IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 149 OF 2014 (UR 121/2014)

BETWEEN

KIMOTHO GIKONYO & 9 OTHERS.....APPELLANTS

AND

JOHN GIKONYO GITUTHU & ANOR.....RESPONDENTS

(Application for stay of proceedings from the order of the High Court of Kenya

at Nairobi (Gacheru, J.) dated 18th June 2014

In

E.L.C *No. 475 OF 2006)*

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REASONS FOR THE DECISION MADE ON THE 11 TH DECEMBER 2014

On 11th December 2014, when the notice of motion dated 25th June 2014 was argued before us, we rendered our decision *sua sponte* pursuant to **Rule 32(5)** of the Court of Appeal Rules, 2010 but reserved our reasons which we hereby give.

The motion before us was for a single prayer namely;

> ***"Pending the determination of the intended appeal further proceedings be stayed in the High Court of Kenya at Milimani Law Courts ELC Case No. 475 of 2006 …."***

The motion had on its face the grounds on which it was premised as follows;

> ***"A. The applicants have an arguable meritorious and/or prima facie case on appeal in that the impugned ruling is wrong in that (inter alia) the learned judge;***
>
> > ***i. Did not consider and/or appreciate (as submitted) the suit before her was representative and it was imperative and prerequisite that notice of its institution ought to have been issued in accordance with Order 1 Rule 8 Civil Procedure Rules before a Consent Order could be validated;***

ii. Counsel did not have valid authority to enter into the impugned consent;

iii. Alternatively counsel could not and did not have authority to reach a consent so as to affect and bind members of Kairi Kiriri Partners an amorphous and an unregistered group (by plaintiff's admission) and the so called 37 Number members;

iv. The impugned consent orders purport to share out and/or donate premises namely L.R. No. 209/2830/26 Parkroad Nairobi and Plot No. 173 Section 1 Eastleigh Nairobi to 69 Number other persons not being the registered owners thereof or parties to these proceedings;

v. The impugned consent is vitiated by fraud and/or misrepresentations.

B. The intended appeal if successful would be rendered nugatory in that;

a. On the strength of the impugned Consent Order counsel for the respondents is set to withdraw substantial sums held by M/s Mamuka Valuers (Management) Ltd which stood at Kshs. 5,405,187/= in May 2012 being rental income from the suit premises and disburse the same purportedly pursuant to the said consent; Further income continues to accrue from May 2012 to date.

b. the alleged beneficiaries of the said sum money and further accumulated rental income are members of an amorphous and untraceable group and/or persons whose means are unknown or 'men of straw' and it will be impossible to recover the same."

It was also supported by the affidavit of the 10th applicant, WACHIRA BERNARD, and was provoked by the dismissal on 18th June 2014 (by Gacheru, J.) of an application by which the applicants had sought to set aside, vacate or vary a consent order issued on 16th October 2008. The basis for that plea was that the said order was fraudulently procured by misrepresentations, by persons who had no capacity and by advocates who were never instructed.

The application was opposed by the respondents with the first, JOHN GIKONYO GITUTHU, swearing a replying affidavit on 15th July 2014 on behalf of the 2nd respondent and himself. In that affidavit the deponent was dismissive of the application before us as being misconceived, a gross abuse of the process of the court, lacking in merit and merely dilatory. The respondents' advocates, M/s Wachira Ndungu & Co; also filed some grounds of opposition to the effect that;

"1. The application lacks merit and the applicants have not satisfied the principles applicable.

2. The appeal was lodged without leave yet it does not lie as of right.

3. The intended appeal is frivolous and is not arguable.

4. In view of the plaint as prayers in the plaint, proceedings in the High Court will not render the appeal nugatory."

Arguing the application before us, Mr. Muturi Kigano, learned counsel, who appeared with Mr. Paul Amuga for the applicants, submitted that the intended appeal pending which proceedings are sought to be stayed is eminently arguable and gave a number of reasons including that the suit filed at the High Court by the respondents was defective for failing to comply with **Order 1 Rule 8** of the Civil Procedure Rules on representative suits; the beneficiaries of an alleged consent order whereby rental income from the disputed property was to be shared out were an amorphous group of uncertain membership; the suit premises were not registered wholly in the names of parties to the suit but was the property of third parties to the proceedings meaning there would be alienation of property of unheard persons.

Mr. Kigano next argued that absent a stay of proceedings the intended appeal would be rendered nugatory because the impugned consent if acted upon the rental income from the suit property would be withdrawn and shared out to unknown and untraceable recipients from whom it would be impossible to recover or retrieve especially because their identification particulars and addresses were never provided by the respondents. He urged us to grant the application.

On his part, Mr. Kamau, learned counsel for the respondents, termed the application an abuse of the process of the court. He extolled the respondents' plaint at the High Court as compliant with the Civil Procedure Rules and attacked the application before us for being incompetent as it should have been preceded by an application for, and grant of leave to appeal. He conceded, however, that the respondents had not moved this Court to strike out the applicants' notice of appeal for incompetence for want of leave. Counsel also submitted that as the applicants had not exhibited a memorandum of appeal even in draft, their assertions that they had an arguable appeal as captured on the face of the motion were no more than an invitation to the Court to act on assumptions, which is impermissible. He was emphatic that there was in place a decree by consent of the parties wherefrom an appeal was precluded under **Section 67(2)** of the Civil Procedure Act. He cited in aid this Court's decision in **FLORA WASIKE Vs. DESTIMO WAMBOKO** [1988] KLR 429. He maintained that the 69 beneficiaries of the impugned consent are well known to each other and so besought us to dismiss the application, which he described as a delaying tactic.

Mr. Wachira, learned counsel for the 3rd respondent, submitted that an arguable appeal has to be one that lies in the first place. He reiterated that leave should have been sought but was not and therefore asked us to reject the application. Counsel next dismissed as speculative the applicant's submissions that there was a plot to share out rent by asserting that there was no order at the High Court for such disbursement of the rental income. He insisted that all parties were involved in the formulation of the award at the High Court and there was therefore neither danger nor urgency necessitating our interference with the proceedings in the court below by an order of stay.

Making his reply to the respondents' submissions, Mr. Kigano maintained that the sharing of the rental proceeds of the suit premises was illogical since the owners thereof are not parties to the proceedings. He scoffed at the objection regarding leave by asserting that the relevant application at the High Court was brought and argued under **Order 45,** an appeal from which does not require leave. The objection was an afterthought, in counsel's view, as evidenced by the absence of any application to strike out the appeal within the requisite time or at all in accordance with **Rule 84** of the Rules of Court.

Upon consideration of the application, we granted it because it satisfied the two limbs that an application for stay of execution or proceedings must satisfy namely that the applicant who has filed a notice of appeal does have an arguable appeal and that such appeal, if successful, would be rendered nugatory unless the stay sought is granted in the interim. See **HALAI & ANOR Vs. THORTON & TURPIN** (1963) LTD [1990] KLR 365. These principles have been enunciated and restated in numerous cases including quite exhaustively and expansively in **STANLEY KANGETHE KINYANJUI Vs. TONY KETTER & 2 OTHERS** [2013] eKLR, though each case must depend on its own peculiar circumstances. **DAVID MORTON SILVERSTEIN Vs. ATSANGO CHESONI** [2002] 1 KLR 867. An applicant needs to satisfy not either but both limbs. An arguable appeal need not be one that must necessarily succeed, and it moreover need not raise a multiplicity of arguable points, one being sufficient.

The issue of the propriety and efficacy of the consent order that purported to benefit persons other than the owners of the suit property some of whom were not even parties to the suit appears to us to be obviously arguable, as is the validity of the suit framed as a representative suit yet without compliance with the provisions of **Order 1 Rule 8** of the Civil Procedure Rules. The first limb was satisfied.

The second limb was also satisfied in that to have rental income paid out to nearly 70 people whose full identities, places of abode and other particulars were unknown would have created a scenario where, were the appeal to be successful, it would be well nigh impossible for the successful appellants to trace, let alone recover, whatever may turn out to have been improperly paid out. The Court should not be seen to aid in the attainment of such deleterious results that cause unnecessary hardship and are likely to bring the

administration of justice into disrepute.

The application was therefore meritorious and accordingly granted.

Dated at Nairobi this 27th day of February, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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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