



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, G.B.M. KARIUKI & GATEMBU, JJ.A.)**

**CIVIL APPLICATION NO. NAI 268 OF 2013 (UR1 196/2013)**

**BETWEEN**

**GRACE SAMSON KOMEN .....APPLICANT**

**AND**

**SOTE KOMEN ..... 1<sup>ST</sup> RESPONDENT**

**WILLIAM KIPROP KOMEN ..... 2<sup>ND</sup> RESPONDENT**

**RACHEL CHEPNGE'ENO KOMEN ..... 3<sup>RD</sup> RESPONDENT**

**MOHAMED KOMEN ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution in an intended appeal from*

*the entire judgment delivered by the Hon. Justice Anyara Emukule on*

*30<sup>th</sup> July, 2010 and the Ruling and Order delivered 20<sup>th</sup> August, 2013*

*in*

**H.C. SUCCESSION CAUSE NO.500 OF 1997, NAKURU HIGH COURT)**

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**RULING OF THE COURT**

1. The applicant, Grace Samson Komen, has applied to this Court for an order to stay the orders of the High Court made on 28<sup>th</sup> June 2013 by Anyara Emukule J. in Nakuru Succession Cause No.500 of 1997. These orders set aside and vacated the orders granted by the same Court on 12<sup>th</sup> October 2011 staying the judgment dated 30.7.2010 pending the hearing and determination of the appeal by the applicant. Unless stay is granted the judgment of the High Court which the applicant indicates he has appealed against shall be implemented.
2. The application shows that on 30.6.2010 the High Court delivered judgment in Succession Cause Number 500 of 1997 relating to the Estate of KIBOWEN KOMEN, deceased, who was survived by several widows and lineal descendants. The applicant is the deceased's daughter-in-law while

- the 1<sup>st</sup> respondent (Sote Komen) is said to be the deceased's widow, and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are the son, widow, and son of the deceased respectively.
3. The deceased's estate was distributed on 30.7.2010 among his heirs, who included the applicant and the four respondents. Aggrieved by the distribution, the applicant lodged **notice of appeal** on 10<sup>th</sup> August 2010 manifesting her intention to appeal against the whole of the decision contained in the said judgment.
  4. By an application dated 14<sup>th</sup> May 2013, Sote Komen, the 1<sup>st</sup> respondent herein moved the High Court sitting in Nakuru for an order that the order for stay made on 12<sup>th</sup> October 2011 be set aside. Grace Samson Komen, William Kiprop Komen, Rachel Chepngeno Komen, and Mohammed Komen were named as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively. The High Court was persuaded by Sote Komen and on 28<sup>th</sup> June 2013 allowed her application and set aside the orders of stay made on 12<sup>th</sup> October 2011. It is against that decision by the High Court that the applicant herein seeks to have stayed so that the stay ordered on 12<sup>th</sup> October 2011 is sustained pending the hearing and determination of her appeal. If the application herein is successful, it will result in the stay order of 12<sup>th</sup> October 2011 remaining intact until the applicant's appeal relating to the notice of appeal (dated 9.8.2010) which was lodged on 10.8.2010 is heard and determined. If the application herein is not granted, the order for stay dated 12<sup>th</sup> October 2011 shall cease. In the latter event, the appeal, if successful, shall be rendered nugatory. It is against this background that stay is being sought.
  5. The application was made on the grounds appearing on its face which echo the applicant's fear that if the estate is distributed before the determination of the appeal, she shall suffer irreparably. We have perused the affidavit sworn on 30.9.2013 by the applicant in support of the application.
  6. In opposition to the application, the 1<sup>st</sup> respondent filed a replying affidavit sworn by her on 5.11.2013 which we have perused.
  7. When the application came up for hearing on 19.12.2013, learned counsel Mr. K. M. Mwangi, instructed by Gakoi Maina & Co., appeared for the applicant while learned counsel Mr. Waiganjo Mwangi appeared for the 1<sup>st</sup> respondent. None of the other respondents filed responses to the application.
  8. Mr. Mwangi informed the Court that the applicant lodged Civil Appeal No.11 of 2013 in the High Court at Nakuru on 2.8.2013 but a hearing date has not been given yet. In paragraphs 27 and 28 of her supporting affidavit, the applicant avers that the record of appeal in appeal No.11 of 2013 against the judgment of 30<sup>th</sup> July 2010 (Koome J., as she then was) has been served and that the 1<sup>st</sup> respondent has filed a notice of Cross Appeal showing that the appeal is underway. In the 1<sup>st</sup> respondent's notice of cross-appeal, the latter challenges the decision of the Court in the judgment of 30<sup>th</sup> July 2010 on distribution and seeks additional allocation to her of 294 acres to be excised from land Reference No.10684, Njoro, which seems to comprise more than 600 acres from which 450 acres were allocated to the applicant.
  9. Counsel for the applicant submitted that the appeal is arguable because the distribution of the estate in the High Court included as an heir a non-spouse namely the 1<sup>st</sup> respondent and that the High Court ignored evidence in this regard. Moreover, contended the applicant's counsel, the High Court is alleged to have failed to take into account other properties of the deceased distributed to heirs including motor vehicles and to bring the same into hotch-pot during distribution. These, contended counsel, were arguable points.
  10. The attention of the Court was drawn by the applicant's counsel to the 1<sup>st</sup> respondent's replying affidavit to demonstrate that the appeal will be rendered nugatory because the latter is in the process of implementing the decision of the High Court on distribution even before the appeal is heard and determined. If the application is not allowed, said counsel, there will be no land available at the conclusion of the appeal, a development that will render the appeal nugatory. But we observe that the fear should not so much be on account of disappearance of the land because it will not dissipate but rather, the likelihood of the land being transferred to innocent third parties without the latter's knowledge of the ongoing litigation.
  11. Counsel cited the case of **Oraro v. Coop Bank** (Civil Appeal No. 358 of 1999, unreported) in which this Court held that in considering whether, if stay is not granted, appeal would be rendered nugatory if it succeeds, the Court must weigh the claims of both parties. In that case, the Court

- held, in relation to enforcement of professional undertaking of Kshs. 6.7 million against the applicant (advocates, Oraro & Rachier) that whereas the respondent, a bank, would be kept out of the sum of Shs.10 million and not be affected, the applicant advocates might find themselves in a very tight situation. Stay was granted as the appeal was arguable and the appeal, if successful, would be rendered nugatory.
12. In **Reliance Bank Ltd V. Norlake Investments Ltd** [2002] 1EA 227 which the applicant's counsel relied on, this Court (Omolo, Bosire & Owour, JJ.A) held that a refusal of the order for stay under rules 5(2)(b) would cause the applicant, who was required to deposit in Court a sum in excess of Shs.15 million, such hardship as would be out of proportion to any suffering the respondent might undergo while awaiting the hearing and determination of the applicant's appeal.
  13. The case of **Mrao V. First American Bank of Kenya Ltd** [2003] KLR 125 relied on by the applicant's counsel was not on rule 5(2)(b) but rather on principles for granting an interlocutory injunction. Also relied on by counsel for the applicant was the decision in **Kamlesh M. D. Pattni v. The Attorney General** (Civil Application No.NAI 301 of 1999 (115/99 UR)) in which stay was sought under rule 5(2)(b) of an order dismissing the application made by the applicants for the disqualification of one of the members of the Court, namely, Honourable Mr. Justice Ole Keiwua J, on the ground that there was a real danger or reasonable apprehension or suspicion that the learned Judge might have been biased, that is to say, that there was an appearance of bias, not actual bias. The Judge had in H.C.C.C 418 of 1998 removed the Court-appointed Receiver and replaced him with one of the parties to the case himself. The learned Judge had also said Kamlesh Pattni, the first applicant, was a man who had "*stuffed himself full from public resources*" and that he was a "*pilferer and a looter*" whilst a criminal case was still pending. The Court found that the applicants had an arguable appeal which would be rendered nugatory if stay was not granted in the event that it succeeded and granted the order sought so as to preserve the administration of justice from suspicion of impartiality.
  14. Mr. Waiganjo, learned counsel for the 1<sup>st</sup> respondent, opposed the application and relied on the latter's replying affidavit. Submitting that the applicant was seeking the exercise of the Court's discretion, Counsel contended that the applicant had not shown that there was an arguable appeal but he hastened to add that his client's cross-appeal did not mean that the applicant's appeal was arguable. Part of the property in question, (185 acres) he said, was sold on 18.12.1995 and the deceased died a year later. Part of the property was to be sold following a Court order that debts due by the estate of the deceased be paid from the proceeds thereof while a portion of 150 acres was to go to the 3<sup>rd</sup> respondent. In view of this, he contended, the appeal would be futile. Moreover, said counsel, the 1<sup>st</sup> applicant was said not to have been the deceased's spouse. The judgment, he said, was delivered three years ago and proceedings were ready in January 2013 yet no record of appeal had been lodged. In counsel's view, the applicant was awakened from her slumber by the application to vacate the orders for stay which resulted in the ruling by Emukule J, being appealed against. If stay was declined, the applicant would keep 150 acres and the rest would go to the respondent, contended counsel. But in rebuttal, the applicant's counsel contended that the land had not been subdivided and it was desirable in the interest of justice that injunction be granted in respect of the entire land.
  15. We have perused the application which seeks under rule 5(2)(b) firstly, a stay of the orders contained in the ruling of Emukule J, dated 28.6.2013 and secondly, an injunction restraining the respondents from subdividing or selling or charging or transferring or alienating or in any way dealing with the suit premises in Nakuru H.C. No.500 of 1997. The latter prayer for injunction could have been framed a little more elegantly to indicate more precisely the land in respect of which the injunction is sought so as to obviate the vagueness in the nomenclature "*suit premises in Succession Cause No.500 of 1997 at Nakuru*" because "*such land*" might be any or all of the properties comprised in the estate of the deceased. But no matter. From the application and the replying affidavit of the 1<sup>st</sup> respondent and the rival submissions made by counsel, it emerged that both parties were *ad idem* that the prayer was in reference to the land known as L.R. 10684 situate in Njoro which is reflected in the applicant's draft Memorandum of Appeal as well as in the 1<sup>st</sup> respondent's replying affidavit particularly paragraph 7 thereof.
  16. The applicant, Sote Komen, avers that she is apprehensive that the land known as L.R. 10684, at Njoro might be disposed of before the outcome of her appeal and her apprehension has been caused by the presence of a surveyor and prospective buyers on the land, hence her prayer for an

injunction. The 1<sup>st</sup> respondent contends that this Court cannot stay the orders of the High Court made on 28<sup>th</sup> June 2013 “*but can only stay execution of the judgment issued on 30<sup>th</sup> July 2010.*” The reason for this is given in paragraph 5 of the 1<sup>st</sup> respondent’s replying affidavit as the fact that the orders of 28<sup>th</sup> June 2013 were “*properly issued in an inter-partes hearing not attended by the applicant.*” At any rate, the 1<sup>st</sup> respondent avers that she has taken possession of 150 acres comprised in land No.L.R. 10684, Njoro in pursuance with the judgment of the Court following distribution of the estate. So as to determine the application, we pose the following questions; (1) is there a competent application before us and are the orders sought capable of being granted? (2) if so, does the application have merit and should the orders sought be granted?

17. The principles applicable to an application predicated on rule 5(2)(b) of this Court’s rules are that an applicant must, as a *sine quo non*, show that he has lodged an appeal or given a notice of appeal under rule 75 of this Court’s rules manifesting his intention to appeal. In this application, the impugned ruling by Anyara Emukule J. was delivered on 28<sup>th</sup> June 2013 against which the applicant, Grace Samsom Komen, gave a notice of appeal lodged in Court on 2<sup>nd</sup> July 2013 (but dated 9<sup>th</sup> June 2013). The said notice of appeal clearly states –

***“Take notice that the Beneficiary/Appellant being dissatisfied with the Ruling of Justice Emukule on 28<sup>th</sup> June 2013 intends to appeal to the Court of Appeal against the whole of the said ruling.*”**

***Dated at Nairobi this 9<sup>th</sup> day of June 2013.***

***Gakoi Maina & Co. Advocates***

***Advocates for the Beneficiary/Appellant***

18. At the time when the notice was dated, the ruling by Emukule J. had not been delivered and it may be argued that the notice is bad for that reason. But it is the date of lodgment of the notice in Court that is more pertinent. The notice was lodged in Court on 2<sup>nd</sup> July 2013 after the delivery of the ruling. Is the error a matter of technicality that can be disregarded under Article 159(1)(d) of the Constitution? The notice of appeal was duly signed and save for the premature date, it is regular in other respects. In our view, if it had been lodged before the delivery of the ruling, it would have been bad in law and incapable of being saved even under Article 159(2)(d) of the Constitution which anticipates compliance with the law but enjoins Courts in exercising judicial authority not to have undue regard to technicalities. In this application, it is our view that as the notice of appeal, though prematurely dated, was presented in Court after the delivery of the ruling, under rule 75 of this Court’s Rules, the notice was given on the date on which it was filed in Court, not when it was dated. It bore the applicant’s signature as the person assuming responsibility for it. The premature date did not render it invalid, we so hold.

19. The issue for our determination is whether the applicant has made out a case under rule 5(2)(b) of the Rules of this Court to entitle it to the order for the stay of execution of the orders made on 28.06.2014. As stated above, the jurisdiction of this Court to entertain applications premised on rule 5(2) (b) arises where an appeal has been filed or where notice of appeal has been given in compliance with rule 75 of the rules of this court. This Court has addressed the issue of its jurisdiction under rule 5(2)(b)(supra) in many cases including **Safaricom Limited versus Ocean View Beach Hotel Ltd & 2 others** (Civil Application Number 327 of 2009) where it stated:

***“It is clear from all the provisions of rule 5 that the basic aim is to provide an interim relief where the Superior Court (High Court) has determined a matter and the party against whom the determination is made has either appealed or intends to appeal ...”***

C. B. Madan JA, as he then was, expounded on rule 5(2) (b) (supra) in **M. M. Butt v. The Rent Restriction Tribunal** (Civil Application No. Nai 6 of 1979) thus:

*“... it has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory, per Brett, L. J. in Wilson V. Church (No.2), 12 Ch.D. (1979), 454 at p.459. In the same case, Cotton, L. J., said, at p. 458:*

*“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”*

*“Megarry J., as he then was, followed Wilson (supra) in Erinford Properties Limited v. Cheshire County Council, (1974) 2 All. E.R. 448 at p.454, and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the Judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes, L. J. in the Attorney General v. Emerson and Others 24 Q.B.D. (1989) 56 at p.59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties, and the appellants have an undoubted right of appeal.”*

10. The applicant lodged on 2.7.2013 a notice of appeal showing that it was aggrieved by and intends to appeal against the whole of the orders of the High Court (Anyara Emukule, J.) dated 28.6.2013 made in Succession Cause No.500 of 1997.

11. The principles applicable to the determination of applications under rule 5(2)(b) of the Rules are well settled. As was observed by this Court in **ISHMAEL KAGUNYI THANDE –V- HOUSING FINANCE OF KENYA LTD** - Civil Application No.157 of 2006-

*“The jurisdiction of the Court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the Court in exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.” (See GITHUNGURI VS. JIMBA CREDIT CORPORATION LTD No. 2 (1988) KLR, J.K. INDUSTRIES LTD VS. KENYA COMMERCIAL BANK LTD (1982-88))’*

12. In **RELIANCE BANK LTD (IN LIQUIDATION) VS. NORLAKE INVESTMENTS LTD** this Court stated:

*“Hitherto, this Court has consistently maintained that for an application under rule 5(2) to succeed, the applicant must satisfy the court on two matters, namely:-*

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

13. What does the applicant need to show so as to secure the orders prayed for in the applications? The principles in this regard are a well beaten track. First, an applicant must show that he has an arguable appeal. An arguable appeal is one that is not frivolous but not necessarily one that is bound to succeed. All that an applicant needs demonstrate is that there is an arguable point or points of law. Secondly, an applicant must satisfy the Court that the appeal shall become nugatory if stay is not granted in the event that the appeal succeeds.

14. In this application, the applicant has averred that she filed appeal No.11 of 2013 on 2<sup>nd</sup> August 2013. That was after delivery of the ruling by the High Court on 28.6.2013. The learned trial Judge (Anyara Emukule J.) pointed out in his ruling (dated 28.6.2013) that the applicant had *“not been diligent in seeking to file the Record of Appeal.”* He expressed the view that *“delay which is over 2 years since judgment was delivered on 30<sup>th</sup> July 2010 was inordinate”* and he further observed that the respondent’s *“anxiety on account of both her age and the delay is both understandable and justified.”* It is on account

of these considerations that the learned trial Judge exercised his judicial discretion to set aside the order for stay made on 12 October 2011. In these circumstances, has the applicant shown to our satisfaction that the learned Judge's order lifting stay should be stayed and/or injunction should be granted as prayed. In short, has the applicant satisfied the court as regards the twin principles aforesaid. It is quite clear that if we decline to allow the application, the orders for stay that are in place will lapse and consequently both the intended appeal and the appeal No.11 of 2013 which has been lodged shall be rendered nugatory.

15. The applicant did not file a draft memorandum of appeal for us to see what grounds she would urge on appeal against the learned Judge's ruling but it is ostensible that what is intended to be challenged is the order allowing the 1<sup>st</sup> respondent's application to set aside the order for stay made on 12<sup>th</sup> October 2011. But even without it, the application and the circumstances attendant to it show that such appeal would be arguable considering that the notice of appeal has not been abandoned or struck out. Both limbs of the twin principles (i.e. that the appeal is arguable and that it will be rendered nugatory if stay is not ordered) have been established.

20. We allow the application and grant orders in terms of prayers 4 and 5 of the notice of motion dated and lodged on 7.10.2013.

21. We direct that, in view of the ages of the parties, this matter should be fast-tracked and heard as soon as possible.

22. The costs of the application shall be borne by the applicant in any event.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of June 2014.**

**WANJIRU KARANJA**

.....

**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**