



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: NAMBUYE, OKWENGU, KIAGE, J.J.A)

CIVIL APPLICATION NO. 25 OF 2013

BETWEEN

STEPHEN MKARE MULEWA.....APPELLANT

AND

LINDA NEWMAN..... RESPONDENT

(Being an application from the Court of Appeal for stay of execution of the judgment, Decree and Orders and to appraise new evidence (Angote J) In Malindi Land Court Case No. 21 of 2011

RULING OF THE COURT

[1] By a Notice of Motion dated 4th November, 2013, **Stephen Mkare Mulewa** (hereinafter referred to as the applicant), has moved this court under **section 3,3A & 3B** of the Appellate Jurisdiction Act; and **Rules 4, 5(2)(b) & 29(1)(a)(b)** of the Court of Appeal Rules. The substantive orders sought in the motion are basically three and may be summarized as follows:

- i. Orders of stay of execution of Judgment and Decree issued on the 19th April, 2003 in the Land Case No. 21 of 2011 at the High Court in Malindi, pending the hearing and determination of an appeal that the applicant has filed against the judgment.
- ii. An order of injunction restraining **Linda Newman** (hereinafter referred to as the respondent), from selling, disposing, transferring, or dealing with the records of registration of ownership of all that property known as Plot No. 815 (original No. 814/2) as delineated on Land survey plan No. 201940 grant No. CR.27979/3 at Watamu (hereinafter referred to as the suit property), pending the hearing and determination of the applicant's appeal.
- iii. An order allowing the applicant to reappraise his evidence during the hearing of the appeal and call additional evidence, which was not produced at the trial in the High Court, for consideration at the time of hearing the Appeal.

[2] The motion was precipitated by the delivery of judgment in a suit which was filed by the respondent against the applicant, and in which the High Court made orders against the applicant. Being dissatisfied, the applicant lodged an appeal (Civil Appeal No. 32 of 2013) against the judgment. The orders sought in the motion are interlocutory orders pending the hearing of that appeal. In the meantime, the hearing of

the appeal has been stayed pending the outcome of this motion.

[3] The applicant's motion is supported by an affidavit in which the applicant has deponed that he has an arguable appeal with overwhelming chances of success. The applicant is apprehensive that his appeal may be rendered nugatory if an order staying execution of the judgment is not issued. The applicant's anxiety arises from the fact that the respondent is a foreigner, and may unless restrained dispose of the suit property. He therefore also seeks an order of injunction restraining the respondent from disposing of the suit property. In addition, the applicant depones that his advocate, whom he had entrusted to defend him did, not produce crucial evidence in support of his defense, in the High Court. He urges the court to allow him to produce this evidence as additional evidence during the hearing of the appeal.

[4] The applicant who was in person filed written submissions that he relied upon. In the submissions, the applicant reiterated what he stated in his affidavit. He pointed out that the respondent has given a power of attorney to one **Mary Makena** in relation to the suit property. This in the applicant view, was an indication that the respondent has already parted with the property, and unless injunctive orders were issued she may mischievously use the property to source for funds and leave the jurisdiction of the court. In regard to the prayer for additional evidence, the applicant pleads that he is a lay man in matters of law and had depended fully on the guidance and advice of his lawyer who abused the trust that he bestowed upon him by failing to produce the crucial evidence. In support of these submissions, the applicant relied on ***Mzee Wanje & others vs Saikwa & others [1976-1985] EA 364***. The applicant also relied on **Article 159** of the Constitution of Kenya and **sections 1A & 1B** of the Civil Procedure Act.

[5] The application is opposed through a replying affidavit sworn by Mary Makena through a power of attorney given to her by the respondent. Counsel for the respondent has also filed written submissions. In short, it is contended that the application is fatally defective as the applicant has not annexed the judgment or order or decree, which he seeks to have stayed, and therefore there was nothing before the court upon which the orders of stay could be anchored.

[6] Secondly, it is argued that the applicant has not satisfied, the conditions for granting orders of stay of execution as provided under **Rule 5(2)(b)** of the Court of Appeal Rules. This is because the intended appeal is frivolous as the applicant admitted receiving the monies sent by the respondent for purchase and development of the suit property. In this regard, counsel relied on ***East African Cable Limited vs Public Procurement Complaints Review Appeals Board & Another [2007] eKLR***

[7] As regards the prayer for adducing additional evidence, counsel for the respondent argued that the power given to the Court of Appeal for calling additional evidence, is not intended to enable a litigant to make out a fresh case on appeal, nor does the rule authorize the admission of additional evidence for the purpose of patching up and filling gaps in the applicant's defence, but is one to be exercised very sparingly and with great caution.

[8] Counsel pointed out that the court proceedings indicated that the applicant applied for and was granted adjournment on several occasions to allow him to produce the documents that he was now seeking to adduce as new evidence. Despite that opportunity, the documents were never produced during the trial. Counsel for the respondent faulted the applicant's attempt to blame his former counsel contending that there was no affidavit from the applicant's said counsel admitting the error, omission or mistake. Counsel submitted that the applicant was not worthy of the exercise of the Court's discretion as he was not coming to the court with clean hands having refused to surrender title documents in contravention of the High Court's orders.

[9] It is trite law that for an applicant to succeed in an application under **Rule 5(2)(b)** of the Court of Appeal Rules, he has to show two things. First, that his appeal is arguable and not frivolous. Secondly, that unless an injunction or stay is granted, the intended appeal if successful would be rendered nugatory (see ***Magnate Venture Limited vs. Eng Kenya Limited [2009] KLR 538***)

[10] In this case, the applicant did not include a copy of the judgment that he seeks to stay. The respondent's counsel pointed out this anomaly. However, the applicant maintained that he had already

filed a substantive appeal, the record of which contained the decree and judgment appealed against, and that this was the same judgment he sought to be stayed. The applicant's position appears to be that since his motion was filed, after the filing of the appeal, he did not need to annex the judgment. What the applicant does not appear to appreciate is the fact that, the application before the court was filed independently and not within the appeal which he had already filed. It is an application which was intended to be complete on its own.

[11] In order for the Court to assess whether the applicant has an appeal which is arguable and not frivolous, it is necessary for the court to have before it, not only the memorandum of appeal but also the impugned judgment. This means that the impugned judgment must form part of the record subject of the application before the court to enable the court look at the judgment in light of the memorandum of appeal. The impugned judgment not having been availed to the Court, the applicant has failed to place material before the Court upon which it can demonstrate to the Court that his appeal is arguable and not frivolous. Further, the applicant appears to admit that the evidence presented before the High Court was weak as crucial evidence was not adduced.

[12] On the second limb, that is, whether the applicant's appeal would be rendered nugatory if the order of stay or injunction is not granted, in ***Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd [1999]1EA 236***, it was held that in dealing with the issue whether or not success in the intended appeal would be rendered nugatory if stay is not granted, the court ought to weigh the competing claims of both sides. In this regard, the applicant's only fear is that the respondent being a foreigner might dispose of the suit property. The respondent on the other hand maintains that the orders are only intended to frustrate her from enjoying the benefits of the judgment given in her favour, yet she is spending a lot of money maintaining the suit property. The respondent further opposes the granting of an order of stay or injunction, contending that the orders sought by the applicant are in actual fact of a mandatory nature.

[13] From the rival contentions, it is apparent that the respondent has a judgment in her favour and that she has apparently been in possession of the suit premises. The Court must be satisfied that the orders sought to be stayed are orders capable of execution. In the absence of a copy of a judgment or order or decree, the Court has no information upon which it can arrive at that conclusion. Moreover, the applicant not having demonstrated that he has an arguable appeal, there is no justification for delaying the execution of that judgment, simply because the respondent is a foreigner. During the trial in the High Court, the respondent attended court at all times and there was no order made for her to provide security for her attendance. The fear that the respondent may dispose of the suit property is without any foundation. The appeal filed by the applicant is ready for hearing but the hearing has had to be stayed because of the applicant's present motion. Therefore, it is the applicant who is delaying the finalization of the appeal. We find that the applicant has failed to satisfy the principles for granting orders of stay of execution or injunction under **Rule 5(2)(b)** of the Court Rules.

[14] As regards the prayer for additional evidence to be adduced, in ***Mzee Wanje & others vs Saikwa & others [1976-1985] 364***, It was held that :

"... before the Court of Appeal will permit additional evidence to be adduced under Rule 29, it must be shown that it could not have been obtained by reasonable diligence before and during the hearing; it must also be shown that the new evidence would have been likely to have affected the results of the suit..."

[15] It is apparent from the proceeding of the trial court contained in the record before us that the additional evidence sought to be introduced by the applicant, was all along available before and during the trial. Indeed the applicant was on several occasions accorded an adjournment to enable him to produce the evidence but failed to do so, therefore the evidence is not new evidence nor is it evidence which was not available with due diligence. Thus the applicant's explanation that it is his advocate who failed to adduce the evidence, cannot hold. The applicant did testify before the trial court and it was his responsibility to produce the documents in his evidence if indeed they were crucial for his defence. Much as the applicant would like to shift the blame onto his counsel, the applicant did not need to be an advocate to appreciate the importance of the evidence. We find that the applicant having failed to

produce the documents, and having lost the case, he simply just wants to have another bite of the cherry by introducing more evidence.

[16] Moreover, the intended additional evidence appears to comprise in the main, in a bundle of letters between the parties which other than going to show the intensity of their relationship, really have no bearing on the legal dispute between them

[17] For the aforesated reasons we find that the applicant's motion has no merit, and is accordingly rejected. We award costs of the motion to the respondent.

Dated and delivered at Malindi this 27th day of February, 2014.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

H. M.OKWENGU

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR