



IN THE COURT OF APPEAL

AT NAIROBI

**(CORAM: P. KIHARA KARIUKI, P.C.A, MWILU & ODEK, JJ.A) CIVIL
APPLICATION NO. NAI 192 OF 2015 (UR 157/2015)**

BETWEEN

SUSAN MBEKE KASOME & 872 OTHERSAPPLICANTS

AND

NJIRU AGERIA DEVELOPMENT LTD..... RESPONDENT

(Application for an order of stay of execution under rule 5(2)(b) of the Court of Appeal Rules 2010 pending the hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (Justice Mary Gitumbi) delivered on the 5th day of June 2015) in ELC SUIT NO. 607 OF 2013 (O.S)

RULING OF THE COURT

1. This is a notice of motion application by **SUSAN MBEKE KASOME and 872** others, hereinafter referred to as the applicants against **NJIRU AGERIA DEVELOPMENT LTD**, hereinafter referred to as the respondent. The application is brought under the provisions of **sections 3A and 3 B** of the Appellate Jurisdiction Act and **rules 5(2) (b) and 42** of the rules of this Court. The application mainly seeks an order of stay of execution of the ruling and order of the High Court dated 5th day of June 2015 and all its subsequent and ancillary proceedings in High Court of Kenya at Nairobi ELC Civil Suit No.607 of 2013 pending the lodging, hearing and determination of the intended appeal against the said ruling and order. A total of twelve grounds have been listed on the face of the application as the basis of the application. The application is further based on the grounds set out in the supporting affidavit sworn by **SUSAN MBEKE KASOME** on her own behalf and that of the other applicants.
2. No response was filed by the respondent though **Mr. Wakoko** learned counsel did appear that on its behalf at the hearing of the application before us.
3. In brief, the applicants filed an originating summons before the High Court seeking to be registered as proprietors of the parcel of land known as LR No.13468 in Nairobi by claiming adverse possession, the said parcel of land being registered to the respondent. The applicants then filed an amended Originating Summons which is the basis of the proceedings. The respondent on its part filed a notice of motion application dated 20th June 2015 in the same proceedings seeking, *inter alia*, temporary injunction restraining the applicants by themselves, their agents, servants and/or anybody claiming under them from cutting stones, selling, alienating, entering, wasting or

in any way interfering with the property pending the hearing and determination of the application and the applicant's amended originating summons.

Following *inter partes* hearing, the trial judge allowed the application granting the interim relief as sought by the respondent.

4. Aggrieved by this decision, the applicant lodged its appeal by filing a notice of appeal and has also filed this application.
5. During the hearing, **Mr. T. Kwanga Mboya** learned counsel for the applicant in support of the application submitted that the injunction should not have been granted by the trial judge as the principles set out in the leading case of ***Giella v Cassman Brown & Co. Ltd [1973] EA358*** were not met. Counsel argued that the respondent had no suit filed on which the injunction application could be premised and no loss would be incurred. As the applicants are in occupation, counsel argued that the balance of convenience did not tilt in favour of the respondent. Counsel further submitted that the originating summons before the trial court had been filed by the applicants and the respondent could not premise its application for injunction on the applicant's originating summons. According to counsel, the respondent should have filed suit upon which the respondent would have sought the injunctive relief. In summary, it was the applicant's argument that the respondent could not prove a prima facie case without a suit. The ruling made by the trial judge therefore was likely to set a bad precedent and the applicant asked us to allow the application. Counsel referred us to this court's previous decisions of ***East African Development Bank v Hyundai Motors Kenya Limited (Nairobi Civil Appeal No.194 of 2004) (unreported)*** and ***The Delphis Bank Limited v Recco Builders Limited & Another (Nairobi Civil Appeal No.291 of 2005) (unreported)*** all discussing the principles of grant of relief of temporary injunction as enunciated in the ***Giella v Cassman Brown case (supra)***.
6. In reply, **Mr. Wakoko** learned counsel for the respondent submitted that no arguable case likely to be rendered nugatory had been established. It was counsel's submission that no injustice or prejudice was likely to be suffered by the applicants as the order given was merely for purposes of maintaining the status quo as the property subject to the proceedings was registered to the respondent. Counsel conceded that whether an injunction can flow from the adverse party's suit as raised by the applicants was a point of law. No authorities were cited by counsel in support of his arguments.
7. Our exercise of jurisdiction under **rule 5(2)(b)** is based on principles which this court has since settled. To restate the principles, firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal that merits to be heard (see ***Githunguri v Jimba Corporation Limited (1988) KLR 838***); and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. See ***Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd, Civil Application Number Nai. 93/02 (UR)***. Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2)(b). (See ***Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31***). The appeal may not only be arguable but also raising a point of law as was held in ***Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union (Kenya) [2014] eKLR***.
8. Though counsel for the applicants did not expressly submit on the arguable nature of the intended appeal, we followed his argument before us and perused the draft memorandum of appeal annexed to the supporting affidavit of Susan Mbeke Kasome. From the above, we note that the applicants' substantive grievance is the fact that the respondent founded its application on the originating summons of the applicant and not on its independent suit leading to the impugned ruling. As noted by the respondent's counsel this is a point of law fit to be fully canvassed on appeal. In our view, once a point of law arises, the same warrants the court's determination summarily as taking of evidence would not change the legal position.
9. If we understood the applicant correctly and we think we did, it is their case that the trial court was

not entitled to consider the principles of the *Giella v Cassman Brown case (supra)* as the principles enunciated therein presupposed the existence of a suit by whoever sought the equitable relief and there was none in the instant case. In essence the applicants' position forming the basis of their intention to appeal is akin to raising a preliminary objection on a point of law, determination of which if argued as a preliminary point may dispose of the suit and the intended appeal in the present case (see *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 969*).

10. The point raised by the applicants is clearly whether it is legally permissible for a defendant/respondent to found an application for the equitable remedies under **order 40** of the **Civil Procedure Rules** and on the principles enunciated in the celebrated case of **Giella V Cassman Brown (supra)**, on the plaintiff's/applicant's suit. That appears to be a novel point to be discussed at appeal, as we cannot at this early interlocutory stage attempt to discuss the point, lest we compromise the appeal and embarrass the bench that would ultimately hear the appeal. The point whether or not the principles for the grant of an injunction were met is yet another matter to be discussed on appeal. We think therefore that these are issues that make the intended appeal arguable.
11. Turning to the second limb as to whether the appeal could be rendered nugatory if stay orders are not granted, counsel for the applicants did not address us on the same while counsel for the respondent submitted that the applicant had not met the threshold as the orders emanating from the trial court's ruling were effectively maintaining the status quo obtaining between the parties. However, from paragraphs 12 and 16 of the supporting affidavit by **Susan Mbeke Kasome** in support of the application, the applicants argue that they are apprehensive that if the this court does not order stay against the ruling at this stage, they stand to suffer irreparable loss as the respondent may cite the applicants for contempt of court, the respondent having served the applicants with the said order by the trial court.
12. In considering the application and as we exercise our discretion, we bear the balance of convenience principle in mind while seeking to balance the interests of the respective parties. The approach we have always taken in determining whether or not to grant a stay of execution is to ensure that the applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondent is not denied the fruit of judgment in their favour and their rights are safeguarded. In our view, the balance in the circumstances of this case tilts in favour of the applicants.
13. Consequently, we allow the notice of motion dated 10th July 2015 as prayed with costs to abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 29th day of January, 2016.

P. KIHARA KARIUKI, P.C.A.

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR