Bahra & another v Chief Land Registrar & 3 others (Civil Appeal (Application) E204 of 2024) [2024] KECA 1661 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KECA 1661 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E204 OF 2024

MSA MAKHANDIA, S OLE KANTAI & A ALI-ARONI, JJA

NOVEMBER 22, 2024

BETWEEN

AVTAR SINGH BAHRA ..... 1ST APPLICANT

AMARJIT KAUR BAHRA ..... 2ND APPLICANT

AND

THE CHIEF LAND REGISTRAR ..... 1ST RESPONDENT

KATESTATES ESTATE LIMITED ..... 2ND RESPONDENT

ISSA & COMPANY ADVOCATES ..... 3RD RESPONDENT

KENYA MEAT COMMISSION ..... 4TH RESPONDENT

(Being an application for stay of execution pending the hearing and determination of a partial appeal from the judgment of the Environment and Land Court of Kenya at Nairobi (Oguttu-Mboya, J.) dated 25th January 2024 in ELC Case No. 799 of 2014)

RULING

1. Before us is a notice of motion dated 22nd March 2024, brought under rules 5 (2) (b), 44, 45 and 49 (1) and (2) of this Court's Rules. In the application, Avtar Singh Bahra and Amarjit Kaur Bahra ("the applicants"), seek partial stay of execution of the judgment and decree of the Environment and Land Court ("ELC") (Oguttu Mboya, J.) delivered on 25th January 2024 in Nairobi ELC Case No. 799 of 2014. The circumstances leading to this application are that on 25th January 2024, the High Court delivered a judgment dismissing the applicants' suit against the 1st and the 3rd respondents with costs whilst the 4th respondent's counterclaim was allowed.

2. The circumstances leading to this application are that the applicants were desirous of purchasing all that piece or parcel of land known as LR No 4275/40, I.R 126044 Riverside Drive, Nairobi, ("the

suit property"). The 2nd respondent approached them and offered to sell them the suit property at a consideration of Kshs 63,825,034.00. Thereafter, they entered into a sale agreement with the 2nd respondent. Pursuant to the said agreement, the applicants paid Kshs. 37,138,063.20 as part payment of the purchase price. However, when the completion documents were presented for registration in the relevant land registry, they could not be registered as the deed file in respect of the suit property was missing. Subsequently, it was discovered that the suit property did not belong to the 2nd respondent but to the 4th respondent. Armed with this information, the applicants issued a termination notice to the 2nd respondent and demanded a refund of the part purchase price paid to it.

3. When the 2nd respondent failed to comply, the applicants sued the respondents jointly and severally. They prayed that they be declared the legal title holders of the suit property; alternatively, the 2nd respondent be ordered to specifically perform his part of the Agreement for Sale; special and general damages against the 1st and 2nd respondents; the 3rd respondent be held jointly and severally liable with the 1st and 2nd respondents to refund to the applicants the sum of Kshs.37,308,063.20 together with interests; and costs of the suit. The respondents entered appearance and subsequently filed defences denying the applicants' claims. Some of the defences included counterclaims. The trial court disposed of the case in terms that the part purchase of Kshs 37,318,063.20 be refunded to the applicants by the 2nd respondent with interest at court rates; the applicants' claims against the 1st and 3rd respondents were dismissed, and the 4th respondent's counterclaim was allowed in terms that the grant issued to 2nd respondent was declared fraudulent, unlawful, and void. The 1st respondent was then directed to revoke the grant and have it gazetted within 60 days at the expense of the 2nd respondent; declared the 4th respondent the lawful and legitimate proprietor of the suit property; and issued an injunction against the 2nd respondent. The court also directed the costs of the counterclaim be borne by the 2nd respondent.

4. Aggrieved by the judgment and decree aforesaid, the applicants filed a notice of appeal evincing their intention to partially challenge the same. The partial challenge will be in respect of that part of the judgment and decree revoking the title in the name of the 2nd respondent and the directive that the revocation be gazetted within 60 days of the judgment and at the 2nd respondent's expense. The applicants subsequently filed the instant application.

5. The application is supported by the grounds on its face and the supporting affidavit of the 1st applicant dated 22nd March 2024. The applicants argue that the intended appeal is arguable on the grounds that: the trial court failed to consider evidence confirming the legitimacy of the Letter of Allotment and title issued to the 2nd respondent by the 1st respondent, did not recognize that the 1st respondent found no forgery in the manner the title to the suit property was processed. That the trial court erred in failing to award special damages to them for costs incurred in the purchase and conveyance of the suit property; failed to hold the respondents jointly and severally liable for the damages with interest; to recognize that the 2nd respondent's title was issued before the 4th respondent's letter of allotment; to acknowledge the validity of the 2nd respondent's title, improperly cancelling the title, and did not protect the appellants' property rights under Article 40 of *the Constitution*.

6. On the nugatory aspect, the applicants contend that if the orders sought are not granted, the suit property may be put beyond their reach. That they had expended a sum of Kshs. 37,318,063.20 towards the purchase of the suit property and other expenses to improve it, which monies, unless there is a stay will be lost forever. That the 1st and 4th respondents are likely to execute the decree with the result that the latter will become the lawful and legitimate proprietor of the suit property. As a consequence, the intended appeal will thereby be rendered nugatory.

7. The application was opposed by the respondents through the replying affidavits of Kenneth Boit dated 6th May 2024 for the 2nd respondent, Mansur Muathe Issa dated 6th May 2024 for the 3rd respondent, and Anthony Omondi Ademba dated 7th May 2024 for the 4th respondent which was however later withdrawn by its counsel by a letter dated 7th May 2024. The 1st respondent did not file any papers in opposition to the application.

8. From the affidavits, it is the respondents' case that the judgment allowed the applicants' claim for a refund of Kshs. 37,318,063.20, being part of the purchase price paid to the 2nd respondent together with costs. That it further allowed the 4th respondent's counterclaim in terms aforesaid. That the appeal, if successful, will not, therefore be rendered nugatory. Further, there is no prejudice that shall be suffered by the applicants as the judgment was actually in their favour and since they were not in possession or control of the suit property. That damages will, in any event sufficiently atone any loss that the applicants may suffer in the interregnum. That the intended appeal does not raise any grounds against the respondents.

9. During the inter partes hearing of the application on 12th June 2024, Ms. Anyango Opiyo, Allan Kamau, Fred Okeyo, Mrs. Maina, and Cohen Amanya, learned counsel appeared for the applicants and the respondents, respectively. Besides relying on their respective written submissions, they also briefly highlighted their said submissions. The applicants contended that the trial court did not consider the evidence of the 1st respondent confirming the legitimacy of the Letter of Allotment and the title issued to the 2nd respondent. The trial court's decision to cancel the title in favour of the 4th respondent and issue a permanent injunction against the applicants violated their property rights under *the Constitution*. That without a stay of execution, they risk losing the suit property as well as their financial outlay. That the trial court failed to justify the award of costs to the respondents and did not consider the applicants' due diligence and official search confirming the 2nd respondent's ownership. That the applicants paid Kshs. 37,308,063 for the suit property and now face a loss of Kshs. 136,671,250 due to the cancellation of the title and a permanent injunction favouring the 4th respondent. They argue that without a stay of execution, the property may change hands, rendering their appeal nugatory and thereby causing them irreparable harm.

10. They referred to the cases of Printing Industries Limited & Another vs. Bank of Baroda Kenya Limited [2014] eKLR, to emphasize the need for a stay of execution to prevent the appeal from being rendered nugatory if the property in question changes hands before the appeal is heard; Stanley Kangethe Kinyanjui vs. Tony Ketter & 2 Others [2013] eKLR, for the principles for granting a stay of execution, highlighting that the appeal must be arguable and that the applicant must demonstrate that the appeal would be rendered nugatory absent stay; Halai & Another vs. Thornton & Turpin (1963) LTD [1990] KLR 365, for the requirement that the applicant must show that substantial loss may result if the stay is not granted, and that the appeal has a high chance of success; Manchar Singh Sagoo & Another vs. Caroline Njeri Mwicigi & 3 Others [2018] eKLR, for the proposition that the court should preserve the status quo to ensure that the appeal is not rendered academic; and lastly, Kenya Tea Growers Association & Another vs. Kenya Plantation and Agriculture Workers Union [2012] eKLR which discusses the balance of convenience, indicating that the court must weigh the potential harm to both parties and decide in favour of preserving the subject matter of the appeal.

11. The 2nd respondent supported the application and rode on the submissions by the applicants. It maintained that the application had met the threshold for grant of the orders sought. He also pointed out that the 2nd respondent had filed a cross-appeal, hence the need to preserve the substratum of the cross-appeal, more so as it was still the registered proprietor of the suit property. The 1st respondent submitted that the judgment and decree dismissed the suit against it. Accordingly, the judgment and

decree were in the nature of a negative decree against it. The orders sought cannot be issued against it in the circumstances. In any event, what is sought to be stayed is not irreversible. Finally, since the applicants are not in possession of the suit property, they will suffer no harm if the application is denied.

12. The 3rd respondent, in opposing the application, submitted that the intended appeal does not challenge the dismissal of the suit against it. Thus, there is no appeal against it. That, in any event, the suit against it having been dismissed was in the nature of a negative decree, thus incapable of being stayed. It was urged that the appeal would not be rendered nugatory absent stay, as the applicants were already compensated for the loss of the suit property, and the judgment was favourable to them in any event. Accordingly, the applicants will not suffer any prejudice if stay is denied.

13. The 4th respondent argued that the grounds of appeal are frivolous and lack specificity, relying on cases such as Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR and Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2008 for the proposition. It was asserted that the appeal is a fishing expedition and that the trial court's decision was based on clear evidence of fraudulent procurement of the title by the 2nd respondent, which was surrendered back to the government. It was further submitted that the appeal would not be rendered nugatory if the orders sought are not granted, citing Hashmukhlal Virchand Shah & 2 Others vs. Investment & Mortgages Bank Limited [2014] eKLR, Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R., and *Equity Bank Limited vs. West Link Mbo Limited Civil Application No. Nai 78 of 2011* in support thereof. That the 4th respondent is in possession of the suit property, and that the applicants' claim was based on a title that no longer exists. It concluded that the application is an abuse of the court process and lacks merit, as any loss suffered by the applicants can be compensated by an award of damages. That the 4th respondent being a public body, was capable of compensating the applicants for such loss.

14. We have given due and anxious consideration to the application, the affidavits in support of and in opposition to, as well as the rival submissions and the authorities cited. It is trite that an order of stay cannot issue where an order or decree dismissing a ruling or a suit is involved. This is what is routinely referred to as a negative order or decree which is incapable of being stayed. See Western College of Arts and Applied Sciences vs. EP Oranga & 3 Others [1976] eKLR. To the extent that the impugned judgment merely dismissed the applicants' suit against the 1st and 3rd respondents, an order of stay of execution of the judgment and decree cannot issue against them. As regards the 2nd respondent, we note that it supports the application. In the premises, a stay order cannot be issued against it. That leaves us only with the 4th respondent.

15. The applicable principles in applications of this nature were set out by this Court in Stanley Kangethe Kinyanjui (supra), and we need not regurgitate them. Suffice to reiterate that the applicant must demonstrate that the appeal or intended appeal is arguable and that if the stay is not granted and the appeal eventually succeeds, it would have been rendered nugatory. We may also add that, it is now accepted that the public interest is a legitimate consideration as well, as stated by the Supreme Court in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR.

16. Having stated as much, we have looked at the intended grounds of appeal by the applicants and, whilst it is not our place to decide whether they will succeed or not at this juncture, we have no difficulty in holding, that the complaints by the applicants are not idle. The appeal is therefore, arguable.

17. We now examine the question, whether the application surmounts the nugatory aspect. In Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others (supra), this Court stated that:

> " Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible
>
> whether damages will reasonably compensate the party aggrieved."

18. In determining this aspect, the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. See Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd (2002) 1 EA 227. What commends itself to us is the balance between preserving the status quo pending the hearing of the intended appeal and the consequences of suspending the declarations made by the trial Court.

19. The applicants contend that without a stay of execution, they risk losing the suit property and being unable to recover their financial losses since the suit property may change hands and be put beyond their reach permanently. This will, therefore, render their intended appeal academic, resulting in irreparable loss to them.

20. However, based on our reading of the judgment and as correctly postulated by the 3rd respondent, the trial court granted the applicants' claim for a refund of Kshs. 37,318,063.20 against the 2nd respondent, including costs and interest. It is evident then, that the appeal will not be rendered nugatory since the applicants were compensated for their losses. Therefore, the applicants will not suffer any prejudice since the judgment was favourable to them. More so, the applicants are not even in physical possession or occupation of the suit property and will not in the premises suffer any discomfort.

21. Lastly, the 4th respondent has asserted that it is a public body and is capable of compensating the applicants for any loss that the applicants may have suffered should their appeal succeed. This assertion has not been controverted at all by the applicants. It can only mean that it is true. Obviously, then the intended appeal cannot be rendered nugatory.

22. The applicants having failed to satisfy both limbs as required, the order that merits the application dated 22nd March 2024 is a dismissal with costs to the 3rd and 4th respondents respectively.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

ASIKE-MAKHANDIA

.....JUDGE OF APPEAL

S. ole KANTAI

.....JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.