



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPLICATION NO. NYR. 21 OF 2013 (UR 5/2013)**

**BETWEEN**

**DICKSON MURICHO MURIUKI ..... APPLICANT**

**AND**

**TIMOTHY KAGONDU MURIUKI ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS KIMONDO MURIUKI ..... 2<sup>ND</sup> RESPONDENT**

**JANE WARIGIA MURIUKI ..... 3<sup>RD</sup> RESPONDENT**

**WINFRED WAIRIMU MURIUKI ..... 4<sup>TH</sup> RESPONDENT**

**DAVID WANJOHI MURIUKI ..... 5<sup>TH</sup> RESPONDENT**

**CENTRAL PROVINCE LAND DISPUTES**

**APPEALS COMMITTEE ..... 6<sup>TH</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT AT NYERI ..... 7<sup>TH</sup> RESPONDENT**

*(An application for stay of execution pursuant to the judgment of the Court of Appeal at Nyeri dated 26<sup>th</sup> June, 2013*

**in**

**CIVIL APPEAL NO. 195 OF 2009)**

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**RULING OF THE COURT**

1. The decisive issue in this application is whether this Court has jurisdiction to hear a matter where final judgment has been delivered by the Court. The complementary question is whether this Court has jurisdiction to grant stay of execution in a matter where it has delivered final judgment. The other issue is whether this Court can entertain an application for stay of execution pending the

- hearing and determination of an application for leave to appeal to the Supreme Court. A final question is whether this Court can entertain an application under **Rule 5 (2) (b)** of the **Court of Appeal Rules** (the Rules) when judgment has been delivered. In other other words can an application under **Rule 5(2)(b)** be made after delivery of judgment?
2. Before us is a Notice of Motion application under certificate of urgency dated 31<sup>st</sup> July 2013 brought pursuant to **Rules 5(2)(b) & 47** of the Rules seeking *inter alia* stay of execution of the decree dated 12<sup>th</sup> July, 2007 in Nyeri C.M.C.C Award Cause No. 12 of 2004 pending the hearing and determination of Civil Application Sup. No. 2 of 2013 which seeks *inter alia* leave to appeal to the Supreme Court against this Court's judgment dated 26<sup>th</sup> June, 2013 in Civil Appeal No. 195 of 2009; and the proposed appeal to the Supreme Court against the said decision of this Court.
  3. The genesis of this application is a family dispute over L.R No. Ruguru/Gachika/83 (suit property). The suit property originally belonged to one Wahome Wanjohi, the father of Susan Nyambura Wahome. After the breakdown of Susan's marriage, her father allowed her to live on the suit property with her children - the applicant and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. Before the death of Wahome Wanjohi, he expressed his wish to bequeath the suit property to Susan. Being apprehensive that her brothers would object to the suit land being bequeathed to her, Susan persuaded her father to bequeath the same to the applicant who was her son. The applicant was to hold the suit property in trust for his mother and siblings.
  4. After a protracted legal dispute in court between the applicant and his uncles, the suit property was registered in the name of the applicant. Thereafter, the applicant refused to subdivide the suit property amongst his siblings causing Susan, his mother, to institute proceedings against him at the District Land Dispute Tribunal at Nyeri (Tribunal). On 20<sup>th</sup> August, 2004 the Tribunal entered an award in favour of Susan by directing the suit property to be transferred to her and that she should then subdivide the same amongst her children. The applicant was aggrieved with the award hence he filed an appeal in the Provincial Land Disputes Appeals Committee (Appeals Committee). The Appeals Committee in its decision dated 14<sup>th</sup> June, 2007 upheld the Tribunal's decision and directed the suit property to be equally subdivided amongst Susan and her six children. The Appeals Committee's decision was adopted as a judgment of the Chief Magistrate's Court at Nyeri on 12<sup>th</sup> July, 2007 in Award No. 12 of 2004.
  5. The applicant herein filed Judicial Review proceedings in the High Court seeking an order of certiorari quashing the decision of the Tribunal. On 20<sup>th</sup> November, 2008 the applicant withdrew the above mentioned Judicial Review proceedings. Thereafter, the applicant filed fresh Judicial Review Proceedings in the High Court on 26<sup>th</sup> November, 2008 this time around seeking an order of prohibition restraining the Chief Magistrate's Court at Nyeri from executing the decree in Award No. 12 of 2004. The High Court in a judgment dated 26<sup>th</sup> February, 2009 issued an order of prohibition restraining the subordinate court from executing the decree in Award No. 12 of 2004.
  6. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents' filed an appeal being Civil Appeal No. 195 of 2009 against the High Court's decision. This Court in its judgment dated 26<sup>th</sup> June, 2013 allowed the appeal and set aside the order of prohibition that was issued by the High Court. Thereafter, on 24<sup>th</sup> July, 2013 the applicant filed an application being Civil Application No. Sup. 2 of 2013 seeking leave to appeal to the Supreme Court against this Court's decision. The said application is still pending for hearing and determination before this Court.
  7. In the meantime, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents' on 25<sup>th</sup> July, 2013 obtained the Land Board Consent to subdivide the suit property pursuant to the decree of the subordinate court. It is this action that prompted the applicant to file the current application under certificate of urgency. The applicant is seeking stay of the execution of the decree by the Chief Magistrate's Court at Nyeri in Award No. 12 of 2004. The applicant is apprehensive that unless the execution of the decree of the subordinate court is stayed, the suit property will be subdivided rendering both his application before this Court seeking leave to appeal to the Supreme Court and the intended appeal to the Supreme Court nugatory.
  8. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent's in opposition to the application filed a replying affidavit sworn by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent deposed that the applicant's application lacked merit on the grounds first, that he had not demonstrated that he had an arguable appeal; second,

- that he had not demonstrated the prejudice if any he would suffer if the order sought is not granted; third, that the order which the applicant seeks to appeal against is a negative order which is not capable of being stayed and that granting the stay would be tantamount to reinstating the orders of the High Court which were set aside by this Court; and that fourth, the applicant had made a similar application for stay of execution in the subordinate court and the same was dismissed.
9. Vide the directions of this Court the application proceeded by way of both written and oral submissions. Mr. Gakuhi Chege appeared for the applicant while Mr. Magee wa Magee appeared for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents'. Mr. Chege submitted that the current application was the first of its kind to be filed after the creation of the Supreme Court by the Constitution. It was submitted on behalf of the applicant that by virtue of **Article 163(4) (b)** of the **Constitution** appeals from the decisions of this Court which are certified by either the Supreme Court or this Court to involve matters of public interest lay in the Supreme Court. Mr. Chege submitted that in **Hermanus Phillipus Steyn –vs- Giovanni Gneccchi- Ruscone – Civil Application No. Sup, 4 of 2012** this Court in observing that there were no rules of procedure regulating the manner in which an application for leave to appeal to the Supreme Court should be filed and handled held that it would adopt the existing procedure for making applications before this Court. He argued that by virtue of parity of reasoning in the above case, we ought to adopt the procedure and principles applicable to applications made under **Rule 5(2)(b)** of the Rules since there were no rules prescribing the procedure of making the current application.
  10. The applicant in relying on the decision of this Court in **Equity Bank Ltd. –vs- West Link MBO Ltd. – Civil Application No. 78 of 2011** argued that in the alternative that this Court could invoke its inherent jurisdiction under **Rule 1(2)** of the Rules and grant the interim order sought pending the hearing and determination of the intended appeal in the Supreme Court. The applicant also submitted that by virtue of filing a Notice of Appeal on 3<sup>rd</sup> July, 2013 against the judgment of this Court dated 26<sup>th</sup> June, 2013, this Court had jurisdiction pursuant to **Rule 5 (2)(b)** of the Rules to entertain the current application.
  11. In opposition to the application, Mr. Magee wa Magee submitted that this Court lacked jurisdiction to grant the order of stay of execution sought. It was the respondents' case that this Court is *functus officio* as far as the current application was concerned having made and delivered the Judgment dated 26<sup>th</sup> June, 2013 which is the subject of the intended appeal to the Supreme Court; that the current application having been made separately from the application seeking leave to appeal to the Supreme Court the same lacked foundation upon which this Court could exercise its jurisdiction; and that this Court could only exercise its jurisdiction under **Rule 5(2)(b)** of the Rules in appeals pending before it. In relying on the decision of the Supreme Court in **Board of Governors, Moi High School, Kabarak & Another –vs- Malcom Bell & Others – Petition No. 6 & 7 of 2013**, Mr. Magee wa Magee submitted that it is only the Supreme Court by virtue of **Section 21** of the **Supreme Court Act** that can grant the order sought. It was argued by the respondents' that jurisdiction of courts could not be inferred but are only conferred by the Constitution or Statute and therefore, this Court could not assume jurisdiction it did not have.
  12. The respondents' argued that the current application was an abuse of the court process because it neither seeks stay of execution of the orders of this Court nor of the High Court but seeks stay of the orders of the subordinate court; and that the applicant in his intended appeal merely seeks prohibition of the subordinate court's orders and does not seek the same to be varied or to be set aside. It was also submitted on behalf of the respondents that orders sought should not be granted because the applicant's application for leave to appeal to the Supreme Court has not been heard and has no merit.
  13. We have considered the application, the grounds in support thereof, the replying affidavit filed on behalf of the respondents, able submissions by counsel and the law. We agree with Mr. Chege that to our knowledge the application before us is the first of its kind to be filed before this Court. What is momentous in the application is whether we have jurisdiction to grant stay of execution sought having pronounced our final judgment on the issues surrounding the case in Civil Appeal No. 195 of 2009.
  14. The applicant herein seeks an order of stay of execution of the orders of the subordinate court pending the hearing and determination of his application for leave to appeal to the Supreme Court and the intended appeal in the Supreme Court. It is not in dispute that there are no rules of

procedure regulating the manner in which the application should be filed and determined. The applicant argued that by virtue of parity of reasoning of this Court in its decision in **Hermanus Phillipus Steyn –vs- Giovanni Gnechi- Ruscone (supra)** we ought to apply the principles applicable in applications for stay of execution made under **Rule 5 (2)(b)** of the Rules in determining this current application.

15. We are of the considered view that the jurisdiction exercised by this Court under **Rule 5(2) (b)** in granting stay of execution is not applicable in this current application. **Rule 5 (2)(b)** provides,

**“5(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution but the Court may**

**a)....**

**b) in any civil proceedings where Notice of Appeal has been lodged in accordance with Rule 75, order stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just.”**

In **Safaricom Limited -vs- Ocean View Beach Hotel Limited & 2 others- Civil Application No. 327 of 2009**, Omolo J.A held,

**“At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging of a Notice of Appeal. If there is no Notice of Appeal lodged, one cannot get an order under Rule 5(2)(b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the Notice of Appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”**

16. From the foregoing it is quite clear as pointed out in this Court's decision in **Equity Bank Limited -vs- West Link MBO Limited- Civil Application No. 78 of 2011** that the true nature of an application under **Rule 5(2)(b)** is an interlocutory application in an appeal pending before this Court; and that **Rule 5 (2)(b)** is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the pending appeal in order to ensure the just and effective determination of appeal. It is also clear that this Court's jurisdiction under **Rule 5(2)(b)** can only be invoked once a Notice of Appeal is lodged in this Court. See **The Interim Independent Electoral Commission & Another -vs- Paul Waweru Mwangi -Civil Application No. Nai. 130 of 2011**. We find that the Notice of Appeal that grants this Court jurisdiction under **Rule 5 (2)(b)** is the one filed against decision of the High Court or any other tribunal prescribed by statute whose appeal lies in this Court and not the Notice of Appeal filed against the decision of this Court which is the subject of an intended appeal to the Supreme Court. Therefore, in this case the Notice of Appeal dated 3<sup>rd</sup> July, 2013 filed by the applicant against the decision of this Court does not grant us jurisdiction and power to exercise our discretion under **Rule 5(2)(b)** having pronounced the final judgment on the appeal that was before us from the decision of the High Court.

17. **Rule 5(2)(b)** confers power to this Court to hear interlocutory applications before the main appeal that is pending before the Court is heard and determined. The Rule does not confer power to this Court to entertain any application on the merits or otherwise of a suit after judgment. The jurisdiction of this Court to entertain any application after its final judgment is granted by the **Article 163(4)(b)** of the **Constitution** and such jurisdiction is restricted to certification of matters that ought to proceed on appeal to the Supreme Court.

18. The applicant urged us in the alternative to invoke our inherent jurisdiction and grant the order sought. It is settled principle of law that this Court has inherent power to ensure that justice is done. **Rule 1(2)** of the Rules provides,

**' Nothing in these Rules shall be deemed to limit or otherwise be deemed to limit or**

***otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.'***

In ***Equity Bank Limited -vs- West Link MBO Limited*** (*supra*) Musinga, J.A held,

***'Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without it being derived from the Constitution or Statute.'***

Jerold Taitz in ***The Inherent Jurisdiction of the Supreme Court (Capetown, South Africa: Juta Publishers, 1985)***, stated as follows:-

***"The inherent jurisdiction of the Supreme Court may be described as the unwritten power without which the court is unable to function with justice and good reason."***

19. By virtue of the foregoing, can we invoke this Court's inherent jurisdiction and grant the orders sought? We are of the considered view that in this current application we cannot invoke our inherent powers to grant the order sought. This is because first, by virtue of **Article 163 (4) (b)** of the **Constitution**, the applicant herein has filed an application being Civil Application No. Sup. 2 of 2013 seeking leave to appeal to the Supreme Court against the decision of this Court on the ground that the intended appeal raises matters of public importance. The said application is still pending for hearing and determination before us. We believe that whether the intended appeal by the applicant will be rendered nugatory mainly depends on whether leave will be granted to him to appeal to the Supreme Court. Since the application for leave which is still pending is not directly before this Court we are unable to determine whether leave will be granted to the applicant to file an appeal against this Court's judgment in the Supreme Court and whether if the said leave to appeal is granted the intended appeal will be rendered nugatory if the order sought is not granted. Having expressed ourselves as above we are unable to invoke our inherent jurisdiction to grant stay of execution of subordinate court's orders. Second, we find that the applicant's current application is tantamount to him putting the cart before the horse because while the application seeking leave to appeal to the Supreme Court is still pending before this Court the applicant has no basis to anchor his application for stay of execution .
20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is *functus officio* and must down its tools. In the absence of statutory authority, the principle of *functus officio* prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of *functus officio* is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan courts is that there must be finality of proceedings at the Court of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts.
21. We take cognizance that when this Court has delivered judgment; all pertinent issues and points of law have been fully canvassed and considered. Upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed. The submissions by counsel, evidence on record, points of law and relevant authorities all have been raised, re-examined, weighted, deliberated upon and judgment made. What new point of law can subsequently be raised in an interlocutory application for stay of

execution that will make this Court change its mind after delivery of judgment and order stay of execution? If there are new points of law or circumstances that arise after judgment, this Court is *functus officio* and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court.

22. We are not oblivious to the holding and decision of the Supreme Court in the case of **Malcolm Bell –vs- Board of Governors of Moi High School Kabarak & Another- Supreme Court Petition Nos. 6 and 7 of 2013 (Consolidated)** where the Supreme Court held it has jurisdiction to issue interlocutory orders in the nature of stay of execution. The Supreme Court stated:

***“It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court’s capability to arrive at a just decision on the merits of the appeal, would be substantially diminished. Both the Constitution and the Supreme Court Act have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case.”***

23. It is our considered view that subject to the Court of Appeal’s jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court; and only when leave or certification has been granted. The upshot of the foregoing is that we find that the application in the Notice of Motion under certificate of urgency dated 31<sup>st</sup> July, 2013 lacks merit and is hereby dismissed with costs to the respondents.

**Dated and delivered at Nyeri this 10<sup>th</sup> day of September, 2013**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

**MARTHA KOOME**

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**