



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME , SICHALE & OTIENO-ODEK, JJ.A)

CIVIL APPLICATION NO. NAI. 141 of 2013 (UR 95 of 2013)

BETWEEN

EDWARD MUSA MATIRU KARUGA.....APPLICANT

AND

BISHOP GEOFFREY MURIUNGI KIRAITHE & STEPHEN MUTETI

MOLOLO (*Suing as Trustees of AFRICAN*

HOLY GHOST CHURCH OF KENYA).....RESPONDENT

(Application for stay pending the determination of an intended

appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (L.N Gicheru, J.) dated 14th June 2013

in

ELC 1015 of 2012)

RULING OF THE COURT

1. We have before us a Notice of Motion application dated 2nd July 2013 brought under **Rule 5 (2) (b), 42** and **49** of the Court of Appeal Rules (**the Rules**) in which the applicant, **Edward Musa Matiru Karuga** is seeking the following orders:

“a) That an order for stay be granted against the execution of the order made on 14th June 2013 by Hon. L. G. Gacheru Judge in HC ELC No. 1015 of 2012 pending the hearing and determination of the intended appeal.

b. That the respondents by themselves, their servants and or agents be restrained from evicting, dealing or in any other way interfering with the Applicant’s quiet enjoyment of Land Parcel No. 523 together with its building and improvements erected thereon pending the hearing and determination of the intended appeal.

C. Costs of this application be provided for.”

2. The application is premised on the grounds that the applicant shall suffer irreparable loss and damage if he is dispossessed of the suit property; that the intended appeal will be rendered nugatory if the injunction sought is not granted; that the respondents are determined to forcefully evict the applicant from the suit premises; that there is an arguable appeal with overwhelming chances of success and that the respondent will not suffer prejudice should the *status quo* be maintained.

3. In the affidavit in support, the applicant deposes that there is a dispute with the respondent relating to LR No. 523 Patanisho Phase II (Block J) in Komarock South Shopping Centre; that he was never served with summons to enter appearance in the suit filed by the respondent at the High Court as ELC Case No.1015 of 2012; that a Notice of Motion was filed by the respondent at the High Court which motion was heard *inter partes* and a ruling delivered on 10th December 2012 wherein it was ordered that the applicant be evicted from the suit property; the applicant deposes at paragraph 9 of his affidavit that he has been on the plot in question since 1990 when he was allotted the same; that he is the rightful owner of the disputed property.

4. The gist of the instant application is that the learned judge issued final orders on an interlocutory application by the respondent and therefore shut out the applicant's chances and avenue of tabling his evidence; that the applicant has built a church and community centre on the suit property and if evicted the appeal shall be rendered nugatory; that the Ruling by the learned judge was against the weight of evidence and it is just and fair to preserve the *status quo* until the question of ownership of the disputed property is determined at a full trial.

5. The respondent in a replying affidavit deposed by **Pastor Joseph Mwangi Recho** opposes the instant application stating that the applicant forcibly, illegally and unlawfully entered the respondent's suit property; that the applicant trespassed on the suit property and constructed permanent structures thereon; that the Nairobi City Council confirmed that the suit property belongs to the respondent; that the intended appeal has no chance of success; that the applicant has not come to court with clean hands and has no arguable appeal; that the applicant shall not suffer irreparable or any loss as he has no legal interest in the suit property. In a further affidavit dated 13th October 2014 filed by Joseph Mwangi Recho, he deposes that the applicant was evicted from the suit property on 13th October 2014; that the eviction was effected by **Inspector Clement Chege** from Soweto Police Station. On his part, the applicant filed a further affidavit dated 20th January 2015 stating that he was never evicted and is still in possession of the suit property.

6. At the hearing of this application, learned counsel Mr. Achoki appeared for the applicant while learned counsel Mr. Chrispin Wainaina appeared for the respondent.

7. The Plaintiff in this matter was filed by the respondent who at paragraphs 3 and 4 of the Plaintiff averred that at all material times, the respondent was the owner of the suit property known as Block J Komarock South Shopping Centre also known as Plot No. 523 Patanisho Phase II; that this is the suit property and it was allotted to the respondent by the City Council of Nairobi in 1994.

8. On his part, the applicant in his pleadings before the High Court claims occupation and ownership to a land parcel known as Plot No. 4/420 (Soweto Scheme). He averred that his plot is not Block J in Komarock but Plot No. 4/420 in Soweto; he denied ever occupying Plot No. 523 Patanisho Phase II; that he is not in occupation of the respondent's plot. The High Court judge in making her decision observed that the applicant has alleged that he was not in possession of the suit plot, that his Church African Mission Community Centre owns Plot No. 4/420 on Soweto Resettlement Scheme.

9. This application, as we have stated above, is brought under **Rule 5 (2) b** of the Rules. The jurisdiction exercisable by this Court under **Rule 5 (2) (b)** of the Rules is now well settled. It is original and discretionary. For an applicant to succeed, he must satisfy the twin guiding principles, first, that the intended appeal is arguable, that is that it is not frivolous and second, that unless a stay is granted, the appeal or as in this case, the intended appeal, if it eventually succeeds, will be rendered nugatory - see the

cases of Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838, J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982-88) 1 KAR 1688, Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited - Civil Application No. Nai. 98 of 2002 (unreported) and Al-Mahra Limited vs. Premier Foods Industries Limited - Civil Application No. Nai. 163 of 2006.

10. In this Notice of Motion, guided by the above principles, we have considered the affidavits. We are aware that in order to succeed in an application under **Rule 5 (2) (b)**, all that is needed in law is that there be even one arguable point and that will suffice. The grounds in support of the instant application do not identify the arguable point of law that will be canvassed in the intended appeal; all that the applicant has stated is that there is an arguable appeal with high chances of success. In the undated draft Memorandum of Appeal the applicant states that the learned judge erred in law and fact by failing to find that in dispute were two different plots and more evidence was required from both parties; that it was wrong for the judge to issue final interlocutory orders. It is our considered view that an application under **Rule 5 (2) (b)** cannot succeed simply by restating the twin guiding principles upon which such an application is to be grounded; the legal and factual basis upon which the application is premised must be succinctly stated and deposited on the face of the application and or in the supporting affidavit. The applicant in his pleading before the High Court deposed that his plot is not Block J in Komarock but Plot No. 4/420 in Soweto; he denied ever occupying Plot No. 523

Patanisho Phase II; that he is not in occupation of the respondent's plot. This Court must exercise caution in granting orders based on affidavit evidence that is *prima facie* contradictory. The applicant before the High Court has always pleaded he is not in occupation or possession of Plot No. 523. We pose the question that how come now the applicant deposes that he is in occupation of Plot No. 523 and may be evicted therefrom? Without prejudice to the outcome of the intended appeal, we find that the applicant has not been able to provide the legal and factual grounds in support of the contention that there is an arguable appeal in relation to Plot No. 523 which plot he has always pleaded that he has never occupied nor been in possession thereof.

11. The next point to consider is whether the intended appeal would be rendered nugatory if we decline to grant the orders sought. In our mind, if we do not grant the orders sought, then by the time the intended appeal is finalised, the suit property shall still be in existence and there is nothing to prevent the applicant from being registered as proprietor thereof; further, the suit property is not depreciating in value. We note that the applicant in his draft Memorandum of Appeal states that there are two different properties in dispute; the applicant claims ownership and possession of Plot No.4/420; there is no order to evict the applicant from Plot No. 4/420. We find that the appeal shall not be rendered nugatory since the applicant deposes he has been in possession and occupation of Soweto Plot No. 4/420 and not Plot No. 523.

12. Considering all the above, what commends itself to us is to exercise caution and not grant orders based on contradictory affidavit evidence disclosed by the pleadings in this case. The further affidavits filed by both parties in this matter do not help as they are irresolute as to whether or not eviction of the applicant from suit property, Plot 523, has taken place. This Court cannot preserve *status quo* when it is disputed as to what is the *status quo*. The final orders are that the Notice of Motion dated 2nd July 2013 has no merit and is hereby dismissed. Costs of this application shall be in the appeal.

Dated and delivered at Nairobi this 19th day of June, 2015

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR