



**IN THE COURT OF APPEAL AT  
NAIROBI**

**CORAM: NAMBUYE, KARANJA & KIAGE, JJ.A.**

**CIVIL APPLICATION NO. NAI 160 OF 2013 (UR 109/2013)**

**BETWEEN**

**HASSAN GUYO WAKALO.....APPLICANT**

**AND**

**STRAMAN EAST AFRICA LTD.....RESPONDENT**

***(An Application for stay of execution of the Ruling of the High Court of Kenya at Nairobi  
(Mutungi, J) dated 18th June, 2013***

***in HCCC NO. 528 OF 2012)***

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**RULING OF THE COURT**

In this notice of motion dated 10th July 2013 made under Rule 5(2)(b) of the Court of Appeal Rules, the applicant seeks an order of stay of execution of the orders issued by the High Court at Nairobi in HCCC No. 528 of 2012 on 18th June, 2013. The same is premised on some eight grounds on its face and is supported by the applicant's affidavit sworn on 10th July 2013.

Some pertinent facts relating to this application are not disputed. For instance, it is admitted by both parties herein that the applicant was issued with a Temporary Occupation Licence (TOL) for the plot in question by the Municipal Council of Nairobi many years ago. Subsequently, the applicant applied to the council for allocation of the said plot on permanent basis but the request was declined.

By a letter dated 15th July 1996, the City Council of Nairobi wrote to the applicant and informed him that;

***“The site in question has now been committed by the Council and***

***you are hereby given 30 days notice to windup your operation.”*** Apparently, the applicant failed to comply with the said notice. In law therefore, his licence was terminated upon expiry of the said notice.

Subsequently, the plot was resurveyed and allocated to another person. The same changed ownership

severally and was transferred to the respondent (**Straman East Africa Limited**) sometime in 2009. Even as these transfers took place, the applicant herein remained in occupation of the plot, the earlier notice to vacate notwithstanding.

In March 2011 the applicant was arraigned before the Chief Magistrate Court Milimani to answer to charges of forcible detainer. After a full trial, he was found guilty, convicted and fined Ksh 150,000/= or to serve twelve months imprisonment in default on 26th July, 2012.

Soon thereafter, the respondent herein filed Civil Suit No. 528 of 2012 against the applicant before the High Court. In the said suit, the respondent was seeking as against the applicant, recovery of the suit premises and also an eviction order against him.

Upon service of the plaint and summons, the applicant filed a memorandum of appearance on 19th September 2012, but before his 14 days within which to file a defence were over, the respondent filed a notice of motion under **Order 36 Rule 1** of the **Civil Procedure Act** seeking summary judgment against the applicant on 28th September, 2012. On 5th October 2012, the applicant filed his defence but the court (Mutungi, J.) went ahead and heard the application for summary judgment, allowed it and ordered the applicant to vacate the said premises within 30 days of service of the decree on him failing which an eviction order was to issue against him, on application by the respondent.

That judgment was rendered on 18th June 2013. The applicant did not file a notice

of appeal until 27th June 2013, which notice of appeal was clearly out of time. That notice of appeal is the basis of this application. The applicant's main grievance with the Ruling of the High Court is that the learned Judge dealt with the same by way of summary judgment contrary to **Order 36 Rule 1** which provides that summary procedure can only be invoked where no defence has been filed. His argument is that there was already a defence on record as at the time the application for summary judgment was heard. That appears to be the main ground to be argued on appeal.

Although, the applicant in his supporting affidavit deposes that his intended appeal raises substantial issues, he has not annexed a copy of the memorandum of intended appeal and nor has he substantiated what other substantive grounds of appeal he wishes to raise on appeal.

The application is opposed by the respondent vide the replying affidavit sworn on

19th September 2013 which is brief and to the point. The respondent challenges the competence of the notice of appeal as the same was not served within the prescribed time contrary to **Rule 77(1)** of this **Court's Rules**. According to the respondent, the appeal raises no triable issues and further that the respondent has not demonstrated that the appeal will be rendered nugatory if the stay orders are not granted. According to Mr. Kahonge, learned counsel for the respondent, the applicant has no registrable interest in the suit property and has been declared a trespasser by a court of competent jurisdiction – a fact he had not disclosed in his application and supporting affidavit. In his view, this application is only dilatory and made just to enable the applicant to stay on the suit premises longer. He urged us to dismiss the application.

On his part, Mr. Njiraine for the applicant while admitting that the applicant only holds a Temporary Occupational Licence which has since been revoked, submitted that the property in question should not have been allocated to somebody else as the same had been reserved for public use as a sewer. He urged that if the stay is not granted, the applicant will be evicted from the suit premises and in the event his appeal succeeds, then the same will be rendered nugatory.

We have carefully considered the grounds of appeal along with the rival submissions of counsel. It is now settled that for an application such as the one before us to succeed, the applicant needs to prove that he has an arguable appeal, i.e his appeal is not frivolous or an abuse of the court process. It should however, be borne in mind that an arguable appeal is not necessarily one that will succeed.

In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.

See Reliance Bank Limited vs Norlake Investment Ltd [2002] 1EALR 227; Harveer

Investments Company Limited vs Equatorial Commercial Limited & 3 Others

[2009] EKLR.

In this case, the only arguable point appears to be that the learned Judge misdirected himself in proceeding with the matter by way of summary judgment when there was already a defence on record. We have perused the record before us. We note that indeed, the applicant did enter appearance on 19th September 2012. His defence was filed on 4th October 2012 which was actually within the timelines allowed by the Civil Procedure Rules.

The respondent's application premised on **Order 36(1) b** of the **Civil Procedure Rules** which was filed on 28th September 2012 is contended to have been premature. That in our view is an arguable point. We nonetheless leave that for the bench that will be tasked with hearing the appeal if and when that happens.

As stated earlier however, it is not enough for an applicant to prove that he has an arguable appeal. One must go further and prove the nugatory aspect. In this case, there is evidence that the applicant is indeed a trespasser on the suit premises. That was the position before the suit before the High Court was filed. It still remains the position and it will not be changed by any orders of stay we may make in this application. This therefore, means that there is nothing to be rendered nugatory even if the stay orders are not granted at this stage. According to the appellant, he does not have the Title documents to the suit property. His argument however is that nobody else should have them because the property is meant to be preserved for public utility. We do not see how that advances his case for purposes of this application. The crux of the matter is that the applicant has failed to prove the nugatory aspect. This application therefore falls far too

short of the threshold set for applications under **Rule 5(2)b** of this **Court's Rules** to succeed.

For these reasons, we find the application before us devoid of merit. We dismiss the same with costs to the respondent.

*Dated and delivered at Nairobi this 8th day of November, 2013.*

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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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**

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