



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 167 OF 2010

BETWEEN

DOUGLAS MBUGUA MUNGAI .....APPLICANT

AND

HARRISON MUNYI .....RESPONDENT

*(An application for a stay of execution of judgment pending the lodging, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang', J.) dated 25<sup>th</sup> March, 2009*

in

**H.C.C.C. NO. 2091 of 1998 (OS)**

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**RULING OF THE COURT**

This is a **rule 5 (2) (b)** application which seeks one substantive order:-

***“That pending the hearing and determination of this application the respondent be restrained from executing the judgment in High Court at Nairobi Civil Suit No. 2091 of 1998 consolidated with High Court Civil Suit No. 2146 of 1998.”***

The suit as filed in the superior court was for adverse possession and alleged trespass. The applicant, who according to the pleadings is the registered proprietor of the suit property known as Title No. Dagoretti/Riruta/S15 relied on the five grounds set out in the body of the application as follows:-

***“1. On 25<sup>th</sup> March 2009 the Honourable Justice J. B. Ojwang’ entered judgment in favour of the respondent (the then plaintiff) by inter alia ordering that the respondent is entitled to either***

*reinstatement to the suit premises, or to damages as against the applicant/appellant.*

2. *The applicant filed a notice of appeal against the said judgment on 30<sup>th</sup> March 2009 and on 1<sup>st</sup> April 2009 sought, in the superior court, a stay of execution of the said judgment. On 28<sup>th</sup> June 2010 the superior court issued an order of stay of execution for 30 days and which orders expire on 27<sup>th</sup> 2010.*

3. *The applicant has an arguable appeal.*

4. *The applicant is apprehensive that in the absence of an order staying the execution of the said judgment, the respondent will move into the suit premises and evict the applicant and or interfere with the applicant's possession and enjoyment of the suit property and thereby render the intended appeal nugatory.*

5. *The applicant has no knowledge of the respondent's assets and verily believe that the respondent has no set income. If the respondent is reinstated into the suit premises as provided in the judgment and the intended appeal is eventually successful, the appeal will be rendered nugatory if a stay is not granted."*

*Esther Kinyenye – Opiyo*, advocate appeared for the applicant whereas the respondent was represented by *Mr Boniface Njiru* advocate. The factual background is that the applicant claims to have inherited the suit property upon the demise of his late mother in 1993 and was registered as the proprietor in 1996. The respondent on the other hand brought suit against the appellant in 1998 by way of an originating summons and claimed the suit property by way of adverse possession. A few days later the respondent filed another suit against the applicant by way of a plaint on which he claimed to have acquired the suit property from the applicant by way of adverse possession. The applicant on his part claimed that the respondent was a trespasser and should be ordered to hand over to him vacant possession.

Following the consolidation of the two suits the superior court *Ojwang', J.* delivered a judgment on 25<sup>th</sup> March 2009 in which he ordered that the respondent herein be reinstated and that the applicant should also pay him damages. Consequently, the applicant in this application contends that the order for reinstatement into the suit property is immediately enforceable by the respondent unless an order of stay is granted and that the order as granted by the superior court does not require any further application in court by the respondent. The applicant relies on the grounds set out in the draft memorandum of appeal, and one of the principal grounds is that the suit property is a commercial property in Riruta Nairobi which he rents out from time to time and if the respondent were to move into the suit property pursuant to the superior court order he could put the suit property beyond reach and that he could substantially change and alter the character of the suit property to the detriment of the applicant. The applicant in the draft memorandum of appeal contends inter alia that the trial Judge failed to appreciate that the respondent had not yet acquired any rights pursuant to **sections 7 and 13** of the Limitation of Actions Act, following the court's finding that the respondent had been on the suit property between 1993 and 1998 (a period of 5 years) and that the respondent filed the originating summons seeking a vesting order in 1998 as a result of which time stopped to run at the point the suit was filed and in addition the superior court had awarded damages which had not been pleaded at all.

Mr. Njiru, learned counsel for the respondent in opposing the application submitted that the orders granted by the superior court were not in law capable of being stayed because they were not subject to any further proceedings and no application to that effect had been filed in the superior court; that the application was punitive; that the conduct of the applicant was a relevant factor to be considered by this Court in that the applicant had allegedly taken part in the eviction of the respondent and therefore he has approached this Court with unclean hands and furthermore the applicant had filed the application almost one and a half (1½) years after the judgment and further that he had not extracted and filed any decree in support of the application.

The learned counsel further contended that the respondent has been in possession from 1985 to 1998 and was therefore in possession for 13 years which period was well within the stipulated period as

per the Limitation of Actions Act and for this reason the applicant could not possibly demonstrate an arguable appeal.

On our part we have put the submissions made on behalf of the two parties on the scales. It is trite that the jurisdiction of the court under **rule 5 (2) (b)** is original and discretionary and that for an applicant to succeed he should show that his appeal or intended appeal is not only arguable but also that unless he is granted the orders he seeks, the intended appeal or appeal if successful, the success will be rendered nugatory (see ***DAVID KAMAU V. SAVINGS & LOAN KENYA LTD Civil Application No. NAI. 2558 of 2005 (UR. 158/2005)***).

It is apt to clarify that with the advent of the overriding objective provisions pursuant to **sections 3A and 3B** of the Appellate Jurisdiction Act and in view of the fact that we are exercising a power under the Act and the rules considering the merits of this application we are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly. Thus this requirement is in our view an mandatory requirement in any **rule 5 (2) (b)** application or in any circumstance where the Court is exercising a power or interpreting any rule or any provisions of the Appellate Jurisdiction Act.

With the three requirements in view, the ground raised by the applicant of whether in the circumstances the respondent was in adverse possession and whether or not damages should have been awarded are not frivolous grounds. We do not agree with Mr. Njiru, the learned counsel for the respondent submission that the application for stay is premature because its purpose is clearly to ensue that the applicant's right of appeal is not negated by any intervening acts of the respondent.

Concerning the nugatory aspect, we are of the view that the respondent has not shown that he is possessed of means sufficient to absorb the value of the suit property if the respondent were to dispose of it or substantially change its character. In the result the applicant's success is likely to be rendered nugatory. Our take on the considerations arising from the overriding objective (0<sup>2</sup>) is that by preserving the status quo as we have done we have as a result treated both parties with equality and we have further preserved the right of appeal until a final determination on merit. In our view, striking the balance in the circumstances is acting fairly and does satisfy the principal aims of the overriding objective.

All in all what commends itself in the circumstances is to allow the application. In the result we grant a stay in terms of prayers two (2) of the application dated 5<sup>th</sup> July, 2010 and further order that the costs of the application abide the outcome of the intended appeal. It is so ordered.

***Dated at Nairobi this 22<sup>nd</sup> day of October, 2010.***

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**M. OLE KEIWUA**

.....

**JUDGE OF APPEAL**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**