



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & AZANGALALA, JJ.A)

CIVIL APPLICATION NO. 269 OF 2015 (UR 228/2015)

BETWEEN

GEORGE NJENGA KAGAI.....APPLICANT

AND

SAMUEL KABI NJOROGI.....1ST RESPONDENT

REVEREND PIUS TEMBO MANGOLI

REVEREND PETER NUTHU MWANGI (TRUSTEES OF THE

KENYA ASSEMBLIES OF GOD, NAIROBI.....2ND RESPONDENT

(An application for stay of execution of the judgment of the High Court

of Kenya at Nairobi (Ougo J) dated 23rd January 2015

in

H.C.C.C. No.1103 of 2004)

RULING OF THE COURT

By way of a motion on notice, the applicant seeks an order of stay of execution of the judgment of the High Court made on 23rd January 2015. In the suit before the High Court, the applicant had sued the 1st respondent for the breach of an agreement for the sale of the parcel of land known as Dagoretti/Riruta/4170 (the suit premises). The applicant alleged that after entering into a contract for the sale of the suit premises, the 1st respondent purported to repudiate the contract and thereafter entered into another contract with the 2nd respondent for the sale of the suit property. That suit was dismissed with costs to the respondents. The applicant is aggrieved with the order of the High Court and intends to appeal against it. To that end he has filed a notice of intention to appeal and has also filed this application seeking a stay of execution of those orders.

In an application of this nature, the onus lies on the applicant to demonstrate to this Court that first the intended appeal is not frivolous, or that it is arguable, even on a solitary ground, and secondly that the

appeal would, should it succeed, be rendered nugatory unless the interim relief is granted. The principles that the Court will consider are well set out in several decisions of this court including that of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others (2013) eKLR (Civil Application 31 of 2012)*

where we stated:

- “i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court...;***
- ii. The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so;***
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75...;***
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances...;***
- v. An applicant must satisfy the court on both of the twin principles...;***
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...;***
- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...;***
- viii. in considering an application brought under Rule 5(2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal...;***
- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling...;***
- x. 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...;***
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecuniocity, the onus shifts to the latter to rebut by evidence the claim...;”***

The applicant contends that his appeal is arguable with high chances of success. It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. We have perused the draft memorandum of appeal annexed to the applicant’s affidavit in support of his motion. The applicant has raised issues regarding the propriety of the contract between the respondents regarding the suit property. Having carefully considered these issues, we are of the view that the intended appeal is arguable.

We now turn to consider whether or not, should we not grant the order of stay of execution, the intended appeal will be rendered nugatory. According to the applicant, the appeal will be rendered nugatory unless the order of stay is granted because the respondents are likely to either develop or sell the suit premises, and that as a result, he will suffer substantial loss as the substratum of the suit premises is likely to change and he may not be adequately compensated by way of damages. The respondent on the other hand contends that the order of stay of execution cannot be granted because the orders of the High Court are negative in nature and therefore cannot be stayed by this court. In addition, the respondents contend that

the order sought should not be granted, because the grounds of appeal advanced by the applicant have no merit as the property in question is already occupied by the 2nd respondent, and has been for a period of over twelve years. For this reason, the respondents submit that the applicant will not suffer any loss should the appeal be successful, and the intended appeal will not be rendered nugatory.

We have carefully considered the judgment of the High Court. We note that the learned judge ordered that a caution registered against the title by the applicant be vacated, and that the respondents be allowed to proceed with the transaction for the sale of the land. We have also noted that for a considerable period of time, the 2nd respondent has been in occupation of the suit premises. We are therefore not convinced that the applicant has demonstrated that his intended appeal, if successful, would be rendered nugatory. In fact, we are of the view that he could be adequately compensated by way of an order of damages. Having failed to satisfy us of the second limb, we have no choice but to dismiss this application with costs to the respondents.

Dated and delivered at Nairobi this 4th day of November, 2016

H. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR