



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, WARSAME & MUSINGA, JJ.A)

CIVIL APPLICATION NO. NAI 19 OF 2013

BETWEEN

PERIS NYIHA KANG'ETHE, JANE WANJIKU KANG'ETHE,

**NJERI KANG'ETHE & MANASES KIHU KANG'ETHE (suing as the administrators of the
estate of the late Serah Njeri Kang'ethe.....APPLICANTS**

AND

FORTUNAS CHARLES KAMAU.....RESPONDENT

***(application for stay of execution of the judgment and decree of the High Court of Kenya at Nairobi
(Hon. Lady Justice Ougo) delivered on 21st December 2012***

in

H.C.ELC No.2288 of 2007 (OS)

RULING OF THE COURT

Before us is a motion dated 4th February 2013 and brought under Rules 5(2) (b), 41 and 42 of the Court of Appeal Rules which seeks the main order that this Court do issue

'a stay of execution of the decree of the Superior Court made on 21st December 2012, interalia ordering that the Respondent be registered as proprietor of L.R. No Dagoretti/Kangemi/711 in place of the Late SerahNjeriKarimi, pending the hearing and determination of the intended appeal'.

The background leading to this application is contained in the supporting affidavit of **PERIS NYIHA KANG'ETHE**, as well in the replying affidavit of **FORTUNAS CHARLES KAMAU**, sworn in opposition to the application. The applicants are children of the late **ASHFORD KANG'ETHE KING'ANGI** and the late **SERAH NJERI KANG'ETHE**.

The late Ashford was the registered proprietor of the parcel of land known as Dagoretti/Kangemi/165 and after his demise, the property was registered in the name of the late Serah. The applicants allege that prior to their father's death, the respondent had been a tenant on a portion of the property, using the property

for carrying out his timber business. He later moved out of the premises sometime in 1982. The respondent on his part claims that he had bought the premises upon which he had established his business from the deceased, and that he asserted that position in 1992 and 1996. The applicants asked him to provide evidence of the purchase. The respondent filed suit in the High Court, in which he sought a declaration that he had acquired the suit property by way of adverse possession. The High Court found in favour of the respondent, prompting the present application.

In applications of this nature, rule 5 (2) (b) gives us the discretion to order a stay of execution of a decree emanating from the High Court. To benefit from this discretion, an applicant must satisfy the court that first, his appeal is an arguable one, and secondly, that the appeal would be rendered nugatory if successful, should a stay order not be granted. These principles have been oft cited by this Court. See ***Trust Bank Limited and Another v Investech Bank Limited and 3 others (Civil Application No. Nai 258 and 315 of 1999 (unreported)***) where the Court stated that:

“The jurisdiction of the Court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show first that his appeal or intended appeal is arguable, [or that it is not frivolous] and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these must be considered against facts and circumstances of each case.”

These principles were reiterated in ***Patel v Transworld Safaris Ltd [2004] eKLR*** when the Court stated that:

“In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously, squarely falls on the applicant to place such evidence before the court hearing his application. In deciding the matter before it the court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously, squarely falls on the applicant to place such evidence before the court hearing his application.”

See also ***Githinji v Amrit & Another [2004] eKLR*** where the Court held that:

“The principles applicable in an application under rule 5(2)(b) of the Court of Appeal Rules are now well settled. The applicant must demonstrate that he has an arguable appeal which is not frivolous. Secondly, he also needs to show that the result of such appeal, if successful, would be rendered nugatory if the application for stay was refused.”

We have considered the application and the affidavit in opposition, as well as the rival submissions of the parties. We have also perused the draft memorandum of appeal annexed to the applicants’ affidavit and have noted the grounds intended to be relied upon. We have no doubt that the issues raised are indeed arguable and not frivolous.

If the order of stay is not granted, the respondent will in all likelihood move to execute the decree and have the suit premises registered in his name. This will in effect allow him to deal with the suit property in whatever manner he wishes. This is a factor that the Court must take into consideration in determining this application. Similar circumstances were obtaining in ***Malcom Bell v Daniel Toroitich Arap Moi & Another [2006] eKLR (Civil Application 342 of 2005)*** where the applicant was apprehensive that if the decree of the High Court was not stayed, then the respondent would act in a manner that would deprive him of property that he claimed rightly belonged to him. We find that a similar approach would serve the interests of justice in the present application. As to whether the intended appeal will be rendered nugatory unless the order of stay of execution is granted, we are satisfied that the applicants have so demonstrated.

We therefore allow the application and hereby issue an order of stay of execution of the decision of the trial court pending the hearing and determination of the intended appeal. The costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 7th day February, 2014

E. M. GITHINJI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

D. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

mwk.