



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Lemereng v Ngolepus & another (Civil Application
E017 of 2022) [2024] KECA 942 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 942 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E017 OF 2022
FA OCHIENG, LA ACHODE & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

REUBEN LEMERENG APPLICANT

AND

JOSEPH PKERKER NGOLEPUS 1ST RESPONDENT

WILSON LONAPA 2ND RESPONDENT

(An Application for stay pending the filing, hearing and determination of an Appeal from the Judgment of the Environment and Land Court at Kitale (F. Nyagaka, J.) delivered on 27th September, 2022 in ELC Cause No. 176 of 2017)

RULING

1. By an application dated 31st October 2022, the applicant asked this Court to grant an order for stay of execution of the Judgment delivered on 27th September 2022, in the case of Kitale ELC Cause No. 176 of 2017; Joseph Pkerker Ngolepus Vs Wilson Lonapa & Reuben Lemereng.
2. The applicant was the 2nd defendant in the case before the trial court.
3. In the impugned Judgment, the trial court granted the following orders;
 - a. A declaration be and is hereby made that the 1st Defendant is in breach of the agreement dated 20/04/2017.
 - b. the 1st Defendant shall pay the Plaintiff the sum of Kshs 2,200,000.00 being 20% of the consideration amount as captured in their agreement dated 20/04/2017.
 - c. An order be and is issued rescinding the agreement dated 20/04/2017 between the Plaintiff and the 1st Defendant.



- d. A declaration be and is hereby made that the Plaintiff is the proprietor of that parcel of land known as Plot No. D/3 Makutano Town and should be registered so.
 - e. An order be and is hereby issued cancelling forthwith any changes of ownership, in the relevant office, of all that parcel of land known as Plot No. D/3 Makutano Town contrary to (d) above.
 - f. The 1st Defendant's Counterclaim dated 04/02/2020 is unmerited and is hereby dismissed with costs to the Plaintiff.
 - g. In the interest of Justice, and to avoid unjust enrichment, the plaintiff to refund the 1st Defendant the sums of money paid to him by the said Defendant, pursuant to the rescinded agreement.
 - h. In the alternative to the Orders above, and should the Plaintiff not rescinding the contract entered into on 20/04/2017, the plaintiff and 1st Defendant to negotiate afresh the sale of the suit land and factor in it, the balance due, the damages payable and the consideration to be reached.
 - i. The 1st Defendant shall meet the Plaintiff's costs of the suit.
 - j. Interest.”
4. Being dissatisfied with the judgment, the 2nd defendant filed a Notice of Appeal dated 30th September 2022.
 5. Thereafter, the said 2nd defendant filed the current application, seeking a stay of execution of the judgment, until the determination of his intended appeal.
 6. The application was supported by the applicant's affidavit, which was sworn on 31st October 2022.
 7. In answer to the application, the 1st respondent filed a replying affidavit.
 8. Essentially, the 1st respondent expressed the view that the learned trial judge did not make any orders against the applicant.
 9. The 1st defendant pointed out that the declaratory orders made in the case, constituted “negative orders”, which were thus incapable of being executed.
 10. The 1st respondent appreciates that the decision as to whether or not to order that execution be stayed, is one of a discretionary nature. However, he believes that the said relief;

“..... is designed on the basis that no one would be worse off by virtue of an order of the court, as such order does not introduce any disadvantage but administers the justice that the case deserves, and this is in recognition that both parties have rights.”
 11. The 1st respondent invited this court to balance the interests of both the successful party in litigation, so as not to unnecessarily bar him from enjoying the fruits of the judgment; and the interests of the Appellant whose appeal may succeed and be rendered nugatory if the order for stay of execution was not granted.
 12. In the understanding of the 1st respondent, the applicant had terribly failed to demonstrate the kind of prejudice which he stood to suffer if execution was not stayed. The said understanding is premised on



the reasoning that the applicant can always be compensated by an award of damages and costs, should his appeal finally succeed, after the judgment had been executed.

13. Another issue which was raised by the 1st respondent was that the notice of appeal herein was ambiguous as it did not specify whether the intended appeal was against the entire judgment or was only against specified portions thereof.
14. In the event, the 1st respondent contends that the applicant's failure to specify the extent to which his intended appeal reached, placed this Court in an awkward situation, as the Court would be left to speculate on what exactly the intended appeal was in respect of.
15. Nonetheless, the 1st respondent went on to state as follows, at paragraph 38 of his relying affidavit.

“That the said Draft memorandum of Appeal by the Applicant is based on a single issue of whether part payment by a third party to buy a property, that is subject to litigation, with the knowledge thereof, ousts the rights of the party to claim for rescission of a pre-existing agreement and makes the third party a bona fide purchaser.”

16. Although the 1st respondent held the view that that issue lacked merit, we hold a contrary view. Our said view is premised upon the applicant's contention, that he was not aware of the part payment by the third party, of the purchase price. In those circumstances, the appellate court would first have to ascertain whether or not the applicant had prior knowledge of the said payment. Secondly, the Court would have to determine if the third party was an innocent purchaser for value, without notice.
17. At this stage, when we are called upon to determine whether or not to grant an order for stay of execution, we are alive to the caution, that the Court ought not to render any definitive pronouncements on matters that will be determined by the bench which will determine the appeal. Accordingly, we do exercise restraint in making any further pronouncements on the strengths or weaknesses of the appeal.
18. However, we are satisfied that the applicant had demonstrated that the appeal raises at least one arguable issue. In other words, the appeal is not a mere frivolity. It is an appeal which has a possibility of success.
19. That conclusion is further informed by the fact that whereas the learned Judge held that the transaction between the applicant and the 2nd respondent was fraudulent, the applicant holds the view that there was no legal basis for such a holding, as the pleadings did not contain any averments of fraud.
20. To our minds, that is an arguable issue.
21. But the 1st respondent emphatically stated that there were no orders that were capable of execution against the 1st applicant, as the orders in issue were all of a negative nature.
22. In the case of *Kaushik Panchmatia & 3 Others vs Prime Bank Limited & Another* [2020] the Court stated as follows:

“... that a negative order is incapable of being stayed because there is nothing to stay.”
23. We are persuaded that declaration orders are, in principle, orders of a negative nature. Accordingly, there would, ordinarily be no action required to execute the declaratory orders.
24. However, we cannot lose sight of the fact that certain declaratory orders can be worded in such a manner that they contain connotations of “positive orders.”



25. In this case, one of the orders made by the learned Judge was as follows;
- “(d) A declaration be and is hereby made that the plaintiff is the proprietor of that parcel of land known as Plot No. D/3 Makutano Town and should be registered so.”
27. Clearly, that order does not contain only a declaration of rights: it goes further to state that the plaintiff should be registered as the proprietor of the suit land.
28. In order to give effect to the order for the plaintiff to be registered as the proprietor, the learned Judge went on to give the following order;
- “(e) An order be and is hereby issued cancelling forthwith any changes of ownership, in the relevant office, of all that parcel of land known as Plot No. D/3 Makutano town contrary to (d) above.”
27. Accordingly, there would be the need to first cancel the registration of any other person or persons as the proprietor(s) of the suit land, so as to give way for the plaintiff to be registered as the proprietor.
28. In the circumstances, there are orders herein whose execution can be stayed, because the said orders require some steps to be undertaken, if the orders are to be actualized.
29. The applicant is in possession of the suit land. If his title is cancelled, and if the land is registered in the name of the 1st respondent, whilst the appeal was pending, we find that there would be nothing to stop the 1st respondent from evicting the applicant from the said property.
30. Mr. Wanyama, learned counsel for the 1st respondent told us that his client does not have any orders for the eviction of the applicant.
31. Whereas no such order has been issued, so far, the same could be issued after the registration of the proprietor has been changed.
32. Furthermore, the 1st respondent pointed out that the suit property is a commercial property which generates substantial income. Mr. Wanyama advocate alluded to the need to have the rental income paid into an account which was in the hands of both the applicant and the 1st respondent.
33. This was a clear indication to the Court that the orders against which the applicant has lodged an appeal, are not simply of a declaratory nature. The 1st respondent definitely wishes to lay his hands on the rental income or to at least have an element of control in that respect, even before the appeal was determined.
34. Having given due consideration to the application, the written submissions, the oral submissions and the relevant law, coupled with the authorities which were cited by the parties, we find that the applicant has demonstrated that he has an arguable appeal.
35. We further hold that unless execution is stayed, the appeal may well be rendered nugatory.
36. As the applicant has satisfied us on the twin requirements for the award of an order for the stay of execution, we hereby order that there shall issue forthwith an order for stay of execution of the Judgment delivered on 27th September, 2022, until the appeal is heard and determined.
37. The costs of the application shall abide the outcome of the substantive appeal.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.



F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

