



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CIVIL APPLICATION NO. 40 OF 2016 (UR 26/2016)

BETWEEN

BURHAN ALI MANSUR.....APPLICANT

VERSUS

MUMIN MAHMOUD MWANZI.....1ST RESPONDENT

HASHIM MAHMOUD MWANZI.....2ND RESPONDENT

ADNAN MAHMOUD3RD RESPONDENT

MUSA MAHMOUD.....4TH RESPONDENT

ASIA MAHMOUD.....5TH RESPONDENT

SAID WANJIRU MAHMOUD *Alias*

ZAIDA MAHMOUD MWANZI.....7TH RESPONDENT

HUSSEIN MAHMOUD.....8TH RESPONDENT

(Being an application for stay of execution of the Judgment/Decree of the Environment and Land Court at Nyeri (Waithaka, J.) dated 20th April, 2015

in

ELC Case No. 67 of 2015

as consolidated with

HCCC No. 23 of 2012)

RULING OF THE COURT

Before us is a Notice of Motion dated and lodged in this Court's Sub-Registry at Nyeri on the 1st day of July, 2016, brought under *Rules 5(2) (b)* and *41 of the Court of Appeal Rules 2010, section 3A and 3B* of the *Appellate Jurisdiction Act Chapter 9 of the Laws of Kenya* and all other enabling provisions of the law. One substantive prayer is sought namely:

1. That this honourable court be pleased to order that pending the hearing and determination of the appeal, there be a stay of execution of the judgment and decree of the Environment and Land Court (L. N. Waithaka, J.) delivered on 20th April, 2015 in Nyeri ELC Case No. 67 of 2015 (consolidated with Nyeri HCCC No. 23 of 2012) or alternatively to give such other or further directions as it shall deem fit.

It is supported by grounds in its body and a supporting affidavit as well as annexures thereto. It is not opposed. On the day fixed for its hearing, only **Mr. C. N. Ngugi** learned counsel for the applicant attended court. The court being satisfied that **Mr. C. M. King'ori**, learned counsel for the respondents, had due notice of the hearing the date having been taken by consent at the registry, allowed **Mr. Ngugi** to proceed with his submissions.

Mr. Ngugi urged that the applicant's application satisfies the twin principles for the granting of the relief sought because:

(i) the court is properly seized of the matter as there is a valid Notice of Appeal on record;

(ii) they already have an arguable appeal on the record ready for disposal;

(iii) their application has not been opposed by the respondents;

(iv) no prejudice will be suffered by the respondents as they will have an opportunity to ventilate their case and should the applicant lose the appeal, the respondents will have the land transferred to them.

He further submitted that the applicant has genuine fears that the subject matter may disappear as the respondents have already called in a surveyor to subdivide the land. It is the applicant's apprehension that if the order for stay is not granted, the respondents are likely to dispose of the resulting subdivisions to 3rd parties thereby making these out of the reach of the applicant should he succeed in his appeal. It is, therefore, not only prudent but also fair and just that the order sought be issued to prevent the applicant's arguable appeal being rendered nugatory.

Our jurisdiction to intervene has been invoked under *rule 5(2) (b)* of the *Rules* of the court. The principles we are enjoined to bear in mind when determining the application have now been crystallized by case law. The jurisdiction is said to be original, independent and discretionary (see *Githunguri versus Jimba Credit Corporation Limited No. (2) [1988] KLR*, it is a procedural innovation designed to empower this court to entertain interlocutory applications for preservation of the subject matter of the appeal where one has been filed or is intended (see the case of *Equity Bank Ltd. versus West...Civil Application No. 78 of 2011 (UR)*); the jurisdiction arises where the applicant has lodged a notice of appeal (see the case of *Safaricom Ltd versus Ocean View Beach Hotel Ltd. & 2 Others, Civil Application No. 327 of 2009 (UR)*).

As a matter of both law and practice, the applicant is obligated to satisfy the twin principles required by law to be established before relief can issue under the rule. The applicant must demonstrate firstly that the appeal or the intended appeal is arguable on the one hand, and secondly, that if the stay sought is not granted the appeal/intended appeal, as the case may be, will be rendered nugatory. See the *Githunguri case* (supra). Arguability does not connote the success of the appeal or intended appeal but one which raises a *bona fide* issue worthy of consideration by the court (see *Kenya Tea Growers Association and Another versus Kenya Planters Agricultural Workers' Union, Civil Application No. Nai. 72 of 2001 (UR)*). Furthermore, an appeal need not raise a multiplicity or any number of such issues. A single arguable point or issue is sufficient to earn an applicant such relief (see *Damji Premji Mandavia versus*

Sara Lee Household & Body Care (K) Limited, Civil Application No. Nai. 345 of 2005 (UR); Kenya Railways versus Ederman Properties Ltd, Civil Appeal No. Nai. 176 of 2012 and Ahmed Musa Isamel versus Kumba ole Ntamorua & 4 Others, Civil Appeal No. Nai. 256 of 2013.

As for the second limb, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible (see the case of **Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others, C.A. No. 31 of 2012** wherein this Court stated, *inter alia*, thus:

"Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved".

Lastly, both limbs must be demonstrated to exist before a party can earn relief under the rule. See **Republic versus Kenya Anti-Corruption Commission & 2 Others, 2009 KLR 31** and the **Githunguri case.**

We have considered the record before us in the light of the applicant's submissions set out above as well as the principles of law set out above. In our view, the applicant has met the threshold for the granting of the relief sought for the following reasons:

- (1) The application is unopposed.
- (2) The exhibited memorandum of appeal raises arguable points among them:- whether the subject matter of the appeal is subject to the intergenerational customary trust; whether the respondents are entitled to a share of the subject matter of the appeal; whether Islamic law is available to the respondents in the pursuit of their claim to the subject matter of the appeal.
- (3) The applicant's appeal is already admitted and processed through case management proceedings, ready for hearing and disposal.

As for the second twin principle, we have no doubt that this too has been satisfied because if the threatened survey work is allowed to proceed, the tendency to dispose of the resulting subdivisions to 3rd parties by the beneficiaries cannot be ruled out. Once disposed of to 3rd parties the applicant may be put to great expense to recover them, if at all, should he succeed in his appeal. It is, therefore, prudent for us to maintain the *status quo* pending the hearing and disposal of the appeal. Further, as submitted by the applicant, no prejudice will be suffered by the respondents as none has been urged before us by their counsel on record.

In the result, we find merit in the application under review. We allow prayer 2 thereof. Costs of the application to abide the outcome of the appeal.

Dated and delivered at Nyeri this 7th day of September, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR