



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, AZANGALALA & GATEMBU, JJ.A)

CIVIL APPLICATION NO. 87 OF 2016 (UR 51/2016)

BETWEEN

RICHARD MEMBO GUYA

T/A RAMOGI CHEMIST.....1ST APPLICANT

SILAS OTIENO OKAL

JULIUS AGONO

PETER MARANGA

(Suing in their capacity as Chairman, Secretary and

Treasurer of Kisumu Municipality Staff and

Board Benevolent Fund).....2ND APPLICANT

VERSUS

CHARLES CHOG NJOROGE.....1ST RESPONDENT

MAHENDRA ENTERPRISES LTD.....2ND RESPONDENT

(An application for stay of execution from the Judgment of the Environment and

Land Court of at Kisumu (S. M. Kibunja J.) dated 28th September, 2016

in

ELC Misc Application No. 15 of 2015)

RULING OF THE COURT

The applicants herein have moved this Court by way of Notice of Motion application pursuant to **Rules 5(2)(b) of the Court of Appeal Rules, 2010** seeking the following orders:-

“1. Spent

2. Spent

3. ***THAT upon inter partes hearing this Honourable Court be pleased to issue an order of stay of execution of the Ruling/order dated 28th September, 2016 pending the lodging, hearing and determination of the intended appeal to be filed by the Applicants.***

4. ***THAT pending the lodging, hearing and determination of the applicants intended appeal there be a stay of all further proceedings in Kisumu HCC ELC Case No. 15 of 2015.***”

The dispute between the parties revolves around land parcel known as **Kisumu Municipality Block 4/883** (hereinafter the 'suit property') to which both parties claim rights. Before the High Court, the respondents, by an application dated 26th January, 2016, sought eviction orders against the 1st applicant from the suit property and the demolition of the structures constructed thereon, on the basis that the 1st respondent was the registered owner of land parcel known as **LR No. Kisumu Municipality/Block 4/876**, allocated to him by the then Municipal Council of Kisumu, after occupying the same under a Temporary Occupation Licence (TOL) wayback in 1992. He thereafter subdivided that land into two parcels giving rise to **Block 4/883**, and **Block 4/884**. Thereafter, the 1st respondent decided to dispose of one of the properties and sold the suit property to the 2nd respondent, Mahendra Enterprises Limited.

Realising that the 1st applicant had erected structures on the property, the respondents filed suit in court by a plaint dated 26th January 2016 seeking the 1st applicant's eviction as well as orders of permanent injunction restraining him from trespassing on the suit property.

The 1st applicant opposed both the suit and the application. In a replying affidavit dated 17th March, 2015 he deponed that on 29th June, 2012 he entered into a 15-year renewable lease agreement with Kisumu Municipal Staff Burial and Benevolent Fund (hereinafter 'the Fund') which had been granted title over the suit property under a TOL by the then Municipal Council of Kisumu.

Silas Otieno Okal, Julius Agono and Peter Maranga suing as Chairman, Secretary and Treasurer respectively of the Fund, the second appellant, sought to be enjoined as the 2nd defendants in the said suit. However in a ruling dated 12th October, 2015, the Court dismissed the application with costs to the plaintiff/respondent for being devoid of merit. Aggrieved, the applicants decided to appeal and filed a notice of appeal dated 15th October, 2015. They also filed an application dated 23rd November, 2015 seeking stay of the EL Court proceedings pending the hearing and determination of that appeal. That application and the one dated 26th January, 2016 were heard simultaneously and one Ruling rendered in respect of both. In the Ruling, the learned Judge dismissed the prayers to stay the proceedings, but allowed the application seeking orders of eviction against the applicant herein. It is that decision that precipitated the intended appeal and the present application. After considering the two applications, the learned Judge held the view that since the application to be enjoined in the High Court's proceedings was dismissed, the applicants lost the *locus* to seek orders of stay of execution as they were not enjoined as parties to the main suit. On the application seeking eviction orders, the learned Judge was satisfied that the documentary evidence before the Court was enough to show that the respondents/plaintiffs were entitled to the rights and privileges of registered proprietors of the suit property; and that the 1st applicant had trespassed onto the suit land, making it impossible for the 2nd respondent to take possession of the suit property having purchased the same from the 1st respondent.

Without hearing the viva voce evidence of the parties, within the interlocutory application, the learned Judge made a finding that the 1st applicant's statement of defence did not contain a counter-claim to the 1st respondent's claim over the suit property, and so the 1st applicant's recourse lay elsewhere. Having so found, the learned Judge saw no need to drag the matter to full hearing. He felt that circumstances of the case justified issuing orders of demolition at an interlocutory stage and issued the following orders:-

“... that the Defendants do vacate and remove all their structures on any portion of land parcel Kisumu Municipality/Block4/883 in their occupation within 30 days in default they be evicted and the structures thereon demolished.

... the defendant do pay the Plaintiff's costs of the notice of motion dated 26th January 2015.”

These are the impugned orders that have brought the applicants to this Court.

When the application was urged before the Court on 17th November 2016, learned counsel Mr. Rayola Olel, and Mr. G.O Kimanga, represented the applicants, and the respondents respectively.

In his submissions, Mr Olel urged that the applicant has an arguable appeal and that the appeal would be rendered nugatory if the application was not allowed. On the first limb, Counsel urged that the respondent's application was allowed summarily without the applicants being heard since the learned Judge only dealt with affidavit evidence. Further that they were challenging the documents of Title and that could not have been determined at interlocutory stage.

On the second limb, counsel contended that if the applicants are evicted and their structures demolished, the appeal would be rendered nugatory as there would be nothing to appeal against.

Opposing the application, Mr. Kimanga submitted that the 2nd applicant was not a party to these proceedings since their application to be enjoined in the matter was dismissed by the High Court. Further that in failing to appeal against that decision they cannot then be presumed to be parties in the present proceedings. In any event, Counsel pointed out, it is the 1st applicant who had established structures on the suit property and not the 2nd applicant. Counsel further argued that the 2nd applicants claim on the suit property is based on a TOL

whereas the respondents hold a lease from the Government of Kenya, which lease has never been challenged in any Court of law. Counsel was adamant that the 1st applicant is a trespasser and the 2nd applicants had no rights on the plot as determined by the ruling of Kibunja J, dated 12th October 2015. Counsel urged the Court to dismiss the application stating that even if evicted, the 1st applicant could claim damages from the 2nd applicant who rented the suit property to them. We wish to state from the outset that we shall eschew dealing with the issue on the 2nd applicant's standing for purposes of this ruling, because that is not for us to determine. At this point in time, all that concerns us is that there is a Notice of appeal, from which we draw our jurisdiction. The validity of the said Notice of Appeal does not concern us at this stage, but may be addressed before the relevant forum, properly moved. That said, we now consider the application as presented before us.

This Court has stated on numerous occasions that before it can exercise its original jurisdiction to grant orders sought under **Rule 5(2)(b) of the Court of Appeal Rules** it must be satisfied that the applicant has an arguable appeal which is to say that it is not frivolous (see: **Joseph Gitahi Gachau vs Pioneer Holdings (A) Ltd & Others Civil Application No. 124/08**); and secondly, that the appeal, if filed, or intended appeal, would be rendered nugatory if the orders sought are not granted. These two principles are conjunctive and a party seeking to succeed in its application must establish the two. Establishing only one will not suffice.

In **Ishmael Kagunyi Thande v Housing Finance Company Limited**, **Civil Application No. 156 of 2006** these principles were restated as follows:-

“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. The principles are 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.”

Applying these principles to the facts as presented before us, can we say that the application before us is merited?

For us, we think that there is the question as to whether the learned Judge was justified in making such definitive orders as to the ownership of the property at an interlocutory stage before hearing the main suit. The law as to who has a better title between a holder of a TOL, which is a temporary letter of offer *vis a vis* a holder of a Title Deed or Certificate of Lease, may be well settled, but does that disentitle a party from being heard on the issue before drastic orders such as eviction orders are given against it? Does such a party have a right to ventilate its argument in court, for whatever it is worth, before its application its suit is summarily determined in an interlocutory application? We hold the view that that is an arguable point in the intended appeal. We remind ourselves that a party only needs to establish one arguable point for the first limb to be satisfied. We therefore find that the first limb has been established.

On the second limb on nugatory aspect, we restate our pronouncement in **Stanley Kangethe Kinyanjui vs Tony Ketter & Others, Civil Application No.31 of 2012** where we stated that:-

“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 where damages will reasonably compensate the party aggrieved.”

We find that the suit that is going to determine the rights of parties has yet to be heard and determined before the trial court. If therefore the applicants herein are evicted from the suit property unheard, in the event the appeal, or intended appeal succeeds, then the appeal will be rendered nugatory, as they will have been condemned unheard. We note further that the 1st applicant is in possession of the suit property. It is in the interest of justice that the property be preserved, until the matter is conclusively determined. Preservation of the property will cause no prejudice to either party and should the appeal fail, the 2nd respondent is at liberty to enter and take possession of the property. See: **Caroline Awinja Ochieng & another v Jane Annan Mbithe Gitau & 2 others, Civil Application No. NAI. 129 of 2015[2015] eKLR.**

In conclusion therefore, we find that the first applicant is entitled to the prayers sought. In the circumstances, this application is hereby allowed in terms in terms of prayers 3 and 4. Costs in the intended appeal.

This Ruling is delivered pursuant to **Rule 32(3) of the Rules of this Court, Azangalala, JA** having retired from his position as Judge of Appeal.

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

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.