



Wautie Technical Services Ltd & another v Ngei; Ngei (Interested Party) (Civil Application E573 of 2023) [2024] KECA 1430 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1430 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E573 OF 2023
SG KAIRU, S OLE KANTAI & JM MATIVO, JJA
OCTOBER 11, 2024**

BETWEEN

WAUTIE TECHNICAL SERVICES LTD 1ST APPLICANT

GINTU HOLDINGS LIMITED 2ND APPLICANT

AND

WINNIE WAIRIGU NGEI RESPONDENT

AND

CHARLES NJOGU NGEI INTERESTED PARTY

(Being an Application for stay of execution of the Judgment and Decree of the Environment and Land Court at Nairobi (O.A. Angote, J.) delivered on 21st September, 2023 in E.L.C. CASE NO. 924B OF 2015)

RULING

1. In a judgment delivered on 21st September, 2023, Angote, J. ordered the 2nd and 3rd Defendants (Wautie Technical Services Ltd and Gintu Holdings Limited) ('the applicants') to compensate and pay the plaintiff (Winnie Wairigu Ngei) her share of the suit property at the current prevailing market value of the suit property without developments; valuation of the suit property be conducted by a valuer appointed by the President of the Institution of Surveyors of Kenya; valuation fees be paid by the applicant and Gintu Holdings Limited and costs of the suit be paid by the applicant and Gintu Holdings Limited.
2. Charles Njogu Ngei (the 1st defendant in the suit), the applicant and Gintu Holdings Limited filed a notice of appeal against the whole of that judgment.
3. In the Motion brought under various provisions of law including rule 5 (2)(b) The [Court of Appeal Rules](#), the applicants pray in the main that pending the lodging, hearing and determination of the



intended appeal we stay the said judgment (Nairobi ELC 924B of 2015). In grounds in support of the Motion and in a supporting affidavit of Ian Oloo, a Director of the applicants, it is said amongst other things that the 2nd applicant wants to protect the subject property (Title No. 12159/29) which is registered in its name; that the said judgment if not stayed will cause considerable loss to the 2nd applicant; that:

“(d) The execution of the judgement if not stayed will dissipate the subject matter of the appeal in that the Respondent is not a resident of Kenya, has no known assets in Kenya and was not working as at the time of the hearing of the Superior Court suit and as such may not be able to refund the amounts yet to be determined as the decretal sums in the very likely success of the appeal herein....”

4. The 2nd applicant offers the suit property as security if that be found necessary and it is said that the intended appeal is arguable. The applicants say that if the application is not allowed they stand to suffer substantial loss and damage which they may not recover upon determination of the appeal in their favour.
5. A replying affidavit is sworn by Henry Kurauka, a Lawyer, who says that he swears to facts because he has been actively engaged by the respondent “...to ensure justice is served in respect of the matter in the superior court.” He says that the intended appeal is not arguable and will not be rendered nugatory even if it succeeds. He says that notice of appeal was not lodged on time and no record of appeal has been filed within the required timelines; that the application has been filed with inordinate delay of 2 months; that costs of the suit have been taxed at Kshs.2,971,800 which remains unpaid; that the respondent did not receive any part of the purchase price for the suit property which was sold without her consent; that the suit property has since been valued as ordered by the trial court. Mr. Kurauka depones that should we grant stay of execution pending appeal we should order payment of taxed costs and make a further order that Kshs.15,000,000 being 25% of the valuation of the suit property be deposited in a bank account.
6. Charles Njogu Ngei, named in the matter as an Interested Party, in a replying affidavit fully supports the application stating that the Judge erred in the judgment; that the applicants paid purchase price to him in full which he received as holder of the respondent’s power of attorney:

“... and I paid the respondent her share of the purchase price...”;

that it is unfair for the court to order the applicants to pay against for a property they already had paid for:

“That the Respondent is my sister and I know for certain that she has no property and or investment in Kenya that can attached (*sic*) to get a refund of the judgement amount in the event that the appeal succeed.”

7. Mr. Ngei wonders in the affidavit why of the 4 owners of the suit property it is only the respondent who complained that she did not receive her share of the sale proceeds.
8. We have seen and considered written submissions filed for the applicants and the respondents.
9. When the application came up for hearing before us on 5th June, 2024 learned counsel Mr. Okeyo appeared for the applicants and the Interested Party while learned counsel Mr. Kurauka appeared for the respondent. In a highlight of submissions counsel for the applicant faulted the trial Judge who



found as fact that the applicants paid purchase price in full to the Interested Party but still held that the applicants should pay 25% of the value of the property to the respondent. Counsel submitted that it was an arguable point whether the Judge was right to hold that particulars of fraud set out in the plaint had not been proved yet still hold against the applicants. Counsel submitted, on the nugatory aspect, that the respondent is a foreigner with no known assets in Kenya and the applicants would not be able to recover anything from her if the appeal succeeds.

10. The respondent in opposing the Motion submitted that the suit property was sold using a forged power of attorney which was executed in Nairobi while the respondent was resident in United Kingdom. Counsel submitted that the respondent is an auditor in United Kingdom and can pay back Kshs.15,000,000.
11. The principles that apply in application for stay of execution pending appeal are well known. An applicant, to succeed must, firstly, show that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay- see the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR.
12. We have seen draft Memorandum of Appeal. The applicants propose to argue, on appeal, that the Judge erred in finding that full purchase price for the suit property had been paid by the applicants to Charles Njogu Ngei but still condemned the applicants to pay 25% of the value of the suit property to the respondent. It is also proposed to be argued on appeal that the Judge erred in law and fact in ordering compensation to the respondent based on current market value of the suit property when the agreement for sale was specific on the value of the property at the time of sale. We find these to be arguable points on appeal and as has been held by this Court - see *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd* Civil Application No. Nai 345 of 2004 an arguable point on appeal is not one which will succeed. It is one that is worthy of a full consideration by the court.
13. It is argued, on the nugatory aspect, that the respondent is a foreigner with no known assets in Kenya and that the applicants would not recover from her in the event that the appeal succeeds. The respondent did not respond to this assertion at all. When an allegation is made like it has here that a respondent is a foreigner with no known asset in Kenya the duty shifts to that party to disprove the allegation by tendering evidence that the party has capacity to pay back money paid to her should the appeal succeed – See *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another* [2006] eKLR where we had this to say on that burden:

“ This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to matter which is peculiarly, within his knowledge.”

14. On the whole the applicant has satisfied the twin principles in an application of this nature. We allow the Motion. There shall be a stay of execution of the judgment and orders of ELC in Case No. 294B of 2015 delivered on 21st September, 2023 pending the lodging, hearing and determination of the intended appeal. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

S. GATEMBU KAIRU, FCIArb.,



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JUDGE OF APPEAL
S. OLE KANTAI

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JUDGE OF APPEAL
J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

