Civil Appeal No. 100 of 2016 has indeed been filed and that a notice of appeal was filed on 30<sup>th</sup> September, 2016.

13. As to whether the intended appeal will be rendered nugatory unless we grant the orders sought, the applicant deposed in her affidavit, and this was not controverted, that the respondent commenced the process of execution and that auctioneers have been to her house on two occasions with a view to evicting her and her family members. She says she risks being evicted from her house where she says she has lived for over 20 years since 1994 when she got married to her late husband. In our view this is a proper case, to use the words of Githinji, JA in **Equity Bank Limited vs. West Link Mbo Limited** (above) "*for preservation of the subject matter of the appeal in order to ensure the just and effective determination*" of the appeal.

14. We accordingly do hereby grant orders in terms of prayer 3 of the applicant's application dated 16<sup>th</sup> November 2016. Costs of the application shall abide by the outcome of Kisumu Civil Appeal No. 100 of 2016.

Orders accordingly.

**Dated and delivered at Kisumu this 20th day of July, 2017.**

**P. KIHARA KARIUKI, P.C.A**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

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**DEPUTY REGISTRAR**