



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: AZANGALALA, J. MOHAMMED & KANTAI, J.J.A.

CIVIL APPLICATION NO. NAI 66 OF 2015 [UR 56 OF 2015]

BETWEEN

WAWERU MWAURA APPLICANT

AND

MARY WANJIRU NJENGA RESPONDENT

(An application for stay of execution pending the hearing & determination of an intended appeal from the judgment & decree of the Environment & Land Court of Kenya at Nairobi (Mutungi, J) dated 12th February, 2015

in

ELC CS NO. 49 OF 2002)

RULING OF THE COURT

1. Before us is a Notice of Motion under certificate of urgency dated 12th March, 2015 brought pursuant to **rules 5(2)(b) and 47 of the Court of Appeal Rules** seeking, *inter alia*, a stay of execution of the whole judgment and decree delivered on 12th February 2015 by *Mutungi, J* in the Environment and Land Court. The application is supported by the affidavit of the applicant herein.

2. The genesis of this application is that the plaintiff (the respondent herein) vide a **Plaint dated 11th January, 2002** filed in the High Court at Nairobi sought, *inter alia*, eviction orders against the defendant (the applicant herein).

The respondent averred that she is the owner of **LR KARAI/GIKAMBURA/2275** (the suit property); that on or about January, 2001, the applicant wrongfully entered and remained onto the suit property where he built a house and cultivated thereon, thereby depriving her the use thereof; and that the applicant was unlawfully in occupation of the suit property despite demands for him to vacate.

3. The applicant filed his defence dated 6th March, 2002 which was amended on 4th August, 2003 to include a counterclaim. The applicant admitted that the respondent was the registered proprietor of the suit property but alleged that the said registration was fraudulently procured. The applicant denied the jurisdiction of the court claiming that the respondent's suit was barred by **section 6 of the Civil Procedure**

Act and Order 7 Rule 1(1) (e) of the Civil Procedure Rules. In the counterclaim, the applicant pleaded particulars of fraud against the respondent. He contended that his admission of liability to the respondent in the sum of KShs.240,000/= and the part payment of KShs.40,000/= was obtained through threats, intimidation and harassment by the respondent; that he was therefore entitled to a cancellation of the fraudulent registration in favour of the respondent and a refund of KShs.40,000/= that he had paid to the respondent under duress.

4. The matter was heard by J.M Mutungi, J who entered judgment in favour of the respondent and dismissed the applicant's counterclaim. The learned Judge found that the respondent was the lawful owner of the suit property in respect of which she was the registered owner and the applicant had no legal right to remain on the respondent's property. The learned Judge made the following orders:

“a) That the defendant be and is hereby ordered to vacate and deliver vacant possession of Title No. Karai/Gikambura/2275 to the plaintiff within 30 days from the date the decree herein is served on him.

b. In the event the defendant defaults in vacating the plaintiff shall be entitled to an eviction order on application.

c. The costs of the suit and of the counterclaim are awarded to the plaintiff.”

5. Aggrieved by the above decision, the applicant lodged a notice of appeal on 2nd March, 2015 and this notice of motion. The applicant avers that he has an arguable appeal with overwhelming chances of success; that he has been, at all material times and continues to be, in possession and occupation of the suit property and built his house on the same two years before the suit was filed; that he risks being evicted from the suit property and suffer irreparable loss and damage that cannot be compensated by damages unless the stay of proceedings prayed for is granted; that his intended appeal, if successful, will be rendered nugatory if this application is disallowed and that the respondent will not be prejudiced by the grant of stay sought.

Submissions

6. Mr P.M. Kahonge, learned counsel for the applicant, submitted that he relies on his affidavit in support of the application and that of the applicant; that the appeal is arguable in that this matter involved transfer of land; that it is a requirement under **section 3(3) of the Law of Contract Act**, that there be a contract in writing between the two parties; that no such contract was signed between the two parties herein; that the transfer to the respondent was not supported by any consideration but was procured by fraud; that the suit property was held between the two parties as joint owners; that no consideration was exchanged by the parties to the sale and there was therefore no valid sale in existence. On the nugatory aspect, counsel submitted that Civil Appeal No 160 of 2015 has been filed wherein the applicant has argued that he has been living on the suit property since 1999; that the suit property is his matrimonial home and he has no other home; that if the order of eviction is not stayed pending the hearing and determination of the appeal, he risks being rendered homeless; that if he were to succeed on appeal, it would be academic and an exercise in futility as the suit property may have been transferred to a third party thus prejudicing the applicant who is in possession of the suit property. Counsel urged us to grant the application as prayed.

7. Mr S M W Kinuthia, learned counsel for the respondent, opposed the application and relied on the respondent's affidavit sworn on 5th June, 2015.

He submitted that the subject property was transferred to the respondent by the applicant due to an overpayment of KShs.240,000/= in a land transaction between them; that the applicant attended the Land Control Board seeking consent to transfer the suit property to the respondent and that he has denied the respondent possession of the suit property for over 11years. Counsel further submitted that there is no arguable appeal since the parties concede that the applicant owed the respondent KShs.200,000/= which amount he failed to pay and in lieu thereof agreed to transfer the suit property to the respondent in payment of the debt. On the nugatory aspect, counsel submitted that the respondent will not suffer

irreparable loss if stay of execution is denied as he has two other plots being Karai/Gikambura/T2277 and T2276. Counsel urged us to dismiss the application and award costs to the respondent.

Determination

8. We have considered the application, the grounds in support thereof, the affidavits, the submissions by counsel and the law. The principles applicable for the determination of applications under **rule 5(2) (b) of the Court of Appeal Rules** are well settled as was observed by this Court in **ISHMAEL KAGUNYI THANDE V HOUSING FINANCE KENYA LTD, CIVIL APPLN NO. NAI 157 OF 2006** (unreported):

“The Jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that 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 that appeal will be rendered nugatory.” (See Githunguri v Jimba Credit Corporation Ltd, No. 2 (1988) KLR 838 & J.K. Industries Ltd v Kenya Commercial Bank Ltd, (1982-88) and Stanley Kangethe Kinyanjui v Tony Ketter & 5 Ors, [2013] eKLR.)”

9. What this court is therefore called to determine is whether the applicant has demonstrated that the intended appeal is arguable and whether the intended appeal, if successful, will be rendered nugatory if orders sought are not granted. (See **JOSEPH GITAHU & ANOTHER VERSUS PIONEER HOLDINGS LIMITED AND 2 OTHERS, CA NO. 124 OF 2008**).

10. The order dated **12th February, 2015**, ordered the applicant to deliver vacant possession of the suit property to the respondent within 30 days from the date thereof, failure to do so, the respondent would be entitled to an order of eviction, on application. Has the applicant shown that this appeal is arguable? It is established that even a single arguable point is sufficient for the grant of orders under **Rule 5 (2) (b)**. From the draft memorandum of appeal, on appeal, one question will be whether the respondent's title to the suit property was fraudulently acquired. We are satisfied that there is an arguable appeal. Will the appeal be rendered nugatory if we do not grant a stay of execution pending the hearing and determination of the appeal? Both counsel concede that the applicant was in possession of the suit property and that a 30 day stay was granted by the High Court in March 2015 and that the respondent was entitled to an eviction order on application. We, therefore find that the intended appeal would be rendered nugatory if the stay order is not granted as there is a likelihood that the applicant may be evicted. From the circumstances of the application before us, the applicant has demonstrated both limbs of **Rule 5 (2) (b)** that the appeal is arguable and that the appeal will be rendered nugatory if the instant application is dismissed.

11. Accordingly, we allow the application and order that the orders issued by the High Court dated **12th February, 2015** be and are hereby stayed pending the hearing and determination of Civil Appeal No. 160 of 2015. Costs shall be in the appeal.

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

F. AZANGALALA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR