



REPUBLIC OF KENYA



Githinji t/a Githinji & Co Advocates v Noorani & another (Civil Application 256 of 2022) [2023] KECA 1502 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KECA 1502 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 256 OF 2022
K M'INOTI, M NGUGI & PM GACHOKA, JJA
DECEMBER 8, 2023**

BETWEEN

ONESMUS GITHINJI T/A GITHINJI & CO ADVOCATES APPLICANT

AND

JOYCE AKINYI OCHIENG 1ST RESPONDENT

AHMED NOORANI 2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the ruling and order of the Environment & Land Court at Nairobi (Mbugua, J.) dated 12th May 2022 in ELCC No. 319 of 2008)

RULING

1. The applicant is an advocate of the High Court of Kenya practising under the name and style of Onesmus Githinji & Company Advocates. On 12th May 2022, the Environment & Land Court at Nairobi (ELC) (Mbugua, J.) entered judgment in favour of the 1st respondent, Ahmed Noorani (Noorani) jointly and several against the applicant and the 2nd respondent, Joyce Akinyi Ochieng (Akinyi) for:

- i) Kshs 4,400,000;
- ii. Exemplary damages of Kshs 3,000,000
- iii. Interest @ 14% from 21st November 2007; and
- ii. Costs.

1. The brief background to the judgment and decree was as follows.



Akinyi was at all material times the registered proprietor of the parcel of Land known as LR No. 3734/223 in Lavington, Nairobi, on which she was constructing villas for sale off-plan. On 1st October 2007 Noorani accepted an offer from Akinyi to purchase Unit No. 5 for Kshs 17 million. The sale agreement that is on record is neither signed nor dated, but it is common ground that on 2nd October 2007 Noorani paid to the applicant Kshs 4,400,000.00 as deposit. The applicant acted for both Noorani and Akinyi as purchaser and seller, respectively. Subsequently, the transaction fell through after a dispute arose between Noorani and Akinyi when the latter attempted to build more units than were on the original plan. Noorani filed in the High Court of Kenya at Nairobi, HCCC No. 212 of 2008 (later transferred to ELC as ELCC No. 319 of 2008) against Akinyi seeking, among others, an order for specific performance; an injunction prohibiting Akinyi from building two extra units on LR No. 3734/233; an injunction restraining Akinyi from selling or transferring the suit property; in the alternative, refund of the deposit of Kshs 4,400,000.00; interest at commercial rates from 2nd October 2007 until payment in full; general and exemplary damages; and costs.

3. The suit was subsequently amended with leave of the court and the applicant was joined as a party. In her defence, Akinyi denied the claim, admitting only that she was the registered owner of LR No. 3734/233. She neither filed witness statements nor attended the hearing. On his part, the applicant filed a defence in which he averred that he had acted for both Noorani and Akinyi and that his communication with his clients was privileged. He contended that he had released the deposit sum to Akinyi in accordance with the agreement for sale which allowed Akinyi to utilise any deposited sums to complete the construction. Like Akinyi, he neither filed witness statements nor attended the hearing. He however, filed submissions.
4. It is apt to point out that before the hearing, on 28th July 2010, the High Court (Msagha, J., as he then was) ordered Akinyi to deposit the Kshs 4,400,000 within 30 days in an interest earning account in the name of Noorani's advocates as stakeholders. Akinyi did not comply with that order and Noorani took out contempt of court proceedings against her in which she denied having entered into any agreement for sale with Noorani; having instructed any advocate to act for her; and having received any deposit from the applicant. On 13th November 2012, the High Court (Kimondo, J.) dismissed Noorani's application for committal of Akinyi.
5. Undeterred, Noorani lodged in this Court Appeal No. 55 of 2013 against the ruling of Kimondo, J. By a judgment dated 31st March 2017 the Court allowed the appeal and directed Akinyi to be committed for 30 days, unless she purged her contempt. It appears from the record that Akinyi never complied with the order to deposit the sum of Kshs 4,400,000.00.
6. After the ELC heard the suit and entered judgment as aforesaid jointly and severally against the applicant and Akinyi, the applicant lodged a notice of appeal followed by the application now before us, in which he seeks two substantive prayers. The first prayer is for leave to withdraw Application No. E177 of 2022 dated 25th May 2022 which is similar to this application. The second prayer seeks an order of stay of execution of the judgment and decree of the ELC pending the hearing and determination of his intended appeal.
7. In his affidavit sworn on 21st July 2021 in support of the application, and written submissions dated 22nd September 2022, the applicant averred that Application No. E177 of 2022 is similar to the current application but is defective for lack of crucial documents. He relied on rule 54 of the Court of Appeal rules which empowers the Court to allow withdrawal of applications and indicated his willingness to pay costs if the Court so orders.



8. On the prayer for stay of execution, the applicant contended that his intended appeal is arguable because the trial court erred by failing to find that as an advocate, he was a mere agent under express instructions to release the deposit to Akinyi. He added that whether the ELC had jurisdiction to hear and determine the dispute which related to the fiduciary duty owed by an Advocate to a client is an arguable point. Other arguable issues identified by the applicant are whether the ELRC erred by allowing amendment of the suit to include him as a party after alleged judgment against Akinyi, and whether Noorani's suit was *res judicata*. He further contended that the learned judge erred by holding him liable while he had released the deposit to Akinyi, in accordance with the agreement for sale.
9. On whether the appeal would be rendered nugatory, the applicant submitted that the decretal sum is colossal and that he stood to suffer irreparable loss and damage, including to his professional standing and reputation. He relied on *Job Kilach v. Nation Media Group & 2 Others* [2006] eKLR and Oraro & Rachier Advocates
 - v. *Co-operative Bank of Kenya Ltd* [2000] eKLR and submitted that when the decretal sum is colossal, the Court also considers the balance of convenience.
10. Noorani opposed the application vide a replying affidavit sworn on 6th March 2023 and written submissions dated 17th April 2023. He contended that there was no proper appeal on record because the applicant served the notice of appeal out of time and that the application was an abuse of the process of court due to the earlier and similar application that the applicant had filed.
11. On whether the intended appeal was arguable, Noorani submitted that if the applicant released the deposit to Akinyi, it was without authority and in breach of the applicant's fiduciary duty. He added that the applicant had not adduced any evidence to show that he had indeed paid the deposit to Akinyi and that Akinyi had expressly denied having received the deposit from the Applicant. Noorani pointed at the applicant's refusal to file witness statements or to testify as indicative of the fact that he had not remitted the deposited sum to Akinyi. It was his further contention that the applicant's claim that the matter was *res judicata* was calculated to mislead the Court because there was only one judgment in the matter, that of the ELC.
12. Regarding whether the appeal risked being rendered nugatory, it was submitted that the applicant had not demonstrated that Noorani would be unable to refund the decretal amount if the appeal succeeded. The decision in *Governors Ballon Safaris Ltd*
 - v. *Skyslip Co Ltd & Another* [2015] eKLR was cited in support of the submission that the onus was on the applicant to prove the inability of the respondent to refund. Accordingly, Noorani urged us to dismiss the application with costs.
13. Akinyi did not file any response to the application and did not appear during the hearing, although she was duly served with the hearing notice.
14. Starting with Noorani's objection that there is no valid notice of appeal on record due to the applicant's failure to serve the same within the prescribed time, we do not think we can entertain that issue in an application under rule 5(2)(b). We do not have before us any evidence that can assist us to determine the issue either way. In any event, Noorani has a clear remedy under rule 86 of the Court of Appeal Rules. That's the route he should take if he is aggrieved with the service of the Notice of Appeal.
15. As regards the prayer to withdraw Application No. E177 of 2022 which is similar to the current application, the applicant has explained that the application is defective for lack of crucial documents, which omission was cured in the current application. Under rule 54, the Court has unfettered discretion to allow withdrawal of an application, subject to the issue of costs. We are satisfied that



the applicant has given justifiable reasons for withdrawal of the earlier application. Noorani has not indicated that he actually responded to that application. According, we grant leave and direct that Application No. E177 of 2022 be and is hereby marked withdrawn with no orders on costs.

16. Turning to the merits of the application before us, the applicant is obliged to satisfy the Court that his intended appeal is arguable and will be rendered nugatory if we do not grant an order of stay of execution. (See *Stanley Kangethe Kinyanjui v. Tony Keter & 5 Others* [2013] eKLR). Taking into account the fact that the applicant is only required to establish even one bona fide issue worthy of consideration by the Court and that an argue appeal need not succeed at the hearing, we are satisfied that the issues that the applicant intends to raise are not frivolous.
17. On whether the appeal risks being rendered nugatory, we bear in mind that what may render an appeal nugatory depends on the peculiar circumstances of each case. See *Reliance Bank Ltd v. Norlake Investments Ltd* [2002] 1 EA 227). Ordinarily however, an appeal will be rendered nugatory if what is sought to be forestalled cannot be reversed or can only be reversed at great expense or cannot be adequately compensated with damages.
18. We take into account that the disputed deposit is Kshs 4,400,000.00 but the ultimate total decretal amount is quite colossal. Although the applicant has satisfied us on both considerations under rule 5(2) (b) of the *Court of Appeal Rules*, we are persuaded that to meet the justice of this case, the applicant deserves only a conditional stay of execution. The question whether the applicant ever remitted the deposit sum to Akinyi is hotly disputed, including by Akinyi herself, and as of now, the applicant has not placed any evidence on record to that effect.
19. Accordingly, we direct that there shall be stay of execution of the judgment and decree of the ELC dated 12th May 2022 on condition that the applicant deposits the sum of Kshs 2,200,000.00 in a joint interest earning account in the names of the applicant's and Noorani's advocates. The deposit is to be made within 30 days of this ruling, failing which this application shall stand dismissed.
20. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER 2023

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

