



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & KIAGE, JJA.)

CIVIL APPLICATION NAI 68 OF 2014 (UR55/2014)

BETWEEN

LUCY WANJIKU KHAINGA1ST APPLICANT

GITATHURU KARIOBANGI CO. LTD2ND APPLICANT

AND

ELIZABETH WARUGURU KANGETHERESPONDENT

(ORIGINAL PLAINTIFF: JOHN KANG'ETHE KABURU, now deceased)

(An application for an injunction pending the hearing and determination of an intended appeal from the Judgment and Decree of the High Court of Kenya Nairobi by (Hon. Justice H. Waweru) dated 18th December 2013

in

HCCC NO. 1161 OF 2001)

RULING OF THE COURT

The motion dated 4th April 2014 is expressed as an application seeking an injunction pending the hearing and determination of an intended appeal from the judgment and decree of the High Court delivered by Hon. Waweru J. on 18th December 2013. The applicant prays for the following orders:-

- (a) Stay of judgment and its subsequent orders
- (b) A maintenance of the status quo respecting Land Reference No. 209/8533/141
- (c) An injunction restraining the Respondents from subdividing, transferring or changing the title of the suit property.

The grounds in which the motion is based are in the face of it while it is supported evidentially by the affidavit of Lucy Wanjiku Khainga expressed as sworn on 4th April 2014. The deponent avers in her affidavit that she is a 76-year old widow who fends for her children and grandchildren single-handedly

and feels that absent a stay order, she and the children may be evicted from the suit property thereby rendering them homeless and disrupting the children's schooling. That eventuality would render her appeal, which she considers meritorious, wholly nugatory.

The respondent opposed the motion by her replying affidavit sworn on 9th June 2014 in which she swore, *inter alia*, as follows;

“5. THAT in reply to paragraph 6 of the affidavit, I depone that the Applicant resides at Githurai with one of her sons but not in the suit property ...as alleged.

6. THAT in further answer to paragraph 6 of the affidavit, I depone that the suit property comprises of (sic!) 8 units, 6 of which are self –contained and the other 2 are single rooms and except for one unit which is occupied by the 1st applicant's son, one Richard Khainga, all the other units are let out by the 1st applicant. In the premises, the 1st applicant's averment that if the eviction is carried out they will have nowhere to go is not true”.

The respondent swore further that the 1st applicant's deceased husband, Patrick N. N. Khainga, did sell the suit property to the respondent's husband (also deceased) a fact confirmed by the 1st applicant's co-wife one Lorne Khainga when she testified before the High Court on behalf of the respondent. She avers further that the applicant having been unable to pay the *mesne* profits ordered by the High Court, and which stood at KShs.5,285,000 as at 31st January 2014, there is no likelihood that the respondent will recover the same and any more that would accrue were the orders sought to be granted. This would be highly prejudicial to the respondent, she asserts.

The factual averments in the respondent's replying affidavit, which are meant to show that the applicant has no arguable appeal and that any appeal she would file will not be rendered nugatory, have not been controverted by the applicant through, as Mr. Amendi; her learned counsel conceded, a further or supplementary affidavit.

In considering an application under **Rule 5 (2) (b)** such as the one before us, the Court travels a well-trodden path, guided by principles of settled notoriety: an applicant must demonstrate first, that he has an arguable appeal and second, that the appeal if successful, would be rendered nugatory unless the orders of stay or injunction are granted. An arguable appeal need raise no more than a single point and the point or points it raises need not be such a must necessarily succeed when fully ventilated. It is enough that the appeal should constitute a *bone fide factual* or legal point or points meriting interrogation, argument and decision. See **RELIANCE BANK LTD –VS- NORLAKE INVESTMENTS LTD [2002] 1 EA 227; STANLEY KANGETHE KINYANJUI –VS- TONY KETTER & 3 OTHERS [2013]e KLR, DANJI PRAGJI MANDANIA –VS- SARA LEE HOUSEHOLD & BODY CARE (K) LTD Civil Application No. NAI 345 of 2004; DAVID MORTON SILVERSTEIN –VS- CHESONI [2002] 1 KLR 867.**

Applying those principles to the matter before us, we note that the applicant has exhibited a memorandum of appeals in draft. It contains some twenty grounds of appeal detailing the manner in which the learned judge is alleged to have erred in law and in fact. Upon a perusal of the said memorandum of appeal, we are unable to say that it is so frivolous and devoid of merit or substance on the face of it as to raise no arguable points on appeals. We take the view that the appeal is arguable. The first limb of our **Rule 5 (2) (b)** jurisdiction is therefore satisfied.

Turning to the second limb that is whether the applicant's appeal would be rendered nugatory if successful unless we grant the orders sought, we are not satisfied that the applicant has discharged her onus. As we have already stated, she alleges that she fears being rendered homeless together with her children and grandchildren in the event of her being evicted. This has been denied by the respondent who has sworn that the applicant does not, in fact, reside in the suit premises. The applicant did not controvert the assertion that she resides at Githurai with one of her sons. We see this as a deficit of candour which

works to disentitle her to our favourable discretion.

We note that the applicant has averred at paragraph 8 of her affidavit as follows:-

“THAT the suit property has been our only source of income and shelter and if I am to vacate I be given ample and reasonable time to vacate.”

In answer to that plea for reasonable time, the respondent has contended that the period since the judgment of the High Court and now, which is in the region of six months, has been ample time for the applicant to organize her affairs. We find this to be an unanswerable assertion. We are also not unmindful of the fact that at issue here is rent collected from the suit premises and the applicant having been adjudged as owing, and has so far been unable to pay sums in excess of KSh. 5 million, we very much doubt that it is in the interests of justice that we should issue orders that will have the effect of increasing that obligation.

In the totality of the circumstances of this case we find the motion dated 4th April 2014 to be devoid of merit and accordingly dismiss it with costs.

Dated and delivered at Nairobi this 11th day of July 2014.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR