



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWILU & OTIENO-ODEK, J.J.A)

CIVIL APPLICATION No. NAI. 303 OF 2012

BETWEEN

**STEPHEN NJUGUNA MWANGI (*Legal Representative of the Estate
of Mwangi Mbothu (Deceased)*) APPLICANT**

AND

WANGARI NJUGUNA RESPONDENT

***(Application for injunction against the whole of the Judgment of the High Court of Kenya at Nairobi
delivered on 15th July 2011 by Hon. Justice H.P.G. Waweru***

in

H.C.C.C. No. 3610 of 1991)

RULING OF THE COURT

1. The Applicant has moved this Court by way of Notice of Motion dated 6th December 2012 under **Rules 5 (2) (b), 41 and 42** of the Rules of this Court. The Orders sought in prayers 2 and 3 of the Motion are as follows:

1.

2. *That this Honourable Court be pleased to grant an injunction restraining the respondent from transferring, evicting, selling and/or dealing adversely with land parcel Kiganjo/Gachika/533 pending the hearing and determination of the intended appeal.*

3. *That the Honourable Court be pleased to grant stay of further proceedings in Nairobi HCCC No. 390 of 2011 pending the hearing and determination of the intended appeal.*

2. The dispute between the parties hereto commenced at the High Court by way of Originating Summons. The suit property is Kiganjo/Gachika/533 and the respondent is the registered proprietor thereof. At the High Court, the applicant sought declaratory orders, *inter alia*, that the respondent holds the suit property in trust for one **Mwangi Mbothu** (deceased) and the heirs of **Njuguna Mbothu, Nahashon Njuguna**

Mbothu, Gitata Mbothu and Ngae Mbothu. The High Court (H.P.G. Waweru J.) in a judgment dated 15th July 2011 dismissed the application for the declaratory orders thus giving rise to the present application for stay and intended appeal.

3. The background facts relevant to this application are summarized hereunder. One **Mbothu Njuguna** died in 1935. He had five sons namely Njuguna Mbothu, Nahashon Njuguna Mbothu, Ngae Mbothu, Gitata Mbothu and Mwangi Mbothu. All these sons are now deceased and some of their children reside on the suit property. The applicant herein is **Stephen Njuguna Mwangi** a son and legal representative of the estate of Mwangi Mbothu who filed and instituted the Originating Summons before the High Court.

4. The late Mbothu Njuguna who died in 1935 inherited the suit property; that during land demarcation in 1958, the status of his children were that Mwangi Mbothu and Gitata Mbothu were in detention; Ngae Mbothu was in Mathare Mental Hospital; Nahashon Njuguna Mbothu was deceased having died in 1943 and Johanna Njuguna Mbothu who was the eldest son was overseeing the land demarcation exercise. That when the land was demarcated, the acreage was 19.94 acres which was consolidated into two land parcels Kiganjo/Gachika/533 composed of 11.1 acres and Kiganjo/Gachika/534 composed of 8.84 acres. It is contented that during the land demarcation exercise, the elder son Johana Njuguna Mbothu who was overseeing the exercise caused land parcels Kiganjo/Gachika/533 composed of 11.1 acres to be registered in his name and Kiganjo/Gachika/534 composed of 8.84 acres to be registered in the name of Gitata Mbothu both to hold as trustees for and on behalf of all the sons of Mbothu Njuguna.

5. That upon the death of Johanna Njuguna Mbothu, the respondent who is the wife of Johanna Njuguna Mbothu got the Public Trustee to be the administrator of his estate and subsequently the Public Trustee transferred and registered land parcel Kiganjo/Gachika/533 composed of 11.1 acres in the name of the respondent. That this act of registering land parcel Kiganjo/Gachika/533, suit property, in the name of the respondent totally ignored that the late Johanna Njuguna Mbothu held the land in trust for his brothers and their heirs. That the suit property does not belong to the house of Johanna Njuguna Mbothu only but all the five sons of Mbothu Njuguna and it is wrong for the respondent to try and dispose of the property and give it to her sons knowing very well that the late Johanna Njuguna Mbothu was registered as proprietor to hold the land in trust for all sons of Mbothu Njuguna.

6. Given the background facts as captured above, in the Originating Summons filed at the High Court, the applicant sought a declaration that the respondent as registered proprietor of the suit property holds the same in trust for the Five (5) sons of the late Mbothu Njuguna who died in 1935 and the heirs of the said five sons.

7. The trial court having heard all witnesses made a finding that there was no trust in respect of the suit property; that the respondent was registered as proprietor in her own right and the applicant had not established and proved that a trust existed over the suit property. In dismissing the application for declaratory orders, the trial court expressed itself as follows:

“The Plaintiff’s case is that the land was divided and registered as two pieces because there were then only two sons available, one being already deceased, one in detention and the third one mentally incapacitated and in a mental hospital. But I find that hard to believe. Could the two available sons not be jointly registered as proprietors of the one whole parcel in trust for the others? What was the impediment to this being done? I find none. Mbothu Njuguna’s one piece of land could only have been divided into two parcels which were registered separately because, as everyone concerned knew, he had two households as represented by his two wives. The fact that his first wife had been abducted and lost to raiders does not detract from this fact. That wife left him a son and some daughters who comprised that household. It matters not that this son was brought up by the second wife.... In the case of Mbothu Njuguna, one parcel resulting from the splitting and registration of his land as two parcels, the suit land was registered in the name of the only son of the first household. He was clearly registered as proprietor of that land for his own benefit and that of his children. I am not satisfied that he was so registered in trust for himself and his four step brothers in equal or any share. Gitata Mbothu on the other hand was registered as proprietor of land parcel Kiganjo/Gachika/534 in trust for himself and his three

brothers in equal shares. Johana Njuguna (and his sons) did not have any interest in this parcel, just as his four step-brothers and their sons did not have any interest in the suit land.”

8. Aggrieved by the decision and judgment of the trial court, the applicant has filed a Notice of Appeal and has lodged the instant application seeking two interlocutory orders that this Court grant an injunction restraining the respondent from transferring, evicting, selling and/or dealing adversely with the land parcel known as Kiganjo/Gachika/533 pending the hearing and determination of the intended appeal. And an order to stay further proceedings in Nairobi HCCC No. 390 of 2011 pending the hearing and determination of the intended appeal.

9. Upon the trial court dismissing the application for declaratory orders, the respondent filed at the High Court Civil Case No. 390 of 2011 seeking orders to evict the applicant from the suit property. This explains why the applicant is seeking orders from this Court to stay any and further proceedings in Nairobi HCCC No. 390 of 2011 pending the hearing and determination of the intended appeal.

10. The grounds in support of the application for injunction and stay of proceedings in Nairobi HCCC No. 390 of 2011 as stated on the face of the Motion and in the affidavit in support thereof is that as a consequence of the dismissal of the applicant's declaratory suit at the High Court, the respondent has filed a suit seeking eviction of the applicant from the suit property; that eviction of the applicant from the suit property would render the intended appeal nugatory and hence the need to stay the proceeding in Nairobi HCCC No. 390 of 2011; that the order for injunction is necessary for purposes of maintaining the *status quo* of the suit property; that the applicant will suffer substantial loss if the respondent is to obtain an order evicting them from the suit property before the intended appeal is heard and determined; that there is a high likelihood of success on appeal and a draft memorandum of appeal has been lodged.

11. During the hearing of the application, ***Ms Wangari Kamau*** from the firm of Kirundi & Co. Advocates appeared for the Applicant while ***Dr. John Khaminwa*** of Khaminwa & Khaminwa Advocates appeared for the respondents. Both counsel filed lists of authorities in support of their submissions.

12. Counsel for the applicant urged that the intended appeal is arguable and the appeal shall be rendered nugatory if stay is not granted. A draft memorandum of appeal has been filed and counsel submitted that the trial judge erred in law and fact in failing to consider and evaluate the entire evidence on record; that the judge erred in failing to note that the deceased husband to the respondent had admitted that the suit property was held in trust; that the trial court did not consider that the grand-children of the late Mbothu Njuguna who died in 1935 live on the suit property; that the trial court erred in failing to consider the evidence and find that a trust had been proved. Counsel submitted that if stay is not granted, the intended appeal shall be rendered nugatory because the respondent has filed an application before the High Court to evict the applicant; that the respondent has also applied to sub-divide the suit property and she may well transfer the resultant parcels of land to her sons; that the act of sub-division shall alter the nature and character of the suit property which is the subject matter of the intended appeal. That although a replying affidavit has been filed by the respondent, the fact of sub-division of the suit property has not been denied.

13. Counsel for the respondent in opposing the appeal urged this Court to find that there is no arguable appeal; that the probability of the appeal succeeding is too remote; that the trial judge sufficiently addressed all issues that are being raised by the applicant; that the learned trial judge clearly established that there was no trust over the suit property; that the trial court upon evaluating the evidence correctly held that the applicant was not entitled to any portion of the suit property; that the applicant was sufficiently provided for vide 8 acres in Land Parcel Kiganjo/Gachika/534. Further that the applicant had applied for stay of execution of the Judgment by the High Court vide Notice of Motion dated 26th July 2011 and the stay was declined vide a Ruling dated 1st December 2011; that trial court in declining stay of execution properly observed that the respondent could not evict the applicant from the suit property without appropriate orders of the court and there being no such orders, there was no threat of the applicant being evicted. Counsel admitted that the respondent has filed an eviction suit before the High Court being - Nairobi HCCC No. 390 of 2011 and a Motion seeking eviction orders; that the Motion is pending for hearing before the High Court. Counsel submitted that if this Court were to grant the orders as prayed,

this would scuttle and interfere with the eviction proceedings now pending before the High Court. It was submitted that the respondent had no intention of disposing or alienating the suit property and there was no affidavit evidence before this Court to show that the respondent was about to dispose the suit property. As to whether the pending appeal would be rendered nugatory, counsel submitted that the applicant had sufficiently been provided for in Land Parcel Kiganjo/Gachika/534; that the respondent is the registered proprietor of the suit property and her title is indefeasible under the provisions of Section 26 of the Land Registration Act.

14. We have considered the Notice of Motion, the supporting and replying affidavits as well as the submissions by Counsel and the judicial authorities filed in the matter. It is plain that this Court has jurisdiction under **rule 5(2)**

(b) of the Rules to grant three kinds of orders pending appeal. These are:- (i) a stay of execution of the decree or order appealed from; (ii) an order of injunction; and (iii) an order of stay of any further proceedings. (See Yagnesh Devani & 4 Others v Joseph Ngindari & 3 others Civil Application No. Nai. 136 of 2004 (UR 72/2004) unreported. In Hon. Peter Anyang Nyongo & Two Others vs. The Minister for Finance & Another Civil Application No. Nai. 273 of 2007 (unreported) it was stated:

“It is trite law that this court is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of this Court to grant interim reliefs in Civil Proceedings pending appeal is circumscribed by Rule 5 (2)

(b). It is apparent that under Rule 5 (2) (b) this Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction, and a stay of further proceedings. This Court has consistently construed Rule 5 (2) (b) to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from.”

15. The instant application is brought pursuant to **rule 5(2) (b)** of this Court Rules. The jurisdiction exercisable by this Court under **rule 5(2) (b)** is now well settled - it is original and discretionary. For the applicant to succeed, he must satisfy the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088 and Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited - Civil Application No. 98 of 2002 (unreported).

16. The issue before us is whether the intended appeal is arguable and whether the appeal shall be rendered nugatory if no stay orders are granted. The gist of the applicant’s case is that the trial Judge erred in law and misdirected himself by failing to appreciate the fact that the respondent’s husband, Johanna Njuguna Mbothu (deceased) held the suit property in trust for the applicant and others; that the learned Judge erred in law and fact in failing to give credence to the evidence of the applicant and his witnesses which showed that the suit property was held in trust. In contrast, it is contented that there is no arguable appeal as the respondent is the registered proprietor of the suit property and the trial judge comprehensively dealt with all issues raised by the applicant. We find that there are competing contentions as to whether or not a trust existed over the suit property. This competing contention can only be canvassed in a full hearing of the intended appeal. As to whether or not the trial judge comprehensively dealt with the issue, this is an arguable matter to be re-evaluated and determined at the hearing of the main appeal. We find that the applicant has been able to demonstrate that there is an arguable appeal. The first test in the grant of orders under **Rule 5 (2) (b)** has been satisfied.

17. The second limb is whether the intended appeal shall be rendered nugatory if no stay orders are granted. The applicant’s submission is that the respondent has applied for sub-division of the suit property and mutation forms are attached to the replying affidavit filed by the respondent. Counsel submitted that if the suit property is sub-divided, its nature and character shall change and the resultant parcels may be alienated to third parties. The respondent submitted that there is no intention to dispose of the suit property. We are satisfied that the evidence tendered in support of the submission that the respondent

intends to sub-divide the suit property has not been controverted. We are convinced that sub-division of the suit property shall change the nature, character and substratum of the case. In addition, if stay is not granted, the applicant may be evicted if eviction proceedings now pending before the High Court are successful. Eviction of the applicant from the suit property would change the *status quo* and render the appeal nugatory. We are satisfied that the applicant has demonstrated that the intended appeal shall be rendered nugatory if no stay orders are issued.

18. The upshot of the foregoing is that the Notice of Motion dated 6th December 2012 has merit and we hereby allow the same. The final Orders of this Court are that an injunction be and is hereby issued restraining the respondent from transferring, evicting, selling and/or dealing adversely with the land parcel known as Kiganjo/Gachika/533 pending the hearing and determination of the intended appeal. An order be and is hereby issued granting a stay of further proceedings in Nairobi HCCC No. 390 of 2011 pending the hearing and determination of the intended appeal in this case. Each party shall bear his/her costs in this application.

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

H.M. OKWENGU

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JUDGE OF APPEAL

P.M. MWILU

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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