



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO, & M'INOTI, J.J.A.)

CIVIL APPLICATION NO. 39 OF 2015

BETWEEN

**MORRIS NGUNDO.....
.....APPLICANT**

AND

**LUCY JOAN NYAKI.....1ST
RESPONDENT**

**TUA BENYAMBO NYAKI (suing in their capacity as adminstatrix
and**

**administrator of the Estate of GILBERT MBONI NYAKI (DECEASED).....2ND
RESPONDENT**

(Being an application pending the lodging, hearing and determination of an intended appeal against a judgment of the Environment and Land Court of Kenya at Malindi (Angote, J.) dated 15th May, 2015,

in

E.L.C. Civil Case NO. 12 of 2015.)

RULING OF THE COURT

By his application dated 22nd July 2015, the applicant sought in the main one order from this Court. He prayed that this Court grants him a stay of execution of the judgment and decree issued by **Angote, J.** in Malindi on 15th May, 2015 pending the hearing and determination of the appeal that he intends to lodge. The application was expressed to have been brought pursuant to **Rules 5(2) (b), 42(1) (2) and 49(1)** of this Court's Rules, and all other enabling provisions of the law. The application was premised on grounds set out in the body of the application and supported by an affidavit sworn by the applicant on 22nd July 2015 to which we shall revert to later in this ruling.

In summary, the background facts to this dispute as can be gleaned from the record are as follows; the applicant instituted in the Senior Resident Magistrate's Court at Kilifi, a suit alleging that he was the registered and beneficial owner of all that piece or parcel of land known as **Kilifi/Mtwapa/424** "the suit

premises". He claimed that he was allocated the suit premises by the Government and had lived on it since 1970. The defendant in the suit was **Gilbert Mboni Nyaki**, "the deceased." According to the applicant, the deceased advanced him a loan of Kshs.135,000/- in 1983 at his request and instance. In return, he offered the suit premises as security for the money advanced as aforesaid. That after failing to repay the loan, the applicant allowed the deceased to live on the suit premises. Feeling that the deceased had overstayed his welcome, the applicant sued the deceased for orders of eviction and permanent injunction on account of trespass.

The deceased on his part denied these allegations and instead averred that the applicant had in fact sold the suit premises to him and not that he had offered it to him as security as alleged. That they had jointly sought and obtained the Land Control Board consent to transfer the suit premises to the deceased. That the applicant signed the transfer forms in favour of the deceased. That the Kilifi Land Registrar confirmed that the suit premises were initially registered under the Settlement Fund Trustee on 1st March 1991 but were later erroneously registered in the applicant's name on 29th August 2006 without having realized that the applicant had sold the suit premises to the deceased and a restriction placed on the suit premises by the deceased on 24th June 2008. He therefore urged for the dismissal of the suit, grant of injunction, costs and interest

The deceased passed on in December, 2010 before the suit was concluded. His widow **Lucy Joan Nyaki** and one, **Tua Benyambo Nyaki** sought and obtained a grant of letters of administration intestate in respect of the deceased's estate. Thereafter, they were substituted as the defendants in the suit upon obtaining leave of the trial court. They are the respondents in this application. Upon joining the suit, they filed an amended defence and counterclaim. They not only sought the dismissal of the applicant's suit but also counterclaimed for an order compelling the applicant to deposit the title deed in respect of the suit premises in court for onward transmission to the Ministry of Lands for further action, a permanent injunction, costs and interest.

It is on the basis of the pleadings and evidence adduced before the trial court that the court dismissed the applicant's suit and granted the respondent the prayers sought in the counter-claim.

The applicant being dissatisfied and aggrieved with the said decision mounted an appeal in the Environment and Land Court being, **ELC Civil Appeal No. 12 of 2013**. The appeal was heard by **Angote, J.** of the Environment and Land Court sitting in Malindi who rendered his decision on the appeal on 15th May 2015. The learned Judge upheld the trial court's findings that the applicant's title deed to the suit premises was obtained by mistake and confirmed the orders issued by the trial court. He rendered himself thus:-

"57. The evidence that was placed before the trial court shows that the Title Deed in respect to the suit property was obtained by mistake, the Appellant having sold and transferred the same to the deceased. Consequently, the order by the learned Magistrate that the Appellant should deposit in court the Title Deed for onward transmission to the Ministry of Lands for further action could only have meant one thing, that the title was to be forwarded to the Ministry of Lands for cancellation pursuant to the provisions of Section 80(1) of the Land Registration Act. ..."

Undeterred the applicant is now before us on an intended second appeal and is seeking in the meantime to stay the execution of the decree of the High Court pending the hearing and determination of the intended appeal. The grounds advanced in support thereof are that he will be exposed to irreparable loss, that the intended appeal is arguable and will be rendered nugatory as the respondents may dispose of the suit premises and thereby put it beyond his reach in the event that he succeeds in his intended appeal.

The application is opposed by the respondents through Grounds of Opposition dated 24th September, 2015 and Replying Affidavit sworn by the 1st respondent on the same date. Basically, they argue that the applicant has not complied with the mandatory provisions of the Court of Appeal Rules relating to the grant of stay, that the grounds in support of the application are not relevant, that the applicant had not

demonstrated the substantial loss he would otherwise suffer and lastly, that the applicant had not offered any security.

By the nature of the application upon perusal of the record, we cannot delve into the merits and/or demerits thereof of the application. The issue that arises and which this Court must first determine is whether it has the requisite jurisdiction to entertain this application. As was held in the celebrated case of **Owners of the Motor Vehicle “Lilian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** a question of jurisdiction ought to be determined at the earliest opportunity as jurisdiction is everything and without it the Court has no power to take one more step. A careful perusal of our respective records reveals that no Notice of Appeal was filed against the judgment of Angote, J. aforesaid. The same situation obtain in the original file in our Registry that we have also called up and perused.

If there is doubt as to whether or not the applicant filed a Notice of Appeal, those doubts are easily put to rest by a perusal of the affidavit in support of the application. It is silent as to whether the applicant filed the Notice of Appeal before lodging the instant application. Whereas in an affidavit in support of the application, the applicant has deposed to and annexed copies of letter of allotment, title deed, plaint, defence and counter-claim, judgment of the trial court, judgment of the High Court, decree, and draft memorandum of appeal as exhibits, there is no mention whatsoever of the filing and service of the Notice of Appeal. Indeed, there is no specific deposition to that fact which lends credence to our conclusion that indeed no Notice of Appeal was ever filed.

Under **Rule 75(1)** of this Court’s Rules; any person who desires to appeal to this Court must give a notice in writing which should be lodged within fourteen (14) days of the date of the decision against which it desires to appeal.

This being an appellate court, its jurisdiction is invoked first by the filing of the Notice of Appeal. Once a Notice of Appeal is filed, it is as good as an appeal having been filed. **Rule 2** of the Court of Appeal Rules defines an appeal to include an intended appeal. It is thus trite law and there is a plethora of case law to the effect that this Court’s jurisdiction is invoked by filing of a Notice of Appeal.

In the case of **Equity Bank Limited v West Link Mbo Limited [2013] eKLR**, this Court stated that once a notice of appeal is filed an appeal is presumed to be in existence and only then can an appellant proceed to file an application for stay under **Rule 5(2) (b)** of this Court’s Rules. Again the case of **Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others; Civil Application No. 327 of 2009, Omollo JA.** held as follows:-

“At the stage of determining an application under Rule 5(2) (b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a Notice of Appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5(2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal manifested by lodgment of the Notice of Appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”

Finally, in the case of **The Interim Independent Electoral Commission & Another v Paul Waweru Mwangi Civil Application No. Nai 130 of 2011**, this Court held that:-

“We have said, times without number, that it is the notice of appeal which for purposes of rule 5(2) (b) of the Court’s Rules gives this Court jurisdiction to hear and determine an application under the rule.”

Since therefore there is no evidence that a Notice of Appeal was filed in this matter to clothe it with jurisdiction to determine the application, this Court lacks jurisdiction to entertain the same and should down its tools.

Accordingly, the application is struck out with no order as to costs.

Dated and delivered at Malindi this 30th day of October, 2015

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR