IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ. A

CIVIL APPLICATION NO. NAI 97 OF 2016 (UR 76/2016)

BETWEEN

SATROSE AYUMA..... 1ST APPLICANT

JOSEPH SHIKANGA……...…...2ND APPLICANT

JOSEPH GITONGA……...…...3RD APPLICANT

BETH WAITHIRA……...…...…….4TH APPLICANT

LYDIA MUTHONI……...…..…..5TH APPLICANT

LAMECK MWAMBE……..…...…....6TH APPLICANT

JOSEPH OTIENO……...…...…7TH APPLICANT

WILSON GITHINJI……...……..8TH APPLICANT

JOHN OCHIENG……...……...…...9TH APPLICANT

EUNICE OPIYO……...……..10TH APPLICANT

YASHPAL GHAI……...…….....…..11TH APPLICANT

PRISCILLA NYOKABI…….…...……..…12TH APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF THE KENYA RAILWAYS

STAFF RETIREMENT BENEFITS SCHEME.....1ST RESPONDENT

THE KENYA RAILWAYS CORPORATION ...…….…...……2ND RESPONDENT

HON.ATTORNEY GENERAL……....……..3RD RESPONDENT

AND

MILOON KOTHATI…….…….....INTERESTED PARTY

*(Being an application for stay of execution of the Judgment and Orders from the High Court of Kenya at Nairobi (**Lenaola, J.**) given on 26th August 2013 and 18th December 2015 respectively*

in

Constitution Petition No. 65 of 2010)

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RULING OF THE COURT

This is an application under **Rule 5(2) (b)** Court of Appeal Rules for stay of execution of the judgment and orders of the High Court in the ***Constitutional Petition No. 65 of 2010*** pending the hearing and determination of the appeal.

The applicants filed the said constitutional petition in October 2010 alleging that the imminent eviction from their houses located on LR. No. 209/6502 commonly known as "Muthurwa Estate" by the 1st respondent breached their various constitutional rights, including their economic and social rights and rights to housing. By the petition, they sought a declaration that they are entitled to such rights, a declaration that the respondents had violated their rights, an injunction restraining the respondents from, *inter alia*, demolishing the houses, terminating the leases or evicting the applicants and prayed in the alternative, that in the event of an eviction and prior to such eviction, the respondents should ensure and provide, *inter alia*, a one year notice in writing to hold a public hearing on the proposed plans and alternatives.

The circumstances which forced the applicants to file the petition and the true status of the respective parties in respect of the suit property LR. No. 209/6502 clearly emerge from the judgment of the High Court delivered on 26th August 2013. They are briefly as follows;

The 1st respondent is a Retirement Benefits Scheme duly set up under the Retirement Benefits Act for the benefit of Kenya Railways Corporation Pensioners estimated at over 12,000. In the year 2006, the 2nd respondent, Kenya Railways Corporation transferred the suit property to the 1st respondent for the provision of pension and other benefits for the employees of the 2nd respondent.

The 1st respondent subsequently applied to Nairobi City Council for change of user of the suit premises to enhance the market value and offer the property for sale to raise money to pay its pensioners. It invited offers for the purchase of the property and subsequently issued notices to the tenants dated 1st July 2010, requiring all residents of Muthurwa Estate to vacate the suit premises within 90 days. On 15th July 2010, the 1st respondent invited offers for plots indicating that the land would be used for development of a micro-metropolis with shopping malls, office blocks, petrol stations and high class apartments. The applicants alleged that demolition of the houses began before the expiry of the 90 days notice which was intended to force the applicants out of the suit premises.

In their petition the applicants stated that the petition was filed on their own behalf and on behalf of 359 tenants and other persons who reside in the suit premises.

Upon hearing the petition, the High Court identified the issue in the following terms:

"***It is undisputed that the petitioners do not hold any title over the suit premises and they are but tenants of the 1st respondent. That being the case, I do not see how the petitioner may violate the 1st***

respondent's rights to the suit premises. They were and are tenants and with or without formal tenancy agreements, they have lived on the suit premises for many years while paying rent for the houses each of them occupies. It is on this understanding that the 1st respondent chose to give them eviction notices so as to enable them move out of its property and get alternative accommodation elsewhere. Accordingly, it is also clear to the petitioners that the 1st respondent owns the suit premises and that issue has not been contested by any one. The issue, therefore, in my view and as framed above should be whether the 1st respondent is entitled to evict the petitioners, given their long history on the suit premises as well as the relationship they have had with the 1st respondent over the years. To answer that question I must start by determining whether the facts as pleaded above have made out a case of violation of constitutional rights."

The High Court made a finding that the applicants have been separately paying rent until 2010 and during the pendency of the proceedings. In the end, the High Court make a finding that the 1st respondent violated the applicant's rights to adequate housing, from the manner it intended to carry out the evictions without a proper plan and time and without involving the applicants in the decision-making process. The High Court further made a finding that the 1st respondent had violated the applicants' right to human dignity and right to protection of the law for the children. However, the High Court dismissed the allegation of violation of applicants' other rights and exonerated the 2nd respondent of any wrong doing.

In considering the appropriate remedies, the court took into account, in essence, the welfare of the pensioners and the fact that the applicants had no strong objection to the change of user of the suit premises, their desire being a more humane programme of eviction. The High Court also took account that there is no law governing evictions or policies and guidelines to ensure that the right to adequate housing is progressively realised.

The High Court ultimately made a declaration in favour of the applicants that the 1st respondent had violated their rights to accessible and adequate housing limited to the manner in which the forced evictions were conducted on or about 12th July 2010. The court further ordered the Managing Trustee of the 1st respondent and applicants to hold a meeting within 21 days where a programme of eviction of the applicants should be designed which agreed programme should be filed in court within 60 days of the judgment. The court also seized the opportunity to order the 3rd respondent to file an affidavit within 90 days detailing the measures the government has put in place towards the realisation of the right to accessible and adequate houses and the existing and planned state polices and legal framework on forced eviction and demolitions.

The court made no orders as to costs of the petition and gave parties liberty to apply.

As the subsequent ruling dated 18th December, 2015 shows, following the judgment the applicants and the 1st respondent held several mediation meetings on developing a programme of eviction which yielded no positive results. The 3rd respondent did not also file the affidavits as required. In the event, the 1st respondent filed an application dated 14th May 2014 seeking, *inter alia*, an order for settlement of the terms of the judgment of the court delivered on 26th August 2015. In that application, the applicants contended, among other things, that only a notice period of six months would be reasonable and fair.

Before making the final orders the court observed.

"…it seems to me that goodwill does not exist on part of any party to this litigation. It is close to two years since my judgment and the opportunity to amicably address the date and conditions of eviction has been lost. Litigation must come to an end hence the final orders to be made in this Ruling."

After considering the respective submissions, the High Court ordered the applicants to vacate the suit premises on or before 30th April 2016 in terms set out in the judgment of 26th August 2013. On 15th January 2016 the applicants filed a notice of appeal signifying the intention to appeal against the Ruling

of 18th December 2015 as read with the judgment of 30th August 2013.

The above synopsis forms the background to the present application which was filed on 19th April 2016.

The jurisdiction of the Court to grant stay of execution under Rule 5(2)(b) Court of Appeal Rules is discretionary. Before the Court can exercise its discretion in favour of an applicant, the applicant is required to demonstrate, *inter alia*, that the intended appeal is arguable and that unless the stay of execution is granted, the intended appeal or appeal would be rendered nugatory. The underlying and paramount consideration is the duty of the Court to do even justice to the parties.

The application is supported by the affidavit of **Satrose Ayuma** who depones, among other things, that the applicant has a good appeal which will be rendered nugatory if execution is not stayed. She has annexed a copy of the draft memorandum of appeal in the proposed grounds of appeal. The applicants aver, amongst other things, that the High Court erred in law in holding that the applicants should be evicted; in failing to give the applicants sufficient time to vacate the suit premises; in issuing eviction orders in total disregard of the evidence that eviction would render some of the applicants homeless; in failure to make an order for compensation; for breach of applicants' fundamental rights, and in issuing eviction orders before the 3rd respondent had complied with the orders of the court.

The application is opposed by the respondents. The 1st respondent has filed a replying affidavit sworn by **Anthony Kilavi** who depones, *inter alia*, that the intended appeal is not arguable nor would it be rendered nugatory. At the hearing of the application, **Miss Maina**, learned counsel for the applicants submitted that the applicants should be given sufficient notice of probably one year.

As regards the issue of arguability of the intended appeal, it is apparent that the central issue in the dispute between the applicants and the 1st respondent was the imminent eviction pursuant to a notice dated 1st July 2010. It is the notice and the process of effecting the notice before its expiry which triggered the filing of the petition. As the High Court found in the excerpt of the judgment quoted above, the applicants do not hold any title to the suit premises. The 1st respondent is the registered proprietor and each applicant is a tenant by virtue of an informal tenancy. Thus, the relationship of each applicant and the 1st respondent is purely contractual and the rights of each is governed by the terms of the tenancy either express or implied.

The High Court made a finding in favour of the applicants that the 1st respondent had violated their rights to accessible and adequate housing **limited to the manner in which the forced evictions were conducted** on or about 12th July 2010 (*emphasis added)*.

The High Court ordered a meeting between the applicants and the respondent to design a programme of eviction of the applicants and stipulated the conditions that should be observed during the eviction. Thus the High Court did not relieve applicants from eviction. Indeed the court appreciated that what the applicants desired was a more humane programme of eviction.

By the petition the applicants suggested one year's notice as reasonable. The applicants had been given a notice of 90 days by the respondent with effect from 15th July 2010. By the time the High Court delivered its judgment on 26th August 2013, nearly three years had elapsed since the notice was issued. The period between the date of judgment and the date of the ruling dated 18th December 2015 is about 2 years and 4 months. The applicants told the High Court at the hearing of the application for settlement of the terms of judgment that they required six months to vacate the suit premises. They were given up to 30th April 2015 – a period of about 4½ months. They now in this Court say that they require another one year.

As the applicants have no proprietary interest in the suit premises and as they do not allege that the 1st respondent has breached any terms and conditions of the tenancy, the appeal against the order requiring the applicant to give vacant possession is not arguable. Moreover, the applicants having now stayed in the suit premises for over six years since the notice to vacate was given by the 1st respondent, the claim that

the applicants were not given a reasonable notice or that they have not had a reasonable notice, is not arguable.

It seems that the present application is an afterthought. The applicant did not file a notice of appeal against the judgment dated 26th August 2013 which ordered a programme of eviction to be devised. The notice of appeal on record was only filed on 15th January 2016 after the subsequent ruling. Moreover, this application was not filed expeditiously. It was filed only on 19th April 2016, about 10 days before the deadline given by the High Court.

The Court should balance the interest of the applicants and the over 900 pensioners who expect to get their pensions from the suit land. It would be unjust in the circumstances of this case to deny the 1st respondent vacant possession of the suit land.

The fear of the applicants that there is a risk of eviction is not justified. There should not be any eviction. The applicants as law abiding citizens should peacefully give vacant possession to the suit land to its owners. Moreover, should eviction be necessary, the High Court has already prescribed the conditions under which a humane eviction should be carried.

Having found that the intended appeal is not arguable, it is futile to deal with the issue of nugatory.

For the above reasons, the application is dismissed with no orders as to costs.

Dated and Delivered at Nairobi this 13th day of May, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

……..…….

JUDGE OF APPEAL

S. ole KANTAI

……..…….

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR