



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KIAGE & ODEK,JJ.A)

CIVIL APPLICATION NO. NAI. 106 OF 2012 (UR 83/2012)

BETWEEN

NTARANGWI M'IKIARI APPLICANT

AND

THE COMMISSIONER OF LANDS 1ST RESPONDENT

MUNICIPAL COUNCIL OF MERU 2ND RESPONDENT

JACKSON MUYUA MUTERA 3RD RESPONDENT

*(An application for stay of proceedings, ruling and order of the High Court of Kenya at Meru
(Kasango, J.)*

dated 29th September, 2011

in

H.C.C.C NO. 153 OF 1995 (O.S.)

RULING OF THE COURT

1. Before us is a Notice of Motion application brought under **Rule 5(2)(b)** of the **Court of Appeal Rules** (the Rules) which seeks stay of the proceedings of H.C.C.C No. 153 of 1995 at Meru pending the hearing and determination of the intended appeal against the ruling of the High Court dated 29th September, 2011.
2. The genesis of this application is that the applicant instituted a suit in Chief Magistrate's Court at Meru being CMCC No. 164 OF 1995 seeking *inter alia* an order of eviction against the 3rd respondent from **L.R No. Ntima/Igoki/2224** (*the suit property*). Thereafter, the applicant commenced H.C.C.C. No. 153 of 1995 after he discovered that the 1st and 2nd respondents, in collusion with the 3rd respondent, intended to divide the suit property into two portions and issue title over one portion to the 3rd respondent. Therein he obtained orders maintaining status quo over the suit property. Subsequently CMCC No. 164 of 1995 was transferred to the High Court and was assigned a new case number, to wit, H.C.C.C. No. 202 of 1995; which was consolidated with

H.C.C.C. No. 153 of 1995 on 25th July, 1996.

3. Vide an application dated 22nd July, 2009, the applicant sought a review of the consolidation order and an order directing the two suits be heard separately. The application was dismissed by the High Court (Kasango, J.). The applicant, thereafter, filed a notice of discontinuance of the suit against the 1st and 2nd respondents. The 1st and 2nd respondents objected to the notice of discontinuance and the High Court directed that the said objection be heard as a preliminary objection. The applicant in support of the notice of discontinuance filed an affidavit and written submissions. The applicant contended that he wished to withdraw the suit against the 1st and 2nd respondents because firstly, the 1st respondent had by virtue of a letter dated 25th May, 1995 through the District Officer of Meru acknowledged the applicant as the registered owner of the suit property; and secondly, the then Town Clerk of Meru Municipal Council, the 2nd respondent, one Mutuma Angaine, who had personal interest in the suit property had since left the Council. Based on those reasons the applicant maintained that there was no reason to proceed with the suit against the 1st and 2nd respondents.
4. In opposition to the notice of discontinuance, the 1st respondent filed an affidavit sworn by Jehoshaphat Maroro. Jehoshaphat deponed that since the hearing of the suit had commenced, the applicant ought to have sought leave of the court to file the said notice under **Order 25 (2)** of the **Civil Procedure Rules, 2010**; that failure to do so rendered the notice incompetent. He further deponed that the government had interest in the suit property having compulsorily acquired it from the applicant; that the applicant was compensated for the said acquisition but has since refused to surrender the title to the government.
5. The learned Judge (Kasango, J.) in the ruling dated 29th September, 2011 struck out the applicant's notice of discontinuance on the grounds that firstly, the said notice was incompetent because the applicant failed to seek leave of the court to file the same contrary to **Order 25 (2)** of the **Civil Procedure Rules** yet the hearing of the suit had commenced; secondly, that orders of status quo having been issued against the 1st and 2nd respondents the discontinuance of the suit against them would be tantamount to allowing the applicant to perpetually have the orders of status quo against the 1st and 2nd respondents; and the 1st and 2nd respondents had demonstrated a reasonable claim over the suit property which they would not be able to litigate upon if they were not parties to the suit. It is against this ruling that this current application has been filed.
6. Mr. M. Kioga, learned counsel for the applicant, submitted that the intended appeal was based on an interlocutory matter. He contended that the learned Judge (Kasango, J.) in striking out the notice of discontinuance of the suit against the 1st and 2nd respondents did no rely on the law. He maintained that this was clear from her ruling where she stated as follows:-

“Before completing this ruling, I wish to state that the plaintiff (applicant herein) relied on a case namely, Omara –vs- Maena(2008) 2 E.A.284-287. The plaintiff failed to attach a copy of that cited case to his submissions and I was unable to trace that case in the law reports that I have in my possession. I therefore do not have the benefit of considering whether the case does support the plaintiff's argument.”

It was contended on behalf of the applicant that unless the proceedings in the High Court are stayed the intended appeal would be rendered nugatory. It was further contended that the failure of filing the intended appeal in time was due to the delay in obtaining the certified proceedings from the High Court. Mr. Kioga urged us to allow the application.

7. Mr. Manasses Kariuki, learned counsel for the 2nd and 3rd appellant, in opposing the application, relied on the case of David Morton Silverstein –vs- Atsango Chesoni – Civil Application No. Nai. 189 of 2001, wherein this Court held that an applicant under **Rule 5(2) (b)** of the Rules must satisfy the court that the intended appeal is arguable and that unless the order of stay is granted, the intended appeal would be rendered nugatory. He contended that the applicant had neither demonstrated that he has an arguable appeal nor that unless stay of the proceedings is granted that intended appeal would be rendered nugatory. Mr. Kariuki maintained that the intended appeal

would not be rendered nugatory if the stay orders are not granted. He contended that in the event the intended appeal was successful the same would only render the proceedings in the High Court invalid.

8. Mr. Kariuki submitted that the learned Judge struck out the applicant's notice of discontinuance of suit against the 1st and 2nd appellants because the same was filed without leave of the court yet the hearing of the suit had commenced. He contended that the applicant erroneously indicated in the said notice that leave to file the same was granted on 18th January, 2011 yet there was no evidence in the proceedings of such leave being granted.
9. The 1st respondent in opposition to the application only filed grounds of opposition. The grounds of opposition were that firstly, the applicant had not demonstrated that the intended appeal is arguable; secondly, he has not demonstrated that the appeal would be rendered nugatory if the stay is not granted; and thirdly, that the application is without merit and should be dismissed with costs.
10. 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 vs. Housing Finance Kenya Ltd. – Civil Application No. Nai. 157 of 2006* (unreported):

“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 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 838& J.K. Industries Ltd vs. Kenya Commercial Bank Ltd (1982-88)”.

11. We find that the issue of whether the learned Judge in failing to consider the authority cited by the applicant in support of his application, was tantamount to failing to take into account the law in making her decision is an arguable point which should be considered in a substantive appeal. An ‘arguable’ appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court. See *Kenya Commercial Bank –vs- Hon. Nicholas Ombija- Civil Application No. 153 of 2009*. We find that there is an arguable appeal as the parties hereto will canvass the issue, whether leave to discontinue the suit was granted and whether a party can be compelled to continue with a suit he wishes to discontinue.
12. We are of the considered view that unless we grant the order of stay of proceedings of the High Court the suit will proceed against the 1st and 2nd respondents yet the intended appeal is in respect of discontinuance of the suit against them. We are unable to agree with the submissions of Mr. Kariuki that in the event that the intended appeal is successful it would only render the proceedings of the High Court invalid and, therefore, there is no need to grant the order sought. The overriding objective of this Court as well as of the High Court is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Therefore, it would be against the above overriding objective to let the proceedings in the High Court to continue bearing in mind that there is likelihood that the intended appeal would succeed. This would amount to wasting this Court's time and rendering the intended appeal academic.
13. The upshot of the foregoing is that we find that the applicant's application has merit. Accordingly, we grant a conditional stay of the proceedings of the High Court pending the hearing and determination of the intended appeal. We order that the intended appeal be filed within 21 days from the date of this judgment and failure of which the conditional stay of proceedings shall lapse.

Dated and delivered at Nyeri this 18th day of September, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR