IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, G.B.M. KARIUKI & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. NAI 180 OF 2015 (UR 145/2015)

BETWEEN

STANLEY MBIUKI ..... APPLICANT

AND

DIRECTOR OF LAND ADJUDICATION ..... 1ST RESPONDENT

MURATHA MICHEU ..... 2ND RESPONDENT

(An application for a prohibitory injunction order arising from the Judgment of the High Court of Kenya, Nairobi (W. Korir, J) delivered on 19th day of March 2015

in

H.C.JR NO.37 OF 1984)

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RULING OF THE COURT

1. On 19th March 2015, the High Court in its judgment in Judicial Review Application No.37 of 1984 dismissed a notice of motion application dated 7th March 1984 filed by Mr. Stanley Mbiuki (**the applicant**) in which the latter sought three orders namely –

> ***1. an order of mandamus compelling the Director of Land Adjudication, the 1st respondent, to include his name in the register of existing rights as the land parcel No.1076, Muiru, as it had been deleted and***
>
> ***2. an order that new numbers be given to the subdivision of the said parcel of Land No 1076 that in to say Karingani/Muiru/1201 to 1206 and***
>
> ***3. an order of certiorari to remove into this court and quash the decision of the Director of Land Adjudication contained in his letter of 11th August 1983 to cancel from the register of Existing Rights the applicant's name and substitute the same with the 2nd respondent's name, that is to say with the name of Muratha Micheu.***

2. In his judgment, the learned Judge (W. Korir J) was not persuaded by the applicant. He held that the applicant cannot be allowed to claim a right to land based on an illegal decision. He found, inter alia, that the letter of 11th August 1983 was unreasonable, and that the applicant was not entitled to a hearing in the circumstances. He dismissed the applicant's judicial review application on the ground that it had no merit. He opined that the applicant's "predicament arose from a mistake on the part of the 1st respondent."

3. Aggrieved by the decision, the applicant lodged in this court on 1st April 2015 a notice of appeal dated 30th March 2015.

4. On 6th July 2015, the applicant proceeded to lodge in this court the notice of motion dated 2nd July 2015 predicated on Rules 5 (2)(b) seeking an order for a prohibitory order to restrain the 2nd respondent from evicting him or interfering with his possession of the parcels of land known as **Karingani/Muiru/1201, 1202, 1203, 1206** and **916** (originally land referenceNo.1076, Muiru) which were later given new numbers namely **Karingani/Muiru/1566, 1567** and **1568** pending the hearing and determination of the intended appeal.

5. When the motion came up for hearing before us, learned counsel **Ms Carolyne Kamende** appeared for the applicant while learned counsel **Ms Lindah Nyamwaya** appeared for the 2nd respondent. There was no representation for the 1st respondent whose counsel on record is the Attorney General who had been duly served to attend the hearing.

6. Ms Kamende submitted that the applicant's intended appeal is arguable and that it will be rendered nugatory if it succeeds unless and stay is granted. She drew our attention to the draft memorandum of appeal containing 13 grounds of appeal and urged that it was discernible that the appeal raises points of law for consideration and determination. Counsel contended that the 1st respondent having entered the name of the applicant in the register, could not exclude it and the subsequent removal of the name was wrongful. Yet in spite of this, said counsel, the learned judge held that the applicant's claim was based on an illegal decision.

7. Submitting on behalf of the 2nd respondent, learned counsel Ms Nyamwaya opposed the application and placed reliance on the latter's replying affidavit sworn on 28th September 2015 by Japhet Muyandi Kibanga, the legal representative of the Estate of the late Muratha Micheu (deceased) who was named as the 2nd respondent. It was Ms Nyamwaya's submission that the application had no merit as the appeal was not arguable. She indicated that the applicant moved into the property after the institution of the suit in the High Court but conceded that the applicant has developed the property, albeit during pendency of the suit. Ms Nyamwaya told the Court from the Bar that her client will not evict the applicant if stay is not granted but urged the Court not to grant stay because, according to her client, the applicant will frustrate the appeal by delaying it if stay is given. It was counsel's submission that the appeal will not become nugatory if the appeal succeeds and stay is not in place.

8. In reply, Ms Kamende contended that her client did not want to rely on the magnanimity of the respondent and that that is why the applicant had applied for the orders prayed for in the notice of motion.

9. We have perused the application and duly considered the rival submissions of counsel. **Rule 5(2) (b)** of this court's **Rules** on which the application is predicated confers on this court independent discretionary jurisdiction where a notice of appeal has been filed in accordance with the rules of this court or where an appeal is pending. Such discretionary jurisdiction is exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and in addition that the appeal, if successful, will be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on rule 5(2)(b). The rationale in these principles is designed to balance two parallel propositions; **first**, that a successful litigant who has a decree or order in his favour which has been appealed against should not be deprived of the fruits of a judgment in his favour without cause and; **secondly**, that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it on appeal (see **Butt versus Rent**

Restriction Tribunal [1982] KLR 417. See also **Kenya Shell Ltd versus Kabiru & Another** [1986] KLR 410.

10. These twin principles must both be satisfied for the Court to grant an order for stay under rule 5(2)(b). For an appeal or intended appeal to be shown to be arguable, it is imperative that it is shown that it raises issues for consideration or determination and that it is not frivolous; in short, that it is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there is only a solitary arguable point.

Further, an applicant must show that the appeal, if successful, will be rendered nugatory or futile if stay is not granted.

11. As to whether the appeal is arguable, a perusal of the notice of motion and the annextures to it shows that there are issues of law that call for determination. We do not wish to pronounce ourselves on the merits or otherwise on those matters, as clearly that is the role and prerogative of the Bench that shall be seized of the appeal, but we are satisfied that the appeal is arguable.

12. As regards the question whether the appeal shall become nugatory if it succeeds and stay is not granted, we observe that the applicant is in possession. We are satisfied that if the applicant was ejected from the land and subsequently the appeal succeeds, he will suffer irreparable damage and the purpose of the appeal shall be defeated. We also observe that the respondent through his counsel has stated from the Bar that he is not intent on disrupting the status quo now obtaining but he would rather stay is not granted lest the applicant drags his feet in prosecuting the appeal. We find merit in the application. We allow it. We hereby make orders in terms of prayers (a) and (b) of the notice of motion dated 2nd July 2015. The costs of the motion shall abide the outcome of the appeal.

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

H. M. OKWENGU

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JUDGE OF APPEAL

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR