



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, GATEMBU & J. MOHAMMED J.J.A.

CIVIL APPLICATION NO. NAI 134 OF 2014 (UR 109/2014)

BETWEEN

HESBON K. LIMISI APPLICANT

AND

DELILAH ACHIENG MATHEWS1ST RESPONDENT

ARGWINGS KODHEK OCHIELY 2ND RESPONDENT

THE CHIEF LANDS REGISTRAR, NAIROBI3RD RESPONDENT

(Being an application for injunction pending the hearing and determination of the appeal from the ruling and order of the High Court of Kenya at Nairobi (Gitumbi, J) dated 6th June 2014

in

ELC HCCC NO. 1227 OF 2013)

RULING OF THE COURT

The application before the Court is a notice of motion dated 10th June, 2014 and brought under **Rule 5 (2) (b) of the Court of Appeal Rules, 2010 (the Rules)** in which **HESBON K. LIMISI**, the applicant herein, seeks orders of injunction restraining the respondents from transferring and/or registering any dealing in favour of any party whatsoever in respect of **Flat No. F situated on block No. MF 32 in Madaraka estate Nairobi within L.R. No. 25980** as comprised in Volume D1 44/2481 file MMVII (hereinafter referred to as the suit property) pending the hearing and determination of **Civil Appeal No. 273 of 2014**. The application is supported by an affidavit sworn by the applicant dated 10th June, 2014.

Background

The applicant depones in his supporting affidavit dated 10th June, 2014, that around 3rd February, 2010, he entered into a sale agreement with the 1st respondent for the purchase of the suit property dated 22nd February, 2010.

The sale proceeds would facilitate the 1st respondent to pay National Housing Corporation (NHC) outstanding amounts due to the corporation. Upon payment of the amounts owed, the corporation would transfer the suit property to the 1st respondent who would in turn transfer the suit property to the applicant.

The applicant further deponed that upon several inquiries, the 1st respondent informed him that the lease document in her favour from NHC had not been processed and she could, therefore, not transfer the said suit property to the applicant; that he obtained vacant possession of the suit property; that by a lease dated 14th June, 2010, between the applicant and the 1st respondent, the applicant leased the suit property to the 1st respondent with effect from 1st July, 2010, that the parties renewed the yearly lease until it came to the knowledge of the applicant that a third party had taken possession of the suit property; that the 1st respondent reassured the applicant that he was the rightful owner of the suit property; and that the 1st respondent had executed transfer documents in the applicant's favour.

The applicant further deponed that it came to his knowledge that the 1st respondent had executed a second sale agreement dated 10th May, 2013, in respect of the suit property in favour of the 2nd respondent for a consideration of KShs.5.5 million.

As a result, the applicant filed Civil Suit 1227 of 2013 in the High Court (ELC) on 11th October, 2013, claiming that the second agreement was a nullity and seeking an order for the transfer of the suit property to the applicant. The applicant also filed an application under a certificate of urgency seeking an injunction order to restrain any dealing or registration of the suit property to a third party pending the hearing and determination of the suit property. The application was dismissed on 6th June, 2014, by the High Court (Gitumbi, J) on the ground that the applicant had not set out a *prima facie* case to warrant the grant of his application for an injunction. The applicant, with the intention of filing an appeal against the ruling has since filed a notice of appeal and an appeal being CA NO. 273 OF 2014. Further, the applicant has filed a memorandum of appeal to demonstrate that he has an arguable appeal.

Submissions by Learned Counsel

When the application came before this Court for hearing, the applicant was represented by learned counsel, Mr Nicholas Sumba while the 2nd respondent was represented by learned counsel, Mr Kevin Kiplagat. There was no appearance by the 1st and 3rd respondents or their respective counsel though the record indicates that both were served with the hearing notice.

In relying on his supporting affidavit dated 10th June, 2014, counsel for the applicant submitted that the applicant paid KShs.4.4 million to the 1st respondent as purchase price for the suit property which fact remains uncontested and which illustrates the existence of a sale agreement between the applicant and the 1st respondent.

Counsel submitted that the suit property had been sold to the applicant and all that remained was the processing of title documents in his favour; that there was an arguable issue for determination on whether the second sale agreement for purchase of the suit property was valid in view of the fact that there was already subsisting a valid sale agreement in favour of the applicant and that as a result of the prior valid sale agreement, good title could not pass to a subsequent purchaser.

Counsel further pointed out that in the 1st respondent's replying affidavit filed in the High Court dated

24th October, 2013, and in her statement of defence of the same date, the 1st respondent clearly indicates that she is ready to surrender the suit property to the applicant and refund the purchase price received from the 2nd respondent. Counsel submitted that the High Court erred in determining that in view of the fact that a title document was not produced in Court, the applicant had not set out a *prima facie* case.

On the second limb on whether the appeal, if successful, will be rendered nugatory if the orders sought are not granted, counsel for the applicant cited several authorities from this Court: **ELIJAH KIPN'GENO ARAP BII V SAMUEL MWERA GITAU & ANOTHER, CIVIL APPLN NO. NAI 243 OF 2004; NYALS (KENYA) LTD V UNITED HOUSING ESTATE LTD, CIVIL APPLN NO. NAI 129 OF 1995; JUDITH NJUE V STANDARD CHARTERED BANK OF KENYA & ANOTHER, CIVIL APPLN NO. NAI 423 OF 2001**. Counsel argued that as evidenced by the authorities in these applications where land is the matter in dispute, the Courts have granted orders sought by the applicant. Counsel concluded by reiterating that the applicant has satisfied requirements under **Rule 5 (2) (b)** and urged the court to grant the orders sought.

Counsel for the 2nd respondent opposed the application stating that the intended appeal is frivolous. Counsel argued that the 1st respondent's support of the applicant's position does not demonstrate an arguable appeal but rather an attempt to dispossess the 2nd respondent of the suit property; that the intended appeal will not be rendered nugatory because the applicant has an alternative remedy in the form of compensation as provided in Clause 10 of the sale agreement dated 22nd February, 2010, which gives liberty to the applicant to seek a refund of the total amount paid to the 1st respondent with 10% interest, should the 1st respondent fail to facilitate the transfer of the suit property. Counsel, however, conceded that there is an arguable issue for determination in the main appeal.

Determination

The law is settled regarding applications brought under **Rule 5 (2) (b)**, that the applicant must satisfy the court that he has an arguable appeal and that his intended appeal, if successful, will be rendered nugatory if the orders he sought are not granted.

This Court in **ISHMAEL KAGUNYI THANDE V HFCK, CIVIL APPLN NAI NO. 157 OF 2006** determined:

“The jurisdiction of the court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. 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.”

Githinji JA in **EQUITY BANK LIMITED V WEST LINK MBO LIMITED, CIVIL APPLN NO. NAI 78 OF 2011**, stated:

“It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance... It is clear that 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

In considering the application, we bear in mind that an arguable appeal is not one that must necessarily succeed, but one which a court should consider; that whether or not an appeal will be rendered nugatory is a question of fact which will depend on the peculiar circumstances of each case; whether or not what is sought to be stayed, if allowed to happen, is reversible or not and whether an award of damages will be sufficient compensation for the purpose of the application.

On the question of whether the appeal, if successful, will be rendered nugatory if stay is not granted, the court ought to weigh the claims of both parties in the dispute.

On the question whether, on the material before us, the applicant has made out an arguable appeal, the applicant has both in the draft memorandum of appeal and in the affidavit in support of his application, stipulated the grounds on which he seeks to appeal against the judgment of the High Court. The applicant, *inter alia*, raises the following grounds of appeal:

1. *The learned judge erred in law and misdirected himself by holding that the appellant had not set out a prima facie case while a sale agreement dated 22nd February, 2010 between the applicant and the 1st respondent was exhibited in court. Further that the applicant had also annexed tenancy agreements between the applicant as lessor and the 1st respondent as lessee, evidencing a tenancy agreement between the parties and confirming that the 1st respondent acknowledged the applicant as the rightful owner of the suit property.*
2. *The learned judge erred in law and misdirected himself by holding that the applicant had not set out a prima facie case to warrant the orders sought when there was evidence that the 1st respondent had filed pleadings in court to confirm that she had sold the suit property to the applicant and that she was ready to transfer the property to him and refund the purchase price paid to her by the 2nd respondent.*

We are of the view that the above grounds are arguable and not frivolous. We are, therefore, satisfied that the applicant has satisfied the first limb of the requirements in an application under **Rule 5 (2) (b)**.

Turning to the question whether the appeal, if successful, will be rendered nugatory, if the orders sought are not granted, we are similarly satisfied that it will. The applicants averments in the affidavit supporting the application dated 10th June, 2014, by the applicant contend that the suit property may be transferred to a third party in view of the fact that the 1st respondent has executed transfer documents in favour of the 2nd respondent.

As this Court stated in ***RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD, (2003) 1EA 232***, what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.

We have come to the conclusion that this is a deserving case for exercise of our discretion under **Rule 5 (2) (b) of the Rules of this Court**. Accordingly, we allow the application. Costs of the application to abide by the outcome of the appeal.

Dated and delivered at Nairobi this 6th day of February, 2015.

P. N. WAKI

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR