



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M. KARIUKI & AZANGALALA, JJ.A.)

CIVIL APPLICATION NO. NAI 136 OF 2015 (UR 110/2015)

BETWEEN

TERESIA KAMENE KING'OO.....APPLICANT

AND

HARUN EDWARD MWANGI.....RESPONDENT

(An application for interlocutory injunction and stay of execution of the Decree,

Proceedings & Judgment of the High Court of Kenya at Nairobi (Lucy Gicheru, J.)

delivered on 13th March, 2015

in

H. C. C. C. No. 519 of 2008)

RULING OF THE COURT

1. The applicant, **Teresiah Kamene King'oo**, seeks in her notice of motion dated 26th May 2015, *inter alia*, an order of stay of execution of the decree issued in the High Court in **H.C. (E.L.C.) Suit No. 519 of 2008** pending the hearing and determination of her appeal **No. 113 of 2015** lodged in this Court on May 12th, 2015. She also seeks a temporary injunction to restrain the respondent from transferring, alienating, charging or sub-dividing or entering into or prejudicially dealing with the contested land known as LR 12661/28 (**the suit land**). The application is predicated on rule 5(2) (b) of this Court's Rules.

2. The application shows that the applicant sued the respondent in the High Court in Suit No. H.C. (E.L.C.) No. 519 of 2008 seeking, *inter alia*, a declarations that the suit land "**is lawfully registered as her property**"; and that "**the purported transfer in favour of the respondent is fraudulent and contrary to the provisions of the law and thus null and void ab initio and of no legal effect**". She also sought in the suit **permanent injunction to restrain the respondent from interfering with her open, peaceful possession, charging the suit land, transferring it, alienating it, sub diving and/or prejudicially dealing with it**. In the alternative, she sought **a declaration that she had acquired the suit land by adverse possession**.

3. The applicant's suit was dismissed with costs on 13th March, 2015. The court entered judgment for the respondent on the latter's counter-claim and granted the respondent a declaration that the respondent is the lawful owner/proprietor of the suit land (No. LR/2661/28); that a permanent injunction would issue restraining the applicant from entering, remaining or in any way interfering with the respondent's possession and ownership of the suit land; that an order to the Registrar of Titles, Nairobi, would issue to cancel entries Nos. 7, 8, 9 and 10 registered against the title to the suit land; and that an award of damages amounting to shs. 3 million for trespass would be paid to the respondent by the applicant together with costs of the suit.

4. The application was supported by the affidavit of the applicant sworn on 26th May, 2015 and on the reasons appearing on the face of the notice of motion.

5. The respondent opposed the motion in his replying affidavit sworn on 20th July, 2015 and filed in Court on 21st July 2015.

6. When the application came up for hearing, learned Counsel, **Ms. J. Ngonyo Munyua**, appeared for the applicant and learned counsel, **Mr. Muturi Kamande**, appeared for the respondent.

7. **Ms. Munyua** urged us to allow the application and grant the orders sought. She submitted that the applicant has an arguable appeal whose record has been filed. She further pointed out that the applicant is in possession of the suit land and submitted that the appeal will be rendered nugatory if it succeeds unless the orders sought are granted. The Environment and Land Court, she said, had ordered maintenance of status quo and that the respondent had not averred truthfully in paragraph 6 of his replying affidavit in stating that "*the applicant has never resided on the suit land after she (the applicant) and her late husband sold it to the respondent in 1995...*" yet, said Ms. Munyua, the learned trial Judge in her judgment had noted that the applicant had refused to give possession of it despite the court having said she never resided on the land. Ms. Munyua further submitted that the application shows that the respondent was not in possession and that the applicant's claim for a declaration for adverse possession was founded on the applicant's possession and occupation of the suit land for many years. It was Ms. Munyua's contention that the award of shs. 3 million to the respondent as damages was without basis. Unless the orders sought are granted, submitted Ms. Munyua, the applicant shall be evicted from the suit land with the result that, if successful, her appeal shall be rendered futile.

8. **Mr. Muturi** opposed the application. Relying on the respondent's replying affidavit, Mr. Muturi submitted that the application has no merit; that the applicant is not on the suit land but rather, the land contiguous to the suit land; that if stay orders are given, the same should be conditional on appeal being heard within six months and deposit of shs. 3 million being made by the applicant; that the application should be dismissed.

9. We have carefully perused the application and the supporting and replying affidavits and the authorities filed by the applicant. We have also duly considered the submissions made by counsel.

10. The success of the application turns on whether the applicant has satisfied the twin principles namely, whether the appeal is arguable and whether the appeal, if successful, will be rendered nugatory unless the orders sought are granted.

11. Rule 5(2)(b) on which the application is predicated confers on this Court independent discretionary jurisdiction exercisable in accordance with these twin principles which the Court has developed to guide it in the exercise of that discretionary power. These principles require that the applicant must satisfy the Court that the appeal is arguable and that unless the orders sought under rule 5(2)(b) are granted, the appeal, if successful, will be rendered nugatory.

12. As stated by this Court in **Velji Narshi Shah v Keriti Narshi and 2 Others**, [Civil Application No. NAI 248 of 2012 (UR 179/2012)];

“these principles are designed to balance two parallel propositions, first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and secondly, that a litigant who is aggrieved by a decision must not be deprived of his right to challenge the impugned decision to the next court. (See Butt v Rent Restriction Tribunal [1982] KLR 417; see also Kenya Shell Ltd. v Kabiru & Anor. [1986] KLR 410.”

“These principles require that an applicant satisfies the Court that first, he has an arguable appeal. To do this, an applicant must show that the appeal is not frivolous, that is to say, it is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. In determining whether the appeal is arguable, the Court will advisedly eschew from delving into the merits or otherwise of the appeal lest it prejudices the appeal or intended appeal. It is important to point out that an arguable appeal is not necessarily one that is bound to succeed. It is sufficient that the applicant has an appeal that is arguable even if it be on a single point of law.

“The second of the twin principles requires that an applicant satisfies the Court that if the order sought under rule 5(2)(b) is not granted, the appeal, if successful, shall be rendered nugatory or valueless or worthless. In short, the success in the appeal would be “Pyrrhic victory....”

13. In the instant application, the record of appeal has been lodged. The application shows that there are triable issues involved that range from occupation and adverse possession to award of damages for trespass. For obvious reasons, we deliberately refrain from delving into the merits of the appeal, for this is a matter for the Bench that shall hear the appeal.

14. As to whether the appeal shall become nugatory if it succeeds, unless the orders sought are granted, we observe that the parties are not in agreement as to who is in possession, but the record does show that the applicant’s assertion that she is in possession is buttressed by the record. For that reason, we have come to the conclusion that the appeal, if successful, may be rendered nugatory unless the orders prayed for in the application are granted.

15. Accordingly, we allow the notice of motion dated and lodged in Court on 26th May, 2015 and grant orders in terms of prayers 3 and 5 of the said application. The costs of the application shall abide the outcome of the appeal.

We so order.

Dated and delivered at Nairobi this 19th day of May, 2016.

M. K. KOOME

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JUDGE OF APPEAL

G.B.M. KARIUKI, SC

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR