Thara & another v Actae Development Ltd & another (Civil Application E054 of 2022) [2024] KECA 107 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KECA 107 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E054 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

FEBRUARY 9, 2024

BETWEEN

MOSES NJOROGE THARA ..... 1ST APPLICANT

WINFRED MWENDIA ..... 2ND APPLICANT

AND

ACTAE DEVELOPMENT LTD ..... 1ST RESPONDENT

SIX SIXTY-ONE GALU BEACH MANAGEMENT LTD ..... 2ND RESPONDENT

(An application for stay of execution of the judgment and decree of the Environment and Land Court at Mombasa(N. A. Matheka, J.) delivered on 26th July 2022 inELC Case No. 196 of 2015)

RULING

1. By Notice of Motion dated August 19, 2022 brought pursuant to rule 5(2) (b) of the *Court of Appeal Rules, 2022*, the applicants, Moses Njoroge Thara and Winfred Mwendia seek stay of execution of the judgment of the Environment and Land Court in Mombasa pending filing, hearing and determination of an intended appeal.

2. The motion is brought on the grounds set out on its face and supported by a sworn affidavit of the 1st applicant dated August 19, 2022 wherein it was deponed that, in the judgment, the learned judge dismissed the applicants' case, allowed the respondent's counter claim and ordered the applicants to pay Kes 1,357,542 as at October 15, 2015 together with such charges as may be properly levied between October 1, 2015 and the conclusion of the suit together with interest thereon from the date the sums accrue until the date of payment; that they were also condemned to pay costs of the counter claim.

3. They were dissatisfied with the judgment filed a notice of appeal, and applied for proceedings to file an appeal in this Court on the grounds, *inter alia*, that: the learned judge was in error in failing to find as a matter of fact that the respondents unilaterally and without complying with their obligations under a

Sub-lease dated March 4, 2011, in respect of Villa No. 10 in the Executive Residential Development *(the development)* at Lantana Galu Beach situated on plot number Kwale/ Galu/Kinondo/661 *(the subject property),* converted the development comprising executive residential apartments, villas, bungalows and penthouses on the subject property to Hotel Type apartments, villas, bungalows and penthouses contrary to the permitted user; and in finding that the applicants having resided in their villa, had made use of the social and recreational amenities, and were therefore obligated to pay service charge; and in failing to appreciate that the applicants paid the provisional service charge specified in the Sub-Lease, and were not therefore obliged to pay service charge demanded by the respondents for extended use beyond the permitted user, particularly as no evidence was led to support the claim for service charge.

4. The applicants contended that the proposed appeal raises serious arguable issues with very high chances of success, and that, unless an order of stay of execution is granted, the intended appeal will be rendered nugatory, as the applicants are apprehensive that the respondents will execute the decree to compel them to pay the decretal amounts, and that they will be unable to recover the monies paid should they be successful in prosecuting their appeal.

5. The respondents opposed the application and, in the replying affidavits sworn on behalf of the respondents by Hamish Govani and Eric Govani on September 16, 2022 and September 27, 2022 respectively, it was deponed that the service charge arrears, inclusive of a surcharge on arrears, currently owing by the applicants was Kes11,729,551.38; that, since January 2021, the applicants have refused and/or failed to pay any service charge, including what they term as provisional service charge; that the applicants have and continue to enjoy unfettered access to the common areas, including swimming pools, gym, manicured gardens, car parks, just like the other homeowners to the respondents prejudice. It was further deponed that the 2nd respondent is financially capable of reimbursing the decretal amount in the event the appeal is successful.

6. Both the applicant and the respondents filed written submissions. Highlighting their submissions during a virtual hearing, learned counsel for the applicants, Mr. Odera, submitted that the applicants have demonstrated that the appeal has a very high chance of success, and that it would be rendered nugatory if the order for stay of execution was denied. Counsel stated that the appeal was filed on October 3, 2022 as //Civil Appeal No. E09 of 2022, and that the applicants could deposit either the whole amount of money or part thereof in a joint account because, were they to pay it, the respondents may not be in a position to refund it should they succeed in the appeal.

7. Also highlighting their written submissions, learned counsel for the respondents Mr. Ishmael and Mr. Muhindi, reiterated that the respondents were in a position to refund the decretal sum and, therefore, the Appeal would not be rendered nugatory in the event the appeal was successful. Counsel further asserted that the applicants have not demonstrated that their intended appeal is arguable as the grounds of appeal raised are not arguable.

8. In brief, the background to the intended appeal is that, through an Agreement of Lease dated June 2, 2010 entered into by the 1st respondent as Vendor and the applicants as purchasers, the 1st respondent agreed to grant a sub- lease to the applicants in respect of the development for a consideration of Kes 33,654,364.

9. The applicants filed suit against the respondents seeking an order of permanent injunction against them, their servants and agents to restrain them from breach of the sub lease dated March 4, 2011 and more particularly the covenant concerning the permitted user of units constructed in the development, general damages for loss of use and quiet enjoyment of Villa 10, special damages, interest, and costs.

10. It was their claim that, in breach of the terms of the Agreement of Lease and the Sub-lease, the respondents, without their approval, had unilaterally and contrary to the agreement, converted the

permitted user of the development from executive residential apartments to hotel type apartments, villas and bungalows; that the conversion of the permitted user was not only a breach of the agreed terms, but also a breach of the regulatory approvals granted in respect of the development; and that the effect of the conversion curtailed their use and enjoyment of their investment.

11. In their defence and counterclaim, the 1st respondent contended that as developer and the registered proprietor of the leasehold interest in the subject property, it entered into a lease agreement with the applicants; that the agreement was to operate as an executory agreement, and was not to be construed as a lease over the villa which was superseded by the Sub Lease dated 4th March 2011 that obligated the 1st respondent to transfer the reversionary interest over the subject property to the 2nd respondent. It was their case that, by a letter dated August 12, 2010, a sub contractual and Facilities Management Agreement dated November 1, 2011, Hotel Type Agreement, Deed of Adherence and Sub Lease, were forwarded to the applicants. In particular, that the applicants would be required, as a condition precedent, to sign the Deed of Adherence accepting the terms contained in the Sub Contractual and Facilities Management Agreement between the respondents and Synad Properties Limited. The Sub contractual and Facilities Management Agreement was entered into with Synad Properties pursuant to the 2nd respondent's obligation under the 9th Schedule of each Lease to manage and maintain the development.

12. It was the respondents' contention that each buyer had the choice to enter into the Rental Scheme by signing the Hotel Type Agreement and that the applicants declined to enter into the Rental Scheme, but signed the Deed of Adherence accepting the terms of the Sub Contractual and Facilities Management Agreement; that, furthermore, under the Lease, the applicants are required to pay service charge computed by the 2nd respondent, and that, while they had been paying a quarterly service charge of Kes 136,595.67 as specified by clause 2.25 of the sublease, it was also a term of the sublease that the service charge would be computed on the basis of periodical expenditure incurred by the 2nd respondent for provision of services listed in the schedules. It is on this basis that the 2nd respondent computed and revised the service charge based on the actual periodical expenditure and informed all lessees of the respective sums payable as service charge; that the revision of the quarterly estimated service charge was made for the years 2013, 2014 and 2015, following detailed analysis of the audited accounts for the years 2012, 2013 and 2014; that statements of account were sent to each of the owners, including the applicants, specifying the amount owed. As at 1st October 2015, the applicants were in arrears of service charge of Kes 1,357,542.00 which amount continues to accrue to date as the applicants have declined to pay the additional amounts.

13. In the counterclaim, the 2nd respondent sought judgment against the applicants for an amount of Kes 1,357,542.00 as at October 1, 2015 together with such charges as may have accrued between October 15, 2015 and the conclusion of the suit together with interests from the date the sums accrue until the date of payment; a declaration that the 2nd respondent has the right to withhold the services to the applicants until full payment is received, and the costs of the counterclaim.

14. Upon considering the dispute, the trial Judge dismissed the applicant's claim and entered judgment for the respondents in the following terms:

    ... the Plaintiffs have failed in their claim and their suit must fail. I find no merit in the Plaint dated August 26, 2015 the same is dismissed with costs to the Defendants. In the same breath, I find merit in the Defendants' counterclaim dated October 5, 2015 and grant the following orders:

    1. The Plaintiffs to pay Kshs 1,357,542.00 as at 1 October 2015 and such charges as may be properly levied between 1 October 2015 and the conclusion of this suit together with interest thereof from the date the sums accrue until the date of payment.

2. The Plaintiffs to pay costs of the counterclaim."

15. It is this decision against which the applicants seek stay of execution.

16. The principles that guide this Court in determination of an application under rule 5 (2) (b) of this *Court's Rules* are well settled. The principles are well summarised in *Stanley Kangethe Kinyanjui vs Tony Ketter and 5 others* [2013] eKLR, to wit: an applicant must demonstrate that the appeal or intended appeal is arguable; and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.

17. In determining whether the intended appeal is arguable or not, it has been stated time without number that an arguable appeal is not one which must necessarily succeed, but one which ought to be fully ventilated before the Court; one which is not frivolous. See *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd. and 2 others*, Civil Application No. 124 of 2008. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See also *Damji Pragji Mandavia v Sara Lee Household and Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.

18. Concerning whether the appeal is arguable, the gravamen of the applicants' appeal, as can be discerned from the draft grounds of appeal, are that the trial judge failed to find that the respondents unilaterally, and without their consent or approval, converted the permitted user of the development from executive residential apartments, comprising villas, bungalows and penthouses, to Hotel Type apartments, comprising villas, bungalows and penthouses, and further that, the learned judge failed to appreciate that the applicants had paid the provisional service charge specified in the Sub-Lease, and were therefore not obliged to pay service charge for the extended user beyond that permitted in the Sub-lease; that, by so doing, they were ordered to pay additional service charge whereas no evidence was led to support the respondents' claim.

19. Indeed, if the learned judge was wrong in construing the terms of the sub lease to find that the respondents were entitled to convert the residential apartment to hotel type apartments, and also wrongly construed the sub lease agreement to conclude that the applicants were required to pay the provisional service charge as well as service charge for the extended user beyond that permitted in the Sub-lease, then these are issues we consider to be arguable.

20. On the nugatory aspect, the applicants' counsel submitted that, if the respondents execute the decree and compel them to pay the sums ordered, they will be unable to recover monies paid to the respondents in respect of service charge for the extended user should the appeal succeed, which would render the appeal nugatory. It was also indicated that the applicants were willing to deposit the decretal sums in a joint account.

21. On the other hand, the respondents have sought to demonstrate that they are capable of repaying the decretal sum, if paid, should the appeal be successful.

22. In the judgment, the applicants were ordered, "...to pay Kshs 1,357,542.00 as at 1 October 2015 and such charges as may be properly levied between 1 October 2015 and the conclusion of this suit together with interest thereof from the date the sums accrue until the date of payment".// What is apparent from the order is that, besides the ascertained amount of Kes 1,357,542 that the applicants were ordered to pay, the court also ordered them to pay unascertained amounts between 1st October 2015 and the conclusion of this suit together with interest from the date the sums accrue until the date of payment. From our understanding of the application, it is the basis of accrual of these sums that has been challenged by the applicants. So that, in the event the applicants are compelled to pay these amounts, and the appeal is successful, they would have had to unnecessarily and prematurely summon resources for payments that were not ultimately due to the respondents. Though, it is not

lost on us that the respondents have stated that they are capable of refunding the amounts paid, we nevertheless consider that payment of such amounts, given the circumstances, cause needless hardship and substantial prejudice on the applicants, which would in effect render the appeal nugatory. But, having said that, the specified charges of Kes 1,357,542 should be deposited in a joint interest earning account with a reputable bank.

23. In view of the foregoing, the applicants having satisfied the twin requirements specified under rule 5(2)(b) of this *Courts' Rules*, the motion dated August 19, 2022 is merited and is hereby allowed.

24. Accordingly, we order and direct that there be stay of execution of the judgment and decree of the Environment and Land Court at Mombasa dated January 21, 2021 and delivered on July 26, 2022 in ELC Case No. 196 of 2015 pending hearing and determination of the applicant's appeal, and on condition that the applicants deposit Kes 1,357,542 in a joint interest earning account with a reputable bank in the names of the parties' advocates within 30 days from the date of this ruling; that the order will lapse in the event of failure by the applicants to comply. The costs of this application do abide the outcome of the appeal.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY, 2024.

A. K. MURGOR

JUDGE OF APPEAL

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DR. K. I. LAIBUTA

JUDGE OF APPEAL

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G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR