



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Application No. 77 of 2006

JOEL WAMBUGU GATAMA 1ST APPLICANT

ELIZABETH MUKUHI GATAMA 2ND APPLICANT

AND

NDEGWA NDIANGUI RESPONDENT

(Application to seek stay of execution from judgment and decree of the High Court of Kenya at Nairobi (Hon. Lady Justice Ang'awa) dated 12th June, 2000

in

H.C.C.C. NO. 6335 OF 1991)

RULING OF THE COURT

We have before us an application by way of notice of motion brought under **Rule 5(2)(b)** of the Court of Appeal Rules (the Rules) in which the applicants herein, **Joel Wambugu Gatama** and **Elizabeth Mukuhi Gatama** are seeking essentially one main prayer:-

“1.

2. **THAT there be stay of execution of the decree of the superior court made on the 12th day of June, 2000 in high court civil case number 6335 of 1991 pending the hearing and determination of the appeal herein.**

3.

This application was based on the following grounds:-

“(a) THAT the appellants have an arguable appeal and the same will be rendered nugatory if stay is not granted.

(b) THAT the respondent through his advocate has filed an application in the superior court seeking execution of the decree dated 12th day of June, 2000.

(c) THAT the applicants stand to suffer irreparable loss and damage should stay be withheld.”

It should be pointed out that the judgment of the superior court (Ang’awa, J.) was dated 8th June, 2000 and **not** 12th June, 2000 as stated in this application.

Mr. Onalo, the learned counsel for the applicants, however, sought leave to effect the necessary amendment as regards the dates which leave was granted by this Court.

The background to this application is rather interesting. The hearing in the superior court proceeded ex parte as the applicants herein who were the defendants in the superior court failed to attend court on the day set down for the hearing of the suit. Being dissatisfied by the judgment of the superior court, the applicants decided to file an appeal rather than an application to set aside the said judgment.

Mr. Onalo, in his brief submission, told us that his clients had a good appeal with chances of success and that the respondent was likely to execute the decree of the superior court.

Mr. Gathenji, the learned counsel for the respondent, started off by stating that the fact that there had been an earlier appeal which had been struck out had not been disclosed by the applicants’ counsel. He went on to reveal that there had been an earlier application in the superior court seeking stay which application was dismissed. All this had not been disclosed to us by Mr. Onalo. It would appear that Mr. Onalo was not candid in the handling of this matter.

Mr. Gathenji further submitted that it had not been shown that the appeal would be rendered nugatory if the application for stay was not granted.

As it has been repeatedly stated, an application under **rule 5(2)(b)** of the Rules must be looked at with the two principles in mind i.e. first, whether the appeal is arguable and secondly, whether if the application is refused, the results of the appeal if successful, would be rendered nugatory. In the case of **TRUST BANK LIMITED AND ANOTHER V. INVESTECH BANK LIMITED AND 3 OTHERS – Civil Application No. Nai. 258 of 1999** (unreported) this Court stated inter alia:-

“The jurisdiction of the court under rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly, that his appeal or intended appeal is arguable, or put another way, it is not frivolous, and secondly, that unless he is granted a stay the appeal or intended appeal if successful will be rendered nugatory. Those are the guiding principles but these principles must be considered against facts and circumstances of each case.”

In the course of his submission, Mr. Gathenji stated that what was before the High Court was execution for the transfer of the suit property subject to full purchase price being deposited. That being the position, we fail to understand how the applicants would be prejudiced if we refused this application. We do not wish to express any view as regards the success or otherwise of the intended appeal but taking into account what has been placed before us, we are unable to say that the intended appeal will be rendered nugatory if we refused to grant the stay sought.

For the foregoing reasons, we find no merit in this application and consequently, we order that the notice of motion dated 21st March, 2006 be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of April, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR