REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, O'KUBASU & ONYANGO OTIENO, JJ.A)

CIVIL APPLICATION NAI 35 OF 2005 (UR.21/2005)
BETWEEN

KALONDU MBUSYA ……..…..…… APPLICANT

AND

1. MARTIN KIMWELE KIKOI)

2. PAUL MBITHI)

3. PATRICK KILONZO)

4. JASPER MULANDI)

5. DICKSON MUTIE)

6. SIMON K. NGOLOLO) ….....……...…..… RESPONDENTS

7. WAMBUA KIMWELI)

8. JOHN KIMWELI)

9. MWOLOLO KINYOO)

10. SHEM MASIO)

11. NELSON MASIO)

(Application for stay of execution pe nding the hearing and determination of an intended appeal from part of the ruling and order of the High Court of Kenya at Machakos (Wendo, J) dated 25th January, 2005 in H.C.C.C No. 228 of 1999)

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RULING OF THE COURT

In Civil Suit **No. 48 of 1998**, the 1st respondent, **Martin Kimwele Kikoi**, sued the applicant, **Kalondu Mbusya**, seeking a declaration that the 1st respondent was the lawful owner of all that parcel of land known as KIENE NGUNDU 16/70 measuring 27.2 acres or thereabouts. He also sought costs and any other relief the court deemed fit and just to grant. That plaint was dated 26th February, 1998. In a Civil Suit dated 15th July, 1999, the applicant sued the 1st respondent together with ten others also seeking a declaration that the same parcel of land namely **KIENE NGUNDU 16/70** (but this time measuring 30 acres) belonged to the applicant, and that the documents pertaining to the land as well as receipts issued towards the payment for the land be returned to her. She also sought an injunction to restrain the other respondents, their agents or licencees and any other 3rd parties from trespassing onto the same land, planting sisal and fencing it, and from tilling the same land. She also wanted general damages and costs as well as interest on both. The two suits were consolidated and heard in Civil Case No. 228 of 1999 by Mwera, J. who in a lengthy judgment delivered on 29th July, 2003, ordered as follows as per the decree:-

> **"1. THAT 1st Defendant Martin Kimwele Kikoi is the right owner of Plot No. 16/70, but the Court will add that much as Kalondu and her sons have ancestral land to go to, Kimwele should not withdraw his offer of some part of Plot No. 16/70 which he has always given to Kalondu.**
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> **2. THAT the Ambua clan will do well to review its decision to return Kalondu to her people.**
>
> **3. THAT the plaintiff do pay to the 1st Defendant Mr. Martin Kimwele Kikoi costs of this suit.**
>
> **4. THAT in summary, Martin Kimwele Kikoi wins and Kalondu Mbusya loses in the consolidated suit."**

The applicant felt aggrieved by this judgment and filed a notice of appeal on 31st July, 2003. Later after about one year, and to be precise on 22nd July, 2004, the applicant filed a notice of motion in the superior court seeking a stay of execution of the decree consequent upon the judgment delivered on 29th July, 2003, until the intended appeal is heard and determined or on such terms as it may deem fit in the circumstances. As is one of the requirements of **Order 41 rule 4** under which the application was made, the applicant stated in her grounds in support of the application that she was ready and willing to abide by any order for security as the court would deem fit. That application was strenuously opposed. It was heard by Wendo, J. who, in a ruling delivered on 25th January, 2005, allowed the application and granted stay on condition stating as follows:-

> **"The applicant claims to have been on the land for over 20 years and it is my view that if stay is not granted the applicant will suffer substantial loss as she may be evicted from the land and it might be put beyond her reach by the time the appeal is determined. If the applicant is evicted and the suit land put beyond her reach would (sic) then render the appeal nugatory. The applicant urged that they were ready to offer whatever security the court ordered. Stay is a discretionary remedy and this being a land matter that touches the heart of the Kenyan considering the history of the land and the admitted fact that the applicant has been on the land for long and despite the delay in filing this application, this court will exercise its discretion and grant a stay of execution on condition that the applicants (sic) deposit a sum of Ksh.150,000 as security for the due performance of the decree. The said sum be deposited in court within 21 days of today's date in default the order of stay vacates. To avoid any further delays, it is also ordered that the appeal be filed within the said 21 days or the order of stay vacates."**

That order is the genesis of this application. The applicant, though granted the order of stay, was

aggrieved with the conditions attached to the same order. She has now brought this application before us in which she is seeking the following order:-

> **"1. This Honourable Court be pleased to order a stay of execution of part of the ruling and order of the High Court made on 25th January, by Hon Justice Stella Wendoh in Civil Case Number 228 of 1999 until the final determination of the applicant's intended appeal to the effect that:-**
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> > **(a) That the plaintiff deposits a sum of Ksh.150,000/= within 21 days as security.**
> >
> > **(b) That an appeal be filed within twenty-one (21) days failure of which the decree be executed."**

The application is made on the ground, among others, that the applicant is of little means and is unable to raise the amount of Ksh.150,000/=; that her inability should not be a bar to her accessing justice; that the order is punitive in the circumstances as this is not a money decree; that the order to file the appeal within 21 days cannot be complied with as the court has to first certify the proceedings as correct even though the same proceedings were typed by the applicant's counsel; that certified copies of the proceedings of the superior court are not yet ready; that the intended appeal is arguable and if stay is not granted, the results of the same appeal, if successful, may be rendered nugatory.

There is an affidavit in support of the application. The respondents opposed the application and contended in their replying affidavit and further affidavit that as the applicant had offered to abide by any security that the court would order, she was estopped from claiming that she cannot offer the security ordered and abide by the order of the superior court requiring her to file the appeal within 21 days of the date of the ruling as she had indeed delayed in filing the appeal and in filing the application for stay before the superior court, the subject of the superior court's order. The respondents also maintained that this application amounted to an appeal against the decision of the learned Judge of the superior court on her decision on the application for stay of execution and that being the case, there should have been a notice of appeal filed and draft grounds of appeal should have been filed. Lastly, the respondents stated that the intended appeal is not arguable and that the 1st respondent has already obtained title to the land, the subject of the intended appeal.

Order 41 rule 4 of the Civil Procedure Rules does not stop a litigant who has applied for stay of execution in the superior court from making an application to this Court for the same stay of execution. Indeed, before it was amended, that rule made it clear that parties seeking stay of execution had to first apply to the trial court for stay before accessing the appellate court. Such a subsequent application, as this, cannot be viewed as an appeal against the decision of the trial court on the application for stay first filed before the trial court. We therefore see no merit in the respondents' assertion in their affidavit that this application is incompetent as it is in effect an appeal from the decision of the superior court and has not been premised upon a notice of appeal and no draft memorandum of appeal was annexed. Of course, it is not an appeal. It is an application, albeit fresh application, on grounds that though the applicant first obtained a stay from the trial court, she was not satisfied with part of the decision of the superior court and she has now made a fresh application which we need to look at afresh.

An applicant seeking orders under **rule 5(2) (b)** is seeking a discretionary remedy. That being the case, he has to satisfy the court on two matters, which are, first, that the appeal lodged or the intended appeal is arguable. In other words, that the appeal or intended appeal is not frivolous. Secondly, he has to demonstrate to the court that if the intended appeal were to succeed, the results would be rendered nugatory if stay is not granted.

We have considered this application, the entire record, the submissions by the learned counsel, and the law with the above principles in mind.

Without stating anything on the merits or demerits of the intended appeal for fear of prejudicing the intended appeal, we are of the view that the judgment of the superior court on the weight that the court

attached to the documents and the records of the subject land and the effect of the same on the entire case together with the final judgment which might be difficult to execute are matters that are arguable and are not frivolous.

We do agree with the learned Judge in her observation that if this application is not granted, the results of the intended appeal, if successful, will be rendered nugatory as by the time the appeal is determined, the subject land might be put beyond the applicant's reach and if she is evicted and the suit land, which, we understand, is already in the name of the 1st respondent, is sold by the 1st respondent, then, even if her intended appeal succeeds, the resultant success would be no more than a pyrrhic victory.

Thus, we do agree with the learned Judge that stay orders were warranted in this matter in which members of one family are fighting over a family land. We do not think, it was necessary in the circumstances, to put conditions on such a stay. The first condition of depositing Ksh.150,000/= within 21 days of the ruling was clearly misplaced as this was not a money decree and when the applicant was offering security, she must have been understood to be complying with requirements of **Order 41 rule 4** of the Civil Procedure Rules and thus the security had to be relevant and consonant with the circumstances of the suit. As to the second condition of filing the appeal within 21 days of the date of the ruling, all we need to observe is that that order could not be legally tenable as the applicant was before the court for an application for stay and not an application for extension of time to file an appeal. Secondly, it could not be legal, as it would militate against the applicant exercising his rights to apply for extension of time to file an appeal once the proceedings were ready together with certificate of delay supplied by the Deputy Registrar of the superior court. Thus, the latter condition imposed would interfere with the applicant's rights under rule 4 of the Court of Appeal Rules. Although, as we have stated, we are not sitting on an appeal against the learned Judge's ruling, we need to state that any condition ordered by the court for doing or not doing anything should not in itself create an impediment for a litigant to access justice. Such a condition must be fair and must not amount to a refusal to grant the order. If the condition ordered is so insurmountable and impossible to accomplish like was the case here where the applicant was requested to file an appeal within 21 days without first ascertaining whether all the requirements such as proceedings, certificate of delay e.t.c were in place, then such a condition amounted to a refusal to grant the stay. That is not proper. It amounts to injustice.

In conclusion, we grant stay as is prayed for in the application before us. We stay the conditions that were ordered by the superior court. For avoidance of doubt, we grant unconditional stay till the intended appeal is filed, heard and determined or till further orders of the Court. We make no order as to costs. Order accordingly.

Dated and delivered at Nairobi this 14th day of April, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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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