



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI 248 OF 2004

PETER MAINGI APPLICANT

AND

EDWARD MALELU LUA 1ST RESPONDENT

STANLEY KYOVO LUA 2ND RESPONDENT

KYALO LUA 3RD RESPONDENT

WAMBUA LUA 4TH RESPONDENT

(Application for stay of execution of a judgment and decree of the High Court of Kenya

chakos (Wendoh, J) dated 11th March, 2004

in

H.C.C.C No. 63 of 2002)

RULING OF THE COURT

The applicant, Peter Mwangi, in a notice of motion dated 30th September 2004, brought under rule 5(2) (b) of the Court of Appeal Rules, is seeking an order that a stay of execution of the decree in High Court Civil Suit No. 63 of 2002 issued on 11th March 2004 be granted till the appeal he intends to file is heard and determined. The grounds for seeking the order are mainly two and these are first, that the intended appeal is not only arguable but raises substantial and “diguable” points of both law and fact, and secondly, that if the decree already obtained is executed prior to the hearing of the intended appeal, the results of the appeal, if favourable to the applicant, will be rendered nugatory.

The respondents oppose the application and the second respondent, **Stanley Kyovo Lua**, swore a replying affidavit on his own behalf in which, in a summary he states that the applicant’s intended appeal has no merit and that the success of the intended appeal will not be rendered nugatory if this application is refused as the appellant is in the suit premises in contempt of several court orders.

Both learned counsel, Mr. Masika, for the applicant, and Mrs. Mutua, for the 2nd respondent, addressed us at length, and the first respondent, Edward Malelu, also addressed us on the application. We have considered their submissions. We have perused and considered the record and the law.

It is not in dispute that the applicant allegedly purchased the subject property from people who had no legal authority to dispose of the property. The property belonged to the late James Maina Lua. It was sold to the applicant by people who had no valid grant of letters of administration confirmed or otherwise. That sale was *prima facie* illegal. The matter first went before the subordinate court, when the applicant sought to evict a tenant from the premises. The subordinate court gave orders in favour of the applicant but on appeal – Civil Appeal No. 68 of 1991, Torghbor J. (as he then was), in a well considered judgment, found specifically as follows:

“But as no immovable property of the deceased could be sold before confirmation of the grant (Section 82 (b) (11) it meant that the purported sale of the plot to the plaintiff by persons not holding such a grant was in breach of these provisions and therefore the sale was unlawful.”

Torghbor J., after the above finding, ordered the present applicant to vacate the suit property. An appeal against that order was filed but later withdrawn and so that decision still stands.

Later, in another matter on the same subject property – Probate & Administration Cause No. 150 of 1992, heard by Mwera J, the learned Judge stated, *inter alia*, as follows:

“From the judgment of Torghbor J, this sale was irregular as those who sold the shop did not have letters of administration to the estate of James Lua to sell any of its part. That court even ordered the 3rd respondent to vacate the shop forthwith. It was not shown or stated by his counsel that a stay of execution against vacating the shop was granted to the third respondent even after he lost his appeal. If that be correct, the 3rd respondent has continued to occupy part of the estate of the late Lua in open contempt of this Court’s orders of 22nd July 1992.”

And Mwera J. concluded his ruling in that matter as follows:

“It is observed here for the benefit of the 3rd respondent that the orders of Torghbor J. issued on 22nd July 1992 are still valid. They stand.”

The applicant was the 3rd respondent in the Probate and Administration matter before Mwera J. No appeal was preferred against that decision. Wendoh J., whose judgment the applicant intends to appeal against, in her judgment in High Court Civil Case No. 63 of 2002, states that the applicant’s defence in that case was struck out. The applicant did not appeal against that ruling striking out his defence, so that that case proceeded formal proof. The learned Judge adopted the decision of Torghbor J. and that of Mwera J., both of which we have referred to hereinabove.

Mr. Masika submitted that the intended appeal is arguable because the learned Judge awarded mesne profits as general damages whereas the mesne profits are in law special damages and that she awarded mesne profits at Ksh.2,000/= per room per month whereas there was no evidence before her to enable her arrive at that decision. Those findings by the Judge do not go to the root of the matter which appears to us to be whether or not the applicant’s possession of the suit property is lawful.

In our view, we see no arguable points so long as the decisions of Torghbor and Mwera, JJ. remain undisturbed.

The application is premised on **rule 5(2) (b)** of this Court’s Rules. The jurisdiction exercisable by this Court under **rule 5(2) (b)** is original and discretionary. For the application to succeed, it must satisfy the twin guiding principles which are that the intended appeal is arguable, that is that it is not frivolous, and that unless a stay is granted, the results of the intended appeal, should it eventually succeed, would be rendered nugatory – see the cases of **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) 1988**,

KLR 838 and J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982 – 88) I KAR 1688.

As must be clear from the above, we are not persuaded that the intended appeal is arguable. That being our view of the matter, we need not go into the second principle of whether or not the refusal of this application would render the results of the intended appeal nugatory were the intended appeal to succeed.

The upshot of the foregoing is that this application fails. It is dismissed with costs to the first and second respondents.

Dated and delivered at Nairobi this 8th day of June, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR