IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, WARSAME & MUSINGA, JJ.A.)

CIVIL APPLICATION NO. 114 OF 2011

BETWEEN

LAKE FLOWERS LIMITED ……. APPLICANT

VERSUS

GEOFFREY MUHORO ……..…….. RESPONDENT

(Intended appeal from the Orders and Directions and the Judgment of the High Court of Kenya at Nakuru (Ouko, J.) dated 25th March, 2011

in

HCCC No. 97 OF 2009)

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RULING OF THE COURT

In a judgment delivered by Ouko, J. (as he then was), on 25th March, 2011 in **HCCC No. 97 of 2009 at Nakuru, Geoffrey Muhoro v Lake Flowers Limited**, the court granted an injunction in favour of the plaintiff (now the respondent) restraining the defendant (the appellant herein) from damaging, alienating, wasting, cultivating, building or putting up temporary structures and encroaching the plaintiff's parcel of land known as **L.R. No. 22957/4** (the suit property). The court further granted a mandatory injunction compelling the defendant to pull down, flatten and remove all the temporary structures on the suit property.

Being dissatisfied with the said judgment the applicant filed a notice of appeal to this Court. On the basis of the said notice the applicant filed an application under **rules 42 and 5(2) (b)** of this **Court's Rules** seeking stay of all process of execution of the decree issued forth in the aforesaid High Court suit pending hearing and determination of an intended appeal. The application was supported by the affidavits sworn by **Mohammed Abdula**, a Director of the applicant, on the 12th May, 2011 and the 14th June, 2011 respectively.

Mr. Mwenesi, learned counsel for the applicant, submitted that the intended appeal is arguable, based on grounds, *inter alia*, that:

i. *Although the trial court had on 5th May, 2011 ordered that the execution do issue, the process of*

eviction that was applied is in variance with the order of the court in the judgment which called upon the applicant to remove the temporary structures and the fence from the suit land.

ii. *The suit land is riparian land subject to Article 62 (1) (i) of the Constitution of Kenya, 2010 and is the subject of subsisting judicial review proceedings involving the applicant and the respondent, High Court Miscellaneous Civil Application No. 1395 of 1998.*

iii. *There was a caveat filed by the Government against the title to the suit land, yet the trial judge granted the respondent the orders that he had sought.*

Mr. Mwenesi further submitted that if the orders sought by the applicant are not granted the intended appeal shall be rendered nugatory.

On his part, **Mr. Njoroge**, learned counsel for the respondent, opposed the application. He submitted that there was nothing that could be stayed as the decree of the High Court had been fully executed and the respondent is in lawful occupation and ownership of the suit land. If at all there was anything illegal about the manner in which the execution was done, the applicant's remedy lies in damages, Mr. Njoroge added. In his view therefore, the intended appeal is not arguable.

We have considered the brief submissions made by counsel. The principles that are applicable in an application of this nature are well known and have been restated by this Court in several cases. In **REPUBLIC v KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS KLR 31,** the Court held:

> ***"The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. in order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him of the order sought if he failed to demonstrate the other limb."***

It is common ground that following delivery of the judgment sought to be appealed against and issuance of the decree on 18th April, 2011, the respondent applied for execution. Although Mr. Mwenesi argued that the process of execution was not done in accordance with the law, he conceded that execution was nonetheless carried out. The affidavit of **John Muthee Ngunjiri,** auctioneer cum court bailiff, sworn on 13th June, 2011 shows that on 11th May, 2011 the court bailiff received an eviction order from the High Court of Kenya at Nakuru directing him to evict the applicant from the suit property. On 31st May, 2011 the court bailiff received an order directing the O.C.S. Naivasha Police Station to provide him with security while evicting the applicant.

On 3rd June, 2011 the court bailiff in the company of the O.C.S. Naivasha proceeded to the suit property and evicted the applicant. Thereafter the respondent took possession of his land. The applicant had by then brought security guards to guard its property as it transported them to their stores, elsewhere.

On the other hand, the applicant complained that contrary to the letter and spirit of the judgment, there was a forceful entry into the suit property by the court bailiff and violent destruction of its property. That notwithstanding, there is no dispute that as at the date of filing this application execution had already been carried out. That being the case, we do not therefore think that there is anything that can be stayed. In that regard we equally do not understand the purport of the present application and orders therein, since the applicant was already removed from the suit premises, lawfully or otherwise.

As regards the applicant's argument that the suit land is riparian land, (land bordering on a waterway) there is on record an affidavit sworn on 29th November, 2000 by **Zablon Agwata Mabeya,** then Assistant Commissioner of Lands, which discloses that the respondent applied for grant of the suit land and was

granted temporary occupation permit on 1st February, 1967 and had been in occupation thereof since then. The respondent thereafter applied for allocation of the suit land and the allocation was approved and a letter of allotment issued on 4th April, 1997. Thereafter the land was sub-divided into two parcels, one of them being the suit land. The respondent became owner of the riparian land, the legality or otherwise notwithstanding, Mr. Mabeya stated. Whether the suit land is riparian land is the subject of Misc. Civil Application No. 1235 of 1998.

In view of the foregoing, we entertain considerable doubt whether the intended appeal is arguable. We are aware that an arguable appeal does not mean one that must succeed, rather, it is one that raises grounds that can sustain a legal argument. See **KENYA TEA GROWERS ASSOCIATION & ANOTHER v. KENYA PLANTERS AGRICULTURAL WORKERS UNION, Civil Application No. NAI. 72 of 2001.**

As to whether the intended appeal shall be rendered nugatory if the orders sought are not granted, the answer is in the negative. In the event that the applicant succeeds in its intended appeal the title to the suit land would simply be ordered to revert to the applicant. Equally the applicant would be able to revert to the suit land with all the attendant nights. As things stand and in the circumstances of this case, we think the applicant is not entitled to the orders sought.

All in all, this application is bereft of merit and consequently dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 8th day of May, 2015.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

D.K. MUSINGA

…….…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR