



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: WAKI, G.B.M. KARIUKI & M'INOTI, JJ.A.**

**CIVIL APPLICATION NO. NAI 157 OF 2013 (UR 106/2013)**

**BETWEEN**

**JOSEPH GITAHI GACHAU ..... 1ST APPLICANT**

**BEATRICE WANGECHI GITAHI ..... 2ND APPLICANT**

**AND**

**PIONEER HOLDINGS (AFRICA) LTD. .... 1ST RESPONDENT**

**PIONEER ASSURANCE CO. LTD. .... 2ND RESPONDENT**

**EVELYN WALEGHWA NG'ANG'A ..... 3RD RESPONDENT**

**(Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the order of the High Court of Kenya at Nairobi (Mutungi, J) dated 5th February, 2013**

**in**

**HCCC NO. 1715 OF 2007)**

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**RULING OF THE COURT**

Before us is a motion on notice taken out under *rule 5(2) (b)* of the rules of this Court. The motion, dated 8th July, 2013 seeks stay of execution of an order of the High Court dated 5th February, 2013 until the applicants' intended appeal is heard and determined. By the said order, the High Court directed the Registrar of Titles to cancel entry No. 8 on the certificate of title *No 52081* relating to *LR No. 14970/49*.

Briefly the background to the application is as follows. The applicants, *JOSEPH GITAHI GACHAU* and *BEATRICE WANGECHI GITAHI*, husband and wife respectively purchased the suit property, *LR No. 14970/49, Evergreen Estate off Kiambu Road* in 1996 through a mortgage of KShs.3,500,000/- financed by the 1st and 2nd respondents. Subsequently the 1st and 2nd respondents, alleging default on repayment by the applicants, exercised their power of sale and sold the suit property by public auction, on 11th November, 2005 to the 3rd respondent, *EVELYN WALEGHWA NG'ANG'A*.

On 18th November, 2005, the applicants filed suit in the High Court seeking, among other reliefs a

declaration that the sale of the suit property was unlawful, fraudulent, null and void and a permanent injunction to restrain the transfer of the suit property to the 3rd respondent. Together with the suit, the applicants filed a chamber summons seeking among other things, an injunction to restrain the 1st and 3rd respondents from transferring, taking possession or occupying the suit property, “*pending the inter partes hearing of this application.*”

On 23rd November, 2005, the High Court certified the chamber summons urgent and directed the same to be heard *inter partes* on 7th December, 2005. In addition the court directed the parties to maintain the *status quo* till the hearing of the application or further orders of the court. When the application came up for hearing on 7th December, 2005 the same was adjourned at the instance of the applicants to enable them file a supplementary affidavit. On this occasion, the court directed that the *status quo* be maintained without any indication for how long. That order on maintenance of the *status quo* was extracted by the applicants but the respondents contend that there was no reference to them as required by the law. It was registered against the title of the suit property, namely certificate of title No 52081, as entry No. 8.

The application for injunction was eventually heard and dismissed with costs to the 1st and 3rd respondents on 9th May, 2007. Aggrieved by the dismissal, the applicants lodged *Civil Appeal No. 67 of 2008* in this Court and pending its hearing and determination, applied under *rule 5(2) (b)* for an interim injunction. On 3rd July, 2009 this Court dismissed the application with costs after finding that the appeal, if successful, would not be rendered nugatory.

Back in the High Court, the 1st respondent, on 13th June, 2007 filed an application seeking to discharge the order made on 7th December, 2005 for maintenance of status quo and a further order directing the Registrar of Titles to cancel entry No. 8 on the certificate of title of the suit property. On 5th February, 2013, Mutungi, J allowed the application, discharged the order of 7th December, 2005 and directed the Registrar of Titles to cancel entry No. 8 on certificate of title No. 52081.

The applicants next filed a notice of appeal to this Court on 12th February, 2013. On 15th February, 2013 they followed it up with an application before the High Court for stay of the order of Mutungi, J dated 5th February, 2013, pending the hearing and determination of their intended appeal by this Court. That application was heard and dismissed on 26th June, 2013. Undaunted, the applicants responded by filing the application presently before us. The main ground upon which the application is based is that “*there is a real and imminent threat of eviction*” of the applicant’s from their home and that it is in the interest of justice that stay of execution be granted otherwise the appeal will be rendered nugatory.

Before us Mr Ibrahim, learned counsel for the applicants, in a bid to demonstrate an arguable appeal submitted that the order of 7th December, 2005 for the maintenance of the *status quo* was not time bound and therefore it must be understood to mean that the *status quo* was to be maintained until the suit before the High Court was heard and determined. By holding otherwise, Mutungi J. was in grave error, he submitted.

Mr Ibrahim also addressed various other issues, which relate to the propriety of the sale of the suit property by public auction. We do not find it necessary to address those issues since they do not arise from the order of Mutungi, J dated 5th February, 2013 in respect of which the notice of appeal relates.

Mr Sarvia, learned counsel for the 1st respondent and Mr Kimani, learned counsel for the 3rd respondent took umbrage with the applicants’ interpretation of the order of 7th December, 2005. In their view, the interpretation negates the very purpose of the subsequent hearing and determination of the applicants’ application for injunction. If indeed the *status quo* was ordered until the hearing and determination of the suit, they pressed, then there was no purpose in hearing and determining the application for injunction. Learned counsel also pointed out that the applicants’ own application had sought the order on interim basis pending the *inter partes* hearing of the application for injunction.

Mr Sarvia further urged that the prayer sought by the applicants namely, “*stay of the order directing cancellation of entry No. 8*”, could not serve any purpose without first staying the order vacating

*status quo*. Since the applicants had not sought stay of the order vacating status quo, counsel submitted, the intended appeal was hopeless or otherwise not arguable.

On whether the appeal, if successful would be rendered nugatory, Mr Ibrahim laid emphasis on the fact that the order for cancellation of entry No. 8 had given the respondents an opportunity to transfer the suit property to the prejudice of the applicants. In his view, if the suit property was transferred or disposed of by the respondents, their intended appeal, if successful would be rendered nugatory.

For their part, the respondents submitted that if by any chance the applicants' appeal was found to be arguable, the same shall not be rendered nugatory because this Court had already made that finding on 3rd July, 2009 in the earlier application for stay of execution after the dismissal of the application for injunction by the High Court.

In determining this application, we are required to satisfy ourselves that the applicants have an arguable appeal or an appeal that is not frivolous and that if an order of stay of execution is not granted, the intended appeal will be rendered nugatory. See TRUST BANK LIMITED & ANOTHER V INVESTECH BANK LTD & 3 OTHERS, CIVIL APPLICATION NO. NAI 258 OF 1999 and EAST AFRICAN POWER MANAGEMENT LTD V THE OWNERS OF THE VESSEL "VICTORIA EIGHT" , NBI CIVIL APPLICATION NO. 245 OF 2009.

We are not satisfied that the applicants have presented an arguable appeal, one that is not frivolous. In our view the applicants' summons for injunction and the subsequent proceedings left no doubt about the duration of the order for *status quo*. We shall advisedly abstain from saying more, lest we prejudice their intended appeal. However, even if we were to find that there was an arguable appeal, which we have not, the same, if successful will not be rendered nugatory. In the ruling dated 3rd July, 2009, this Court concluded as follows:

*"We are of the view that damages would be an adequate remedy for the party that succeeds ultimately in the appeal. Having considered the interests of both parties, we have come to the conclusion that the appeal herein, though arguable, will not be rendered nugatory (if) the order sought is not granted".*

We invited counsel for the applicants to indicate to us what had changed since the above finding, but we did not get any satisfactory response. The applicant is obliged to satisfy both the principles that we have set out above; it will not suffice to satisfy only one of them. See PETER MBURU NDURURI V JAMES MACHARIA NJORE, CA NO. 29 OF 2009 (UR 14/2009).

Ultimately we do not find any merit in the applicants' motion for stay of execution of the order of the High Court dated 5th February, 2013 and the same is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 4th day of April, 2014.

**P. N. WAKI**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

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