



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CIVIL APPLICATION NO. 43 OF 2014 (UR. 29/2014)

BETWEEN

NELSON ONGERA MIGIRO.....APPLICANT

AND

GEOFFREY NYAUMA OSINDI.....1ST RESPONDENT

FLORENCE MORAA MOGERE.....2ND RESPONDENT

(An application for stay of execution, injunction or any further proceedings

under Rule 5 (2) (b) of the Appeal Rules from the judgment

and decree of the High Court of Kenya at Kericho (Sergon, J.)

dated 16t May, 2014

in

KERICHO SUCC. CAUSE NO. 14 OF 2009)

RULING OF THE COURT

The applicant ***Nelson Onger Migiro*** has brought this Motion on Notice under ***Rule 5 (2) (b)*** of this Court's Rules against the respondents ***Geoffrey Nyauma Osindi*** and ***Florence Moraa Mogere***. The prayers that were urged before us are prayers 2, 3 and 4 in the motion which are that pending hearing and determination of the application, conservatory orders be issued allowing the respondents to continue occupying the suit premises and paying the rent of Kshs.5000/= as had been ordered by consent of the parties entered on 26th August, 2013 in Succession Cause No. 24 of 2010; that pending hearing and determination of Kisumu Civil Appeal No. 32 of 2014 the respondents be restrained from alienating, transferring, disposing off or interfering in any manner with the title to the said property and finally that pending hearing and determination of the said appeal there be an order of stay of any further proceedings in Kericho Succession Cause No. 14 of 2009.

The motion is supported by the affidavit of the applicant sworn on 13th June, 2014 and annextures thereto

which include Notice of Appeal and Memorandum of Appeal in the said appeal No. 32 of 2014.

The respondents filed a joint replying affidavit sworn on 10th July, 2014.

The principles upon which this Court exercises jurisdiction under the said Rule are now quite well known. For such an application to succeed the applicant must satisfy the Court on two matters – firstly, that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal and secondly, that if an order of stay of execution, or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would be rendered nugatory by the refusal to grant the stay or the injunction – see the decisions of this Court in **Transouth Conveyors Limited v. Kenya Revenue Authority & Anor.** Civil Appeal No. NAI. 37 of 2007 which relied on **Reliance Bank Limited (in liquidation) v. Norlake Investments Limited** Civil Appeal No. NAI. 93 of 2002. See also **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others** [2013] eKLR. In the latter case the principles under which this Court exercises jurisdiction were very well summarized in the following terms:

“i) In dealing with Rule 5(2) (b) the court exercises original discretion and that exercise does not constitute an appeal from the trial judge’s discretion to this court. See **Ruben & 9 Others v Nderitu & Another** (1980) KLR 459.

ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. **Halai & Another v Thornton & Turpin (1963) Ltd.** (1990) KLR 365.

iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own peculiar circumstances. **David Morton Silverstein v Atsango Chesoni**, Civil Application No. Nai. 189 of 2001.

v) An applicant must satisfy the court on both of the twin principles.

vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd**, Civil Application No. Nai. 345 of 2004.

vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. **Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 Others.** Civil Application No. 124 of 2008.

viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. **Damji Pragji** (supra).

ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. **Reliance Bank Ltd v. Norlake Investments Ltd [2002] 1 EA 227** at page 232.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible whether damages will reasonably compensate the party aggrieved.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecuniness, the onus shifts to the later to rebut by evidence the claim. **International Laboratory for Research on Animal Diseases v. Kinyua**, [1990] KLR 403.....”

What has provoked the application before us is the judgment of J.K. Sergon J. delivered at Kericho on

16th May, 2014 in Succession Cause No. 14 of 2009 where the applicant's originating summons was dismissed. Before the learned Judge was an originating summons brought under provisions of the Civil Procedure Act and the Limitation of Actions Act where the applicant sued the respondents claiming a beneficial interest in a parcel of land L.R. No. 631/940 situate in Kericho. The reliefs sought were the following:

“(i) A declaration that the forcible entry and occupation of the suit premises by the respondents without due process of the law constitutes a trespass.

(ii) Consequent upon the said trespass, the respondents be jointly and severally ordered to pay mesne profits to the applicant based on paragraph 20 of the applicant's affidavit of support of this summons.

(iii) A declaration that prior to her demise, the deceased Agnes Moruri Osindi was holding the suit property, namely L.R. No. 631/940 in trust for the applicant and consequently the administrator and administratrix respectively of her estate are holding it in the same capacity.

(iv) There be an order terminating the said trust.

(v) An order be issued to the administrator and administratrix respectively of the estate of Agnes Moruri Osindi directing the two to sign documents of transfer vesting title of the suit property in the names of the applicant and in default the designated officer of this court to do so on their behalf.

(vi) Costs of this application be provided.....”

The respondents filed a replying affidavit in that court and also filed a petition to strike out the originating summons. The matter was heard through written submissions and the learned Judge after preferring the case of the respondents to that of the applicant, dismissed the summons which orders provoked filing of Civil Appeal No. 32 of 2014 at Kisumu and this application.

Mr. J.O. Soire, the learned counsel for the applicant in arguments before us relied on the applicant's affidavit and submitted that the appeal was an arguable one and was not frivolous. He urged that the applicant had purchased the suit premises from his sister who had since died and that it was the applicant who had constructed the building on the premises and occupied it only losing it to invaders during post elections violence that rocked the country after the 2007 elections. This, to learned counsel, was a point of law sufficient to satisfy that limb requiring that an applicant establishes an arguable point. Reliance was laid on **Andrew Cheruiyot & Anor. V. Anyoka Rogito (Nakuru) Civil Application No. 1523 of 2009** where the Court stated that:

“... an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court...”

Counsel submitted further, on the second limb of the principles in **Rule 5 (2) (b)**, that the applicant would suffer substantial loss rendering the appeal nugatory because the respondents, who had applied for grant of letters of administration could sell the property putting it beyond the reach of the applicant.

Mr. Ochieng Gai, the learned counsel for the respondents in opposing the application relied on the replying affidavit of the respondents and submitted that the applicant's case must fail because it was made against a deceased person who, to counsel, could not answer. Counsel submitted that the applicant did not possess an allotment letter of the land and did not have a sale agreement and there were therefore no reasons for grant of a stay.

We have considered the motion, the affidavits and the submissions made. We have also perused Memorandum of Appeal in Civil Appeal No. 32 of 2014.

The applicant has stated as grounds 2, 3 and 9 of the Memorandum of Appeal:

“1.

2. *The learned trial judge erred and misdirected himself on facts especially when he held that the appellant’s case was unmerited as he failed to produce any rental receipts for his tenants when even the respondents admitted in their affidavit that the Appellant herein had been in occupation and use and in fact collected rents for the premises for a period of 20 years up to and including the year 2007.*

3. *The learned trial judge erred in law and fact in holding that there was no purchase or trust when there was cogent evidence in support of the same, firstly the one comprising of the handing over of the letter of allotment by the late Agnes Moruri to the appellant; secondly by confirmation of the sale by the deceased on 15th June, 1999 when she directed the first respondent to take accounts with the appellant in respect of the monies paid to the National Housing Corporation through the Municipal Council of Kericho by the respondents, with the view that the latter would reimburse the respondents; thirdly the said late Agnes Moruri Osindi never interrupted the appellant’s occupation and use of the suit property until her demise.*

4.

5.

6.

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8.

9. *The learned trial judge erred in law and fact in not addressing himself to the issue as to whether the suit property was a free property available for administration and distribution as part of or estate of the deceased Agnes Moruri had disposed of the same to the appellant.....”*

As stated elsewhere in this Ruling an arguable appeal is not one that must necessarily succeed. The applicant’s case was that he purchased the parcel of land from his late sister, had developed it and had occupied it for 20 years when he was evicted by raiders during post elections violence. This, to us, is an arguable ground. On whether the appeal would be rendered nugatory the respondents have applied for grant of letters of administration in Kericho High Court Succession Cause No. 14 of 2009. Once in possession of the same they could very well dispose of the property taking it beyond the applicant’s reach and this could render the appeal nugatory.

In sum, therefore, we are satisfied that the applicant has satisfied both limbs of the principles set out and we allow the application to the extent that an order be and is hereby issued restraining the respondents from alienating, transferring or disposing of the suit property pending the hearing and determination of the appeal. Costs of the Motion shall be in the appeal.

Dated and Delivered at Kisumu this 19th day of September, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR