



**Solio Ranch Limited v Registrar & another (Civil Application
E016 of 2024) [2024] KECA 1077 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 1077 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E016 OF 2024
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
JULY 26, 2024**

BETWEEN

SOLIO RANCH LIMITED APPLICANT

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

JAMES MUCHANGI GACHEMI 2ND RESPONDENT

*(Application for stay of execution pending the hearing and determination
of the appeal filed from the judgment of (J. Olola, J.) dated and
delivered at Nyeri on 9th March, 2023 in Nyeri E.L.C. No. 39 of 2016)*

RULING

1. By a notice of motion dated 20th February, 2024 brought under, inter alia, Rule 5(2)(b) of the [Court of Appeal Rules, 2022](#) the applicant seeks an order of stay of execution of the judgment and decree of the Environment and Land Court (ELC) (J.O. Olola, J), delivered on 9th March 2023 in Nyeri ELC Civil Case No 39 of 2016 pending hearing and determination of the substantive appeal.
2. In the judgment, the learned Judge allowed the 1st respondent's claim. In the suit before the ELC, the 1st respondent claimed that by a sale agreement dated 10th December 2012 between the applicant's duly appointed agent, Tysons Limited, and the 1st respondent, the latter agreed to purchase the suit properties being LR Number 11571/36 for Kshs 50 Million which the respondent paid in full and LR Number 11571/37 for Kshs 60 Million which the 1st respondent admitted to paying a deposit of Kshs 11 Million. It was the 1st respondent's case that it was an express term of the agreement that the suit properties would be transferred to him free from any encumbrances based on the terms and conditions in the agreement dated 10th December 2012. That despite the applicant receiving the monies aforesaid as the purchase price, it proceeded on 6th May 2014 to issue a new letter of offer to the 1st respondent couched in similar terms as the earlier agreement.



3. The 1st respondent contended that on or about 27th May, 2014 upon request by the 1st respondent, the purchase price of Kshs 61 Million was transferred from the 1st respondent's account to the applicant's advocates M/s Kaplan and Stratton Advocates, and that on 19th June, 2014 the 1st respondent requested the applicant to engross the draft sale agreement in respect of LR Number 11571/36 and also forwarded draft transfers to the applicant's advocates for confirmation so as to enable engrossment and execution but the applicant failed to complete the agreement obligation as a result of which the 1st respondent suffered loss and damage hence the suit. These are the circumstances that birthed the suit and resultant judgment appealed against, which has given rise to the application under our consideration.
4. In his judgement, the learned Judge allowed the 1st respondent's suit and issued orders, inter alia, as follows;
 - a. an order is hereby made directing and compelling the defendant to forthwith execute all documents and do all acts for purposes of completing the contract between the plaintiff and the defendant for the sale of the property known as LR Number 11571/36 and delineated in survey plan number 361443 situate West and South West of Naromoru within Laikipia County;
 - b. subject to payment of the sum of Kshs 49,000,000 within 60 days from today by the plaintiff to the defendant an order is hereby issued directing and compelling the defendant upon receipt of the said sum from the plaintiff to forthwith execute all documents and do all acts for purposes of completing the contract between the plaintiff and the defendant for the sale of the property known as LR Number 11571/37 and delineated in survey plan number 361444 situate West and South West of Naromoru within Laikipia County;
 - c. in default of such payment by the plaintiff within the said 60 days the defendant to forthwith refund the sum of Kshs 11,000,000 to the plaintiff being the deposit paid for the suit land together with interest at the then applicable bank rates per annum effective 27th June, 2014 until payment in full; and
 - d. a permanent order of injunction is hereby issued restraining the defendant from alienating, offering for sale in any manner, disposing off, selling or charging the properties known as LR Number 11571/36 and delineated in survey plan number 361443 and LR Number 11571/37 and delineated in survey plan number 361444 situate West and South West of Naromoru.”
5. That judgment is what gave rise to the applicant's appeal and the notice of motion now before us. The motion is supported by grounds stated on its face, an affidavit sworn by Dr. Fred N. Ojiambo, SC, MBS, the Chairman of the Board of Directors of the applicant and written submissions filed in support of the motion.
6. The applicant contends that the appeal raises pertinent and plausible issues of law which are arguable. Learned counsel has availed a draft memorandum of appeal in which he faults the judgment of the ELC on eight (8) grounds. He maintains that the Honourable Judge erred when he found that the letter of offer was a binding contract between the applicant and the 1st respondent when the letter of offer was expressly subject to the contract between the parties; that there was a binding contract between the 1st respondent and the applicant with respect to the suit property in the absence of a contract for sale of



the suit property and in failing to hold that the applicant had with good reason rescinded the letter of offer in respect to the property LR Number 11571/37 and particularly in light of the plaintiff's email dated 2st May, 2014.

7. The applicant submits that the said grounds are substantive and warrant the attention and decision of this Court and that they make the intended appeal fully arguable.
8. The applicant submits that it has discharged the onus of proving the nugatory aspect for the reason that the status of the subject matter shall not be reversible as the respondent has initiated the process of execution of the impugned judgment through its application dated 18th September 2023.
9. This Court held in *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the Court is bound to consider the conflicting claims of both sides.
10. The 1st respondent opposed the motion vide a replying affidavit dated 2nd April 2024 which was sworn by James Muchangi Gachemi. In the affidavit, it is deposed that the application does not meet any of the twin requirements and that the same is frivolous. Further, that the applicant in a deliberate and outright attempt to defeat the orders of the trial court and in contempt of the decree of the court through its advocates on record, by a letter dated 8th May 2023 wrote to Absa Bank Kenya Plc Queensway House Branch demanding that a sum of Forty-Nine Million Shillings (Kshs 49,000,000) which the 1st respondent had on 5th May 2023 deposited in its advocates known bank account to be returned. Further, that the applicant has not demonstrated that the intended appeal has any chances of success as this Court held in several decisions that a contract may be formed through numerous correspondences exchanged between the parties and the subsequent performance of obligations by one of the parties which included the letter of offer duly executed by the parties in the presence of witnesses.
11. Finally, that the applicant has not demonstrated how the intended appeal is likely to be rendered nugatory in case it succeeds as the mere deposit of the balance of the purchase price and transfer of the land to him is not final as the court can always reverse the transfer.
12. On the first limb on arguability it is submitted that the applicant has not satisfied the first limb for the reasons that there is no copy of an annexed memorandum of appeal in the application.
13. On the nugatory aspect reliance was placed on the decision in *County Government of Busia v Manwari & Co Advocates* [2021] eKLR for the proposition that a mere transfer of the land and or deposit of the purchase price is reversible and damages can reasonably compensate the applicant in case the intended appeal succeeds.
14. We have considered the motion, the contending affidavits and the rival submissions filed by counsel. In order for the application to succeed, the applicant must satisfy the Court that the appeal or the intended appeal is not frivolous. That is to say, that the appeal or intended appeal is arguable and, secondly, that unless the application is granted the appeal, if successful, would be rendered nugatory.
15. We wish to point out that we granted interim orders preserving the status quo when this motion came for plenary hearing. We are not persuaded that the appeal giving rise to this application is frivolous. All that is required at this stage is for the applicant to demonstrate the existence of at least one arguable issue. The question whether a binding contract could be inferred from the letter of offer as read with the other correspondence is evidently not an idle issue and calls for determination by this Court. We find the applicant has demonstrated that it has an arguable appeal.
16. As regards the nugatory aspect, the applicant has demonstrated that the decree issued by the learned Judge includes an order for the applicant to execute all documents and do all acts for purposes of



completing the contract between the applicant and the 1st respondent for the sale of the property known as LR Number 11571/36. It is obvious that if the decree is executed, the applicant will lose possession of the suit property and this will not only prejudice it but can also lead to the suit properties being alienated and falling into the hands of third parties. Of greater concern to us, however, is having the parcels of land transferred on the basis of a contract whose validity and enforceability is yet to be determined on appeal.

17. On our part, we are satisfied, given the circumstances herein, that this is an appropriate case in which stay should issue. Accordingly, we issue an order of stay of execution of the judgment of the ELC pending the hearing and determination of the appeal as sought in the applicant's motion.
18. Additionally, in order to preserve the property, we issue an order of injunction restraining the applicant from parting with possession of the suit properties or in any way interfering with title to the disputed properties pending the hearing and determination of the appeal. The costs of the application will be in the appeal. It is so ordered.

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

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I Certify that this is the true copy of the original.

Signed

DEPUTY REGISTRAR

