IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, MWILU & AZANGALALA, JJ.A

CIVIL APPLICATION NO. NAI 18 OF 2016 (UR 12/2016

BETWEEN

KENYA AGRICULTURAL RESEARCH INSTITUTE.....APPLICANT

AND

FARAH ALI, CHAIRMAN ISAHAKIA SELF HELP GROUP*(Sued on his own*

Behalf and on behalf of the members of the group)...1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

(An application for injunction pending the filing and hearing of an intended appeal against

the entire ruling and orders of Hon. Justice Sila Munyao dated 5th November, 2015

in

HCCC NO. 23 OF2011

****

RULING OF THE COURT

1. This is an application under **rule 5(2) (b)** of this Court's Rules for two principal orders namely, that there be a stay of proceedings in Nakuru High Court Civil Case (Nakuru HCCC) No. 23 of 2012 pending the hearing and determination of an intended appeal against the decision of **Munyao J,** dated 5th November, 2015 and that this Court be pleased to issue a conservatory order to compel the 1st respondent to give up vacant possession of the portions of land known as ***L.R NO. 5210*** and ***L.R 5211, Naivasha*** in their possession and to further restrain the 1st respondents whether by themselves or their officers, juniors, agents, servants and/or employees from getting into and remaining upon the said parcels of land until the hearing and determination of the intended appeal. The applicant is ***Kenya Agricultural & Livestock Research Organization (KLRO)***. It has named as the 1st respondents, ***Farah Ali,*** Chairman Isahakia Self Help Group having been sued on his own behalf and on behalf of members of the group (hereinafter the "1st respondents") and the ***Commissioner of Lands*** as the 2nd respondent.

2. The principles which guide the Court in applications of this nature are now well settled. First, an applicant must show he has an arguable appeal or stated differently, an appeal which is not frivolous. Second, that his appeal or intended appeal, if eventually successful, will be rendered nugatory unless he is granted the stay or injunction sought as the case may be.

3. The background facts are rather convoluted and not straight forward. The dispute revolves around portions of land known as ***L.R. No. 5210*** and ***L.R. No. 5211*** in Naivasha, Nakuru County. The applicant was formerly known as ***Kenya Agricultural and Research Institute (KARI)*** and is established under the Science and Technology Act (Cap 20) Laws of Kenya. The applicant, in its former style, filed suit against the respondents by way of plaint at Nakuru, being Nakuru HCCC No. 23 of 2011. It, *inter alia*, sought a declaration that a letter of allotment dated 7th December, 2010 issued to the 1st respondents is void and further that the 1st respondents deliver vacant possession to it of L.R. No. 5211.

4. This suit was consolidated with constitutional petition No. 7 of 2011 dated 19th April, 2011 filed by ***Oyugi Neto Agostinho and 16 others*** against the respondents together with the Attorney General (A.G.) and the Commissioner of Police. The petitioners seek to restrain the named respondents, among others, from interfering with KALRO's peaceful possession and use of the same pieces of land namely; ***L.R No. 5210*** and ***L.R No. 5211*** Naivasha. The petitioners, *inter alia*, claim that KALRO is the legitimate owner of the said pieces of land and that the letter of allotment issued to the 1st respondents was issued to them through misrepresentation of facts and was, in any event revoked and should be quashed.

5. The plaint by KALRO and the petition by the 17 petitioners were accompanied with interim applications for injunction and conservatory orders respectively against the respondents. The interim applications were heard by ***Wendoh J,*** who, after considering the prima facie merits of the same on 23rd March, 2012 allowed both applications and ordered the 1st respondents to vacate the subject properties. It would appear that the 1st respondents did not vacate the subject properties.

6. On 30th September, 2013 they lodged an application by way of Notice of Motion seeking stay of proceedings pending determination of a petition they had filed at the National Land Commission. The applicant, on its part, lodged another application by way of Notice of Motion dated 17th December, 2013 seeking to enforce the orders of ***Wendoh J,*** made on 23rd March, 2012.

7. The two applications were heard by ***Waithaka J***, who, on 10th December, 2014 dismissed the 1st respondents' Notice of Motion and allowed the applicant's application. The learned Judge however, at the same time, allowed a thirty (30) days stay of her order to allow the 1st respondents time to make arrangements for alternative accommodation.

8. By their Notice of Motion dated 21st December, 2014, the 1st respondents were back in court. They sought a stay of execution of their eviction which had been issued on 10th December, 2014. This application was placed exparte before ***Mulwa J,*** who, on 24th December, 2014 temporarily stayed the eviction of the 1st respondents and fixed the application for hearing, *inter partes*, on 27th January, 2015. The hearing does not appear to have happened.

9. On 6th March, 2015 the applicant lodged an application by way of a Notice of Motion of even date, seeking mainly the discharge of the order of ***Mulwa J*** of 24th December, 2014. That application was certified urgent and fixed for hearing, *inter partes*, on 16th March, 2015. That is the status of the dispute when the matter was placed before ***Munyao J***. The learned Judge was peeved by the multiplicity of applications in the file which he felt impeded the hearing of the main dispute between the parties. On 16th March, 2015 the learned Judge made the following orders:

> ***"1) That the hearings of the applications on record are hereby suspended***
>
> *2.* ***That parties to make ready the suits for final hearing and disposal.***

3. ***That the date of 21st May, 2015 is hereby converted to a date of directions on how the two suits are to proceed to hearing***

4. ***That within 30 days from today all parties to have filed and exchanged their pre trial documents.***

5. ***That parties to ensure that the two matters are ready for hearing"***

10. While these directions were in place, the applicant commenced enforcement of the orders of ***Wendoh J,*** by seeking to evict the 1st respondents. The enforcement proceedings triggered the Notice of Motion dated 3rd June, 2015 by the 1st respondents by which motion they sought, among other things, a stay of execution of eviction orders which had been issued on 14th May 2015.

11. The application was placed before ***Munyao J***, who, on 8th June, 2015 made the following orders:

"1) That there be a stay of execution of the order of 14th May, 2015 pending further directions.

2. ***That Court will give directions on 30/6/2015***

3. ***That all parties in both suit and petition be served"***

12. Before the date appointed for directions, the applicant appears to have made an application seeking, *inter alia*, an order discharging the orders of the learned Judge of 8th June, 2015. A copy of that application is not in this record but it is not in contention that the application was indeed made and came up for hearing on 30th June, 2015.

13. The learned Judge made the following orders:

"1) That the hearing of the applications on record are hereby suspended

2. ***That the orders of 8th June, 2015 are varied to status quo on the suit property to prevail pending hearing of the suit.***

3. ***That within 90 days from today the petitioner to file and serve their witness statements and documents.***

4. ***That the respondents counsel to file its (sic) witnessstatements within 45 days.***

5. ***That the matter to be fixed for hearing on priority basis.***

6. ***That any party aggrieved by the orders has leave to appeal.***

7. ***That the matter be mentioned on 5th October, 2015."***

14. The applicant was not happy with those directions and therefore lodged, by way of Notice of Motion dated 16th September, 2015 an application in which it sought, *inter alia*, recusal of ***Munyao J,*** and the setting aside or review of his orders of 30th June, 2015. The application was heard by the learned Judge who, on 5th November, 2015 dismissed the same. It is that dismissal which is being challenged in the intended appeal based upon the notice of Appeal dated 19th November, 2015.

15. Pending the intended appeal, the applicant now seeks an order staying proceedings before the court below. It further seeks conservatory orders to compel the 1st respondents to give vacant possession of the subject properties.

16. ***Mr. Kanjama***, learned counsel for the applicant, contends that the learned trial Judge exhibited manifest bias when he made substantive orders adverse to the applicant during a mention date and before hearing the application itself. By so doing, according to ***Mr. Kanjama,*** the learned Judge perpetuated an illegality, the illegality being that the 1st respondents continued being in possession of the subject properties in contravention of the orders made by ***Wendoh J,*** and ***Waithaka J***, aforesaid which orders had neither been set aside nor reviewed. By not hearing the applicant on its application and ignoring the aforesaid orders, learned counsel urged the view that the applicant's fundamental right to a fair hearing had been infringed. In learned counsel's view, the applicant's intended appeal is not frivolous or put differently, it is arguable.

17. On the nugatory aspect of the application, ***Mr. Kanjama*** posited that unless the orders sought are granted, the lower court matter will proceed to hearing before a court which the applicant does not consider impartial and that the intended appeal even if it succeeds will result in inordinate delay as the matter would have to begin afresh. Several authorities were cited in support of the application, among them the case of ***Chris Munga, Bichage v Richard Nyagaka Tongi & 2 Others [Civil Application No. 39 of 2013 (2013]eKLR; Permanent Secretary, Ministry of Roads & Another vs Fleur Investments Limited [2014]eKLR; Reliance Bank Ltd. vs Norlake Investment Ltd.[2002]IEA 227*** *and* ***Mumias Sugar Company Ltd. vs Mumias Outgrowers Company [1998] Ltd (2014) eKLR.***

18. ***Mr. Onyiso***, learned litigation counsel for the Commissioner of Lands and the A.G, associated himself with the submissions made by his colleague, ***Mr. Kanjama,*** and supported the Notice of Motion.

19. ***Mr. Athuok***, learned counsel for the 1st respondents, in opposing the application, argued that the applicant has no title to the subject parcels of land and cannot therefore claim ownership of the same. Learned counsel further urged the view that the learned trial Judge cannot be faulted for expediting disposal of the applicant's own case. In the premises, in counsel's view, the intended appeal is not arguable.

20. On the nugatory aspect of the application, learned counsel submitted that the same had not been demonstrated. In his view, if the appeal were to eventually succeed, the hearing will still proceed albeit before a different Judge after some delay. It was also ***Mr. Athuok's*** further contention that, applications for stay of proceedings are considered less favourably than applications for stay of execution pending an intended appeal or appeal if one has been filed. Learned counsel invoked the decisions of ***Silverstein vs Atsango Chesoni [Civil Appl No. Nai 189 of 2001](UR) and The Standard Limited &Others vs Wilson Kalya & Another [Civil Appl No. Nai 369 of 2001 (1901)] (UR)***for that proposition.

21. Does the applicant have an arguable appeal? We think so. Of course, the intended appeal or appeal, if one has been filed, is not one which will necessarily succeed. (See ***Kenya Tea Growers Association & Another vs Kenya Planters Agricultural Workers Union [Civil Application No. Nai 72 of 2001](UR)***. The issue as to whether the learned trial Judge could ignore valid orders of his colleagues which had not been set aside or reviewed is in our view not frivolous and so is the allegation that the order suspending all applications had the effect of perpetuating an illegality. The issue as to whether the learned Judge should have recused himself from handling the matter cannot however, be considered in detail at this stage. If we did so, we would be delving in the realm of speculation. The issue should be left to be determined by the Court at the hearing of the appeal. The allegation of bias of the trial Judge is still just that, at this stage, an allegation.

22. As we stated in ***Bichage vs Tongi & 2 Others (supra),*** it is not necessary that there be a multiplicity of arguable issues for the Court to find whether the appeal filed or the intended appeal is arguable. In law only one arguable point suffices for that finding and the applicant has surmounted that hurdle.

23. As we have said before in many such applications, in considering whether an appeal will be rendered nugatory unless the stay or injunction sought is granted, we must bear in mind that each case, must depend on its own facts and peculiar circumstances (See for example ***Mumias Sugar Company Ltd. vs Mumias Outgrowers Company (1998) Ltd. (supra) Stanley Kinyanjui vs Toney Ketter & 5 Others [2013] eKLR Civil Application No. 31 of 2012,*** among many). In the last stated case, we went further and

held that in considering an application under ***Rule 5(2)(b)*** of this Court's Rules the court should not make definitive or final findings of either fact or law as doing so may put the bench which ultimately will hear the appeal in a bind.

We think the consequence of declining the order sought herein should the intended appeal eventually succeed is common ground. All the parties appreciate that some delay will result as a re-hearing before a different Judge may be ordered. Will the appeal thereby have been rendered nugatory?

24. In the Bichage case, his (Bichage's) election as the MP for Nyaribari Chache Constituency in the 2013 elections had been successfully challenged by the respondent, Tongi, in an election petition filed at the High Court at Kisii. Bichange felt aggrieved by the decision and appealed to this Court at Kisumu. In the interim, he lodged an application for stay of execution of the High Court order pending the determination of his appeal.

We were satisfied that the two limbs, under ***Rule 5(2)(b)*** of this Court's Rules had been met. We found that since the election had been nullified and a subsequent election ordered there would have been a constitutional crisis if a third party was elected as a Member of Parliament and the appeal were eventually to succeed. There would then be two elected MPs for one constituency. It is plain that those circumstances were special and do not obtain in the matter before us.

25. The applicant also invoked our decision in the case of ***Permanent Secretary Ministry of Roads & Another vs Fleur Investments Limited (supra)***. That case involved a substantial sum of money which would have been paid by the applicant even before the application to join two proposed defendants in an intended counter-claim was finally determined. To avoid that eventuality we ordered a stay of proceedings pending the disposal of the appeal. Those circumstances are again obviously distinguishable from the circumstances of the matter before us.

26. In ***Mumias Sugar Company Ltd. vs Mumias Outgrowers Company [1998] Ltd. (supra),*** upon which the applicant also placed reliance, we allowed a stay of taxation given the close business relationship between the parties and being alive to the substantial amount in contest where each party claimed in excess of Kshs.3 billion from the other. In those premises we found that it would have been improper to allow a party who was in dire financial problems to get costs which could well be paid after the resolution of the dispute. Once more, the facts speak for themselves. That case is clearly distinguishable from the facts of this application.

27. This application is akin to the application in ***Silverstein vs Atsango (supra)*** where we declined to grant a stay of proceedings before the High Court, under ***Rule 5 (2)(b)*** of the Court's Rules as the second limb of the Rule was not demonstrated. There, we followed our decision in ***Kenya Commercial Bank Ltd. vs Benjoh Amalgamated Ltd & Another [Civil Application No. Nai 50 of 2001 (29/2001 UR)*** which was an application for stay of proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. On whether the intended appeal's success would be rendered nugatory if a stay of proceedings was declined, we stated as follows:-

> ***"The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and if successful the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless."***

We adopted that reasoning in ***Silverstein v Atsango (supra)*** and found there that the appeal would not be rendered nugatory if stay was not granted. We however, cautioned that an inflexible principle was not being laid out as that would offend the provisions of ***Rule 5(2)(b)*** of this Court's Rules as each case must turn on its own facts.

28 Our decision in the ***Standard Limited & 2 Others vs Wilson Kalya & Another t/a Kalya & Co. Advocates (supra)*** was of the same genre. There, we felt that should the High Court case proceed, and assess damages in the dispute between the parties, that event alone would not render the appeal nugatory. If the appeal were to succeed, the order to be made on appeal would automatically render the proceedings in the High Court unnecessary and an appropriate order for costs would remedy the situation.

29. In the application before us, if we decline to grant the order staying proceedings as sought, the High Court will proceed with hearing the dispute between the parties, may be, to conclusion. If the intended appeal of the applicant is eventually heard and determined in its favour, the hearing before the High Court will have to recommence before a different Judge. Only a delay in the determination of the parties' rights will have been occasioned but the intended appeal will not have been rendered nugatory.

30. In the end even though the applicant may have satisfied us that it has an arguable appeal, it has failed to demonstrate that if the stay is not granted its intended appeal will be rendered nugatory. As we have stated, the two limbs under ***rule 5(2)(b)*** must both be demonstrated for an order of stay or injunction to issue. This application therefore must fail.

31. We order that it be and is hereby dismissed. Costs shall be in the intended appeal and if not lodged the applicant shall bear the 1st respondents' costs of this application.

Dated and Delivered at Nairobi this 15th day of April, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR