



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OUKO & GATEMBU, JJ.A)

CIVIL APPLICATION NO. 48 OF 2014 (UR 35/2014) BETWEEN

RAMCO INVESTMENT LIMITED APPLICANT

AND

UNI-DRIVE THEATRE LIMITED RESPONDENT

(Application for injunction pending the lodging, hearing and determination of an intended appeal from the Judgment and Decree of Hon. Justice P. Nyamweya delivered on 30th January, 2014

in

NAIROBI HIGH COURT ELC 106 OF 2009)

RULING OF THE COURT

An application brought under **rule 5 (2) (b)** of the Court of Appeal Rules for an order of stay of execution, injunction or a stay of further proceedings is required to satisfy the following well established conditions:-

- i) that the notice of appeal to challenge the impugned decision has been lodged with the registrar of the court where the decision was given within 14 days of the date of the decision in accordance with **rule 75**.
- ii) that the appeal or intended appeal is arguable, and
- iii) that if the order of stay is not granted, the appeal or the intended appeal will be rendered nugatory in the event it succeeds.

See **Butt V. Rent Restriction Tribunal** [1982] KLR 417 and **J.K. Industries Ltd, Kenya Commercial Bank Ltd & Another** [1987] KLR 506.

The other germane considerations underlying the application of **rule 5 (2) (b)** drawn from a long line of this Court's decisions, are that in considering whether the appeal or intended appeal is arguable, even a single *bona fide* arguable ground will suffice; that an arguable appeal is not necessarily one that must succeed, but one which is not frivolous. At this stage, the Court must not make definitive or final findings

of either fact or law; whether or not an appeal is likely to be rendered nugatory will depend on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will be reasonable compensate the aggrieved party. The applicant must satisfy both principles of arguability of the appeal and its nugatory aspect. See **Stanley Kang'ethe V. Tony Ketter**, Civil Application No. 31 of 2012 where these principles were considered in detail.

The applicant before us seeks that, pending the lodging, hearing and determination of the intended appeal, the respondent be restrained from:

“...possessing and/or taking possession, occupying, and/or interfering with the plaintiff/applicant’s quiet possession of the parcel of land measuring approximately 0.1249 Hectares situated on the northern boundary of Land Parcel L.R. No. 1034.1.”

This is clearly a prayer for an order of temporary injunction. We shall revert shortly to it when considering the jurisdiction of this Court to issue a temporary injunction in favour of a party whose suit has been dismissed by the High Court.

The brief background to this application is that the applicant brought an originating summons in the High Court claiming, by prescriptive right a portion of land measuring approximately 0.1249 Hectares from the respondent’s main parcel known as L.R. No. 10341. The learned Judge (P. Nyamweya, J.) framed and considered three issues, and ultimately declared that the claim of adverse possession was not proved because:-

- i) The applicant was not in complete exclusive physical control over the property in dispute due to the fact that on this very portion, the Kenya Power and Lighting Company has also erected electricity poles and installed a transformer.
- ii) The applicant’s possession and occupation of the suit property was by consent of the respondent.
- iii) As a consequence of the foregoing, the respondent was not disposed and the applicant’s possession was not adverse.

These findings and the dismissal of the originating summons aggrieved the applicants who have evinced their intention to challenge the decision on appeal to this Court.

Applying these facts to the principles and other consideration enumerated early, we emphasize that whether the application is for a stay of execution, stay of further proceedings or injunction under **rule 5 (2) (b)**, the principles and consideration set out earlier apply. An injunction under **rule 5 (2) (b)** does not follow the traditional consideration enunciated in the celebrated **Giella V. Cassman Brown** EA [1973] 358 even though it remains an invocation of the equitable jurisdiction of the Court. It would appear from the decision of the predecessor of this Court (the Court of Appeal for East Africa) in **Western College of Arts and Applied Sciences V. Oranga & Others**, [1976] KLR 63 that under **rule 5 (2)** of that court’s rules it only had power to stay execution of any order or decree appealed from but no power to issue a temporary injunction as was held in that decision. The case dealt with the question whether an order of temporary injunction was available in that court to a party whose suit had been dismissed by the High Court. Law V.P. in a leading decision said:-

“This court has a similar power, where a notice of appeal has been filed under rule 5 (2) of the rules of this Court. Does this power to order a stay of execution include a power, in a proper case, to order the issue of a temporary injunction if it is considered necessary to do so, to give efficacy to an order for stay?There is nothing arising out of the High Court judgment for this Court, in an application for a stay, to enforce or restrain by injunction.

It appears to me therefore that what this Court is now being asked to do is to order the

issue of a temporary injunction in respect of a matter which is not directly connected with a stay of execution of the judgment – the subject of the intended appeal. I am not satisfied that this Court has jurisdiction to do so.”

This Court under the repealed and present rules has express jurisdiction to issue a temporary order of injunction alongside orders of stay of execution and proceedings. Whereas, the Court has consistently held that where an action has been dismissed by the High Court, it cannot, by reason of dismissal issue an order of stay of execution as there would be nothing to stay, the Court will nonetheless entertain applications, and in appropriate cases, grant temporary injunctive orders. It is this exercise of its jurisdiction that the Court describes as original.

We have said these things because in his submissions before us, Mr. Kimani for the respondent wondered, even though he knew the answer, whether the twin principles under **rule 5 (2) (b)** applied also to applications for temporary injunction under same rule.

The other aspect of the Court’s jurisdiction raised in the application is the applicant’s offer to abide by any condition or order as to security pending the lodging and determination of the intended appeal and the averment by the respondent that should we be inclined to grant the prayer sought, that the applicant be ordered to furnish security by depositing funds in an interest earning account in the joint names of the parties’ advocates.

That prayer and averment would be appropriate in an application made in the High Court under **order 42 rule 6 (2)** of the Civil Procedure Rules. The criteria for the exercise of the discretion to order a stay of execution (or in this case an injunction) in the High Court and this Court are different. It is not a requirement in the latter for the applicant to offer to provide security. See **Oraro & Rachier Advocates V. Cooperative Bank of Kenya** [1999] 1 EA 236. In a proper case, however, the Court will require the respondent to give security for the due performance of the decree or order which it may ultimately issue. As noted in **Mukuma V. Abuga** [1988] KLR 645 substantial loss is what has to be prevented in both jurisdictions by the exercise of the discretion to grant an order of stay.

Turning to the question whether the applicant has satisfied the conditions for the grant of the relief sought, in our opinion, it would be a matter of argument in the appeal whether the respondent maintained presence in the suit property through Kenya Power and Lighting Company Limited, a third party: whether the respondent was dispossessed by the applicant of its property or the latter was a mere licensee. Another arguable point, which relates to this, is the question of whether the applicant was in exclusive possession.

We need not set out further arguable grounds and we must therefore turn to the question whether or not the success of the intended appeal will be rendered nugatory if an injunction is not granted. Mr. Ranja for the applicant urged us to hold that the intended appeal will indeed be nugatory without an injunction to preserve the *status quo* because the prospects of the respondent selling the property, going by their conduct, including tenants vacating the property, was high. This contention was resisted by the respondent, on whose behalf Mr. Kimani maintained that there were no plans to sell the suit property.

The respondent holds the title documents to the property, while the respondent does not. The latter is however in occupation and has been for sometime, whether exclusive or not is for the appeal to determine. In circumstances of this dispute, we hold that if we do not grant the order sought in this application the intended appeal may be rendered nugatory in the event it succeeded.

In the result, we allow the application and order that pending the lodgment, hearing and determination of the intended appeal the respondent will be restrained by an order of injunction from taking possession or interfering with the applicant’s quiet possession of the suit property.

To obviate any loss and suffering it is further ordered that the applicant shall file and serve the intended appeal within forty five (45) days from the date of this order failing which the temporary injunction herein will stand vacated without further orders. Upon filing of the intended appeal, the President of the

Court be pleased to allocate a hearing date on priority basis.

Costs of this application will be in the intended appeal.

Dated and delivered at Nairobi this 9th day of July 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

W. OUKO

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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

/mgkm