



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 68 OF 2015 (UR 42/2015)

BETWEEN

WENSLEY BARASA.....APPLICANT

VERSUS

IMMACULATE AWINO ABONGO.....RESPONDENT

*(An application for stay of execution from the Judgment of the High court of Kenya at Bungoma, (Hon. S. Mukunya, J.) dated 28<sup>th</sup> October, 2015*

in

HCC E&L NO. 93 OF 2011

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RULING OF THE COURT

1. The applicant, Wensley Barasa, seeks an order of this Court under rule 5(2)(b) of the Rules of the Court to stay execution of an eviction order issued by the High Court at Bungoma on 28<sup>th</sup> October 2015 in HCCC No. 93 of 2011 in favour of the respondent. The court in that suit gave judgment in favour of the respondent and granted the applicant 60 days to remove any structures on the property known as Title Number E. Bukusu/S. Kanduyi/5778 with liberty to the respondent to demolish the same if not removed within the 60 days period. Aggrieved by that judgment, the applicant filed a notice of appeal and thereafter filed the present application seeking stay of execution pending the hearing and determination of the appeal.

2. The object of rule 5(2)(b) of the Rules of this Court is the ***“preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”*** [per Githinji JA, in **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011**].

3. To succeed, the applicant needs to demonstrate that the intended appeal is arguable and that if we decline to grant the order sought, the intended appeal will be rendered nugatory. In **Ishmael Kagunyi Thande v HFCK Civil Application No. Nai 157 of 2006** this Court stated that:

***“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] These principles are now well settled. For an application to***

***succeed he must not only show 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 the appeal will be rendered nugatory.”***

4. We are also mindful that an arguable appeal is simply one that is deserving of the Court’s consideration and not one that must necessarily succeed as held in **Dennis Mogambi Mong’are vs. Attorney General & others [2012] eKLR**

5. Given those parameters, what then are the circumstances in this case?

6. The applicant asserts that between 1987 and 1988 he purchased portions of land from one Evans Masika Simiyu of what presently constitutes the property known as Title Number E. Bukusu/S. Kanduyi/5778 (the property); that he settled on the property sometime between 1989 and 1992; that the said Evans Masika Simiyu died in 1993 and his brother, who was the administrator of the estate of their late father, demanded a crate of beer from the applicant in order to transfer the property to him but the applicant declined to supply the beer on account of his faith; that he was shocked when people invaded his home on the property in early 2015 and started demolishing one of his houses whereupon he sought protection from the court; that he then learnt that the property had been transferred to the respondent. According to the applicant, he has lived on the land peacefully for over 30 years and has a pending suit in the Environment and Land Court at Bungoma seeking title over the property on the basis of adverse possession.

7. The respondent’s case on the other hand is that she is the registered proprietor of the property, having purchased it from one Aggrey Maurice A. Nandwa for Kshs. 550,000.00 under an agreement for sale dated 29<sup>th</sup> December 2010; that on 30<sup>th</sup> December 2010 she was issued with the title over the property; that she thereafter learnt the applicant had put up a semi-permanent house and a toilet; that her demands that he should vacate were not successful; that she was then constrained to institute suit, being Bungoma HCCC No. 93 of 2011, seeking orders for the eviction of the applicant from the property. That suit culminated in the judgment the applicant is appealing against.

8. After hearing the parties, the Judge was not satisfied that the applicant had an interest in the property capable of protection and proceeded to order his eviction from the property.

9. According to Mr. Joseph Sichangi, learned counsel who appeared before us on behalf of the applicant, the intended appeal is arguable in that the learned Judge overlooked that the applicant has been in possession of the property and execution of the judgment before his appeal is heard will occasion him great hardship; that the appeal, which has already been filed as Civil Appeal No. 115 of 2015, raises serious issues; and that the title to the property had already been extinguished by adverse possession by the time the respondent contracted to purchase the property.

10. Learned counsel for the respondent, Mr. Emmanuel Situma, argued that the intended appeal is hopeless; that the applicant has never been in possession of the property; that the applicant’s application is overtaken by events in that the respondent is in possession; that the applicant will not suffer any prejudice as he is not in possession; that the applicant must have purchased the property from a person who had no title.

11. We have considered the application and the submissions by counsel. Mindful, as we are, that an arguable appeal is not one that must necessarily succeed, we do not think the intended appeal is frivolous. For instance, the applicant’s intended appeal raises the question whether the applicant has an interest capable of protection and whether the learned Judge’s finding to the contrary was correct.

12. As to whether the intended appeal will be rendered nugatory unless the order sought is granted, the parties are not in agreement as to what the status on possession of the property is. Counsel for the respondent argued that the applicant has never been in possession. That does not appear to be correct. The respondent’s suit was initiated with a view to evicting the applicant from the property. Needless to mention, that suit would never have been necessary if indeed the applicant was never in possession. The

respondent is recorded to have informed the trial court that the applicant “*lives on my land as a squatter.*”

13. On a preponderance of the material before us, it would seem that the applicant is in possession of the property. We think in those circumstances the applicant should have an opportunity to be heard on his appeal. Counsel informed us that Civil Appeal No. 115 of 2015 is already filed. His eviction would no doubt render the appeal nugatory should he ultimately be successful in that appeal.

14. For those reasons we allow prayer 2 of the applicant’s notice of motion dated 17<sup>th</sup> December 2015. The costs of the application shall abide the outcome of the appeal.

Orders accordingly.

**Dated at Kisumu this 2<sup>nd</sup> day of June 2016.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

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**DEPUTY REGISTRAR**