



REPUBLIC OF KENYA



**KENYA LAW**  
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**Dayah Construction Company Limited v Munge & 3 others (Civil  
Application E367 of 2021) [2022] KECA 1 (KLR) (21 January 2022) (Ruling)**

Neutral citation: [2022] KECA 1 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E367 OF 2021  
KI LAIBUTA, DK MUSINGA & AK MURGOR, JJA  
JANUARY 21, 2022**

**BETWEEN**

**DAYAH CONSTRUCTION COMPANY LIMITED ..... APPELLANT**

**AND**

**PATRICK KARIGE MUNGE ..... 1<sup>ST</sup> RESPONDENT**

**GARUN INVESTMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution pending the hearing and determination of an intended Appeal from the Ruling of the Environment and Land Court of Kenya at Nairobi (L. Komingoi, J.) delivered on 21st October 2021 in E.L.C Case No. 238 of 2016)*

**RULING**

1. In its Notice of Motion dated 26<sup>th</sup> October 2021 and made under Rule 5 (2)(b) of the [Court of Appeal Rules](#), the applicant seeks inter alia a stay of execution of the Ruling delivered on 21<sup>st</sup> October 2021 in Nairobi ELC Case No. 238 of 2016 (L. Komingoi, J) pending the hearing and determination of the Motion aforesaid, and of the intended appeal. The applicant also prays for costs. The Motion is supported by the affidavit of Ubdi Yaheye Haji (a director of the applicant) sworn on 26<sup>th</sup> October 2021. The application is opposed as is evident from the 1<sup>st</sup> respondent's replying affidavit sworn on 17<sup>th</sup> November 2021.
2. The impugned Ruling was delivered in determination of the 1<sup>st</sup> respondent's Notice of Motion dated 17<sup>th</sup> February 2020 filed in the ELC Case aforesaid. In its application, the 1<sup>st</sup> respondent herein, Patrick Karige Munge, had sought inter alia prohibitory orders of injunction to restrain the applicant herein from alienating or otherwise dealing in its parcels of land known as LR Nos. 19952/4 and 19952/5



(being Grant Nos. 153627 and 153628 respectively) situated in the City of Nairobi and registered in the name of the applicant pending further orders. The prohibitory orders thereby sought were intended to facilitate attachment and sale of the said parcels of land in execution of the decree issued on 12<sup>th</sup> April 2019 against the applicant in favour of the 1<sup>st</sup> respondent in the sum of KShs. 50,000,000.

3. The decree, a copy of which is annexed to the 1<sup>st</sup> respondent's replying affidavit was issued by the trial court against the applicant in the following terms:

1. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants [the applicant and the 2<sup>nd</sup> respondent herein] shall jointly and severally pay the plaintiff [1<sup>st</sup> respondent herein] a sum of KShs. 50,000,000 being his claim in respect to all those parcels of land title numbers LR 209/19441 and 209/19442 (Grant Nos. 121647 and 121648 respectively) hereinafter "suit property".
2. A sum of KShs. 20,000,000 to be paid to the plaintiff or his appointed agent on or before execution of the deed of settlement entered into by the parties herein, the plaintiff acknowledges receipt of the said sum of KShs. 20,000,000 as at the time of executing this consent.
3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' advocates who were in the process of selling the suit premises to M/s. Elmi Afrah Properties Limited (or any other purchaser of their choice) through the law firm of M/s. Abdinasir, Abdikadir and Co. Advocates shall through the said law firm pay the plaintiff through his appointed agents for purpose of receiving payment herein M/s. Sheikh and Company Advocates the sum of KShs. 30,000,000 being the balance of the agreed sum. The said amount to be paid as per following clause.
4. A sum of KShs. 20,000,000 shall be paid to the plaintiff through his appointed agents for purpose of receiving payments herein (M/s. Sheikh and Company Advocates) by the 1<sup>st</sup> and 2<sup>nd</sup> defendants on or before 1<sup>st</sup> August 2019.
5. The balance of KShs. 10,000,000 shall be paid to the plaintiff on or before 10<sup>th</sup> December 2019 upon which this matter will be fully and finally settled.
6. That upon execution and filing these consent orders, the plaintiff shall within seven days of the same being adopted, proceed and lift/remove from the register of parcels of land title numbers 209/19441 and 209/19442 (Grant Nos. 121647 and 121648 respectively) the previous orders registered against those parcels of land in his favour.
7. All payments due to the plaintiff herein shall be paid through M/s. Sheikh and Company who the plaintiff has appointed as his agent for purposes of receiving payment herein.
8. In default of payment of any single instalment hereinabove, execution do issue against the 1<sup>st</sup> and 2<sup>nd</sup> defendants immediately and/or their respective directors in their personal capacity.
9. The suit herein settled as per above terms with no orders as to costs.

4. It is noteworthy that the decree aforesaid is not in issue in the proceedings before this Court, and neither is it sought to be challenged in the intended appeal. To our mind, the applicant's Motion is intended to resist execution of the decree aforesaid pending hearing and determination of its intended appeal



against the impugned Ruling which, by order, authorized the advertisement and sale by public auction of LR Nos. 19952/4 and 19952/5 to recover the outstanding balance of the decretal amount due and payable in the sum of KShs. 30,000,000 as at 21<sup>st</sup> October 2021.

5. When the applicant's Motion dated 26<sup>th</sup> October 2021 came for hearing before us, Mr. Kimathi, learned counsel for the 1<sup>st</sup> respondent, told the Court that a further sum of KShs. 12,900,000 was paid in December 2021 in further reduction of the outstanding balance of the decretal amount, leaving a balance of KShs. 17,100,000 presently due. Except for the sweeping allegation by Mr. Kiprop learned counsel for the applicant that the consent judgment from which the decree aforesaid was drawn did not accurately reflect the agreement of the parties with regard to the mode of payment of the decretal amount, we find nothing on the record before us to suggest that the amount of the decree and the mode of payment in satisfaction thereof was contested or, at the very least, the subject of the intended appeal. Mr. Kiprop's denial of the various payments by the applicant in reduction of the decretal amount was, in our considered view, misinformed.
6. Having considered the Applicant's Notice of Motion dated 26<sup>th</sup> October 2021, the affidavit in support thereof, the 1<sup>st</sup> respondent's replying affidavit, the written and oral submissions of the learned counsel for the Applicant and those of the learned counsel for the 1<sup>st</sup> Respondent, we form the view that the Applicant's Motion stands or falls on two main grounds:
  - a. whether the appeal is arguable, which is to say, it is not frivolous; and
  - b. whether the appeal, if successful, would be rendered nugatory if stay was not granted.
7. The principles that apply in applications under Rule 5(2) (b) of the Court of Appeal Rules for stay of execution or of further proceedings pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings arising from the impugned judgment, decree or order were not stayed. These principles have been enunciated in, various judicial pronouncements of this Court, including those cited by the parties.
8. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the Applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
9. On our reading of the grounds on which the Applicant's Motion is founded, the affidavit in support thereof, and from the respective written and oral submissions of the learned counsel for the parties, we draw the conclusion that the applicant's grievance revolves around (a) the imminent execution of the decree issued with the consent of the parties on 12<sup>th</sup> April 2019; and (b) a belated complaint that the consent order on the basis of which the decree was issued was not in the terms agreed between the parties with regard to the mode of payment of the decretal amount. Be that as it may, we fail to understand why it took the applicant almost three years to raise the issue as to the terms of the consent order from which the decree was drawn. Indeed, it was not until delivery of the impugned Ruling on 21<sup>st</sup> October 2021 that these issues were raised. To our mind, the applicant's Motion was an afterthought designed to resist execution of a decree in the face of default on its part to settle the outstanding balance of the sums decreed with the consent of the parties.



10. In addition to the foregoing, we hasten to observe that –
- a. apart from the grounds set out on the face of the Motion, the applicant has not filed any draft Memorandum of Appeal disclosing the basis of the intended appeal;
  - b. in the absence of a record of appeal, this Court is unable to ascertain the genesis of the claim that led to the consent judgment and decree, and the grounds on which the intended appeal is proposed to stand;
  - c. the applicant’s Motion is merely intended to stand in the way of execution of a decree properly issued for sums part of which remain due and recoverable; and
  - d. accordingly, the intended appeal is not arguable but is, in our respectful view, frivolous.
11. Having found that the intended appeal is not arguable, we need not consider whether it will be rendered nugatory.
12. Having considered the Applicant’s Notice of Motion dated 26<sup>th</sup> October 2021, the affidavit in support thereof, the 1<sup>st</sup> Respondent’s replying affidavit, the respective written and oral submissions of the learned counsel for the applicant and for the 1<sup>st</sup> Respondent, we find that the Applicant has failed to satisfy the two limbs of the requirements in an application for stay of further proceedings in the ELC pending the intended appeal. Accordingly –
- a. the Applicant’s Notice of motion dated 26<sup>th</sup> October 2021 is hereby dismissed; and
  - b. costs of this application be borne by the applicant.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JANUARY, 2022**

**D. K. MUSINGA, (P)**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

