



REPUBLIC OF KENYA



KENYA LAW
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**Stackelberg & another v Obst (Application 81 of 2021)
[2022] KECA 496 (KLR) (1 April 2022) (Ruling)**

Neutral citation: [2022] KECA 496 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
APPLICATION 81 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 1, 2022**

BETWEEN

JOACHIM VON STACKELBERG 1ST APPLICANT

YOLANDA FIRTH 2ND APPLICANT

AND

SYLKE OBST RESPONDENT

(An application for stay of execution of the judgment and decree of the High Court of Kenya at Mombasa delivered by Hon. Lady justice Kasango, J. on 6th November, 2014 in High Court Civil Suit No. 133 of 2007)

RULING

1. The application before us is dated 3rd November 2021, brought by way of a Notice of Motion pursuant to Rule 5(2)(b), 41, 42, 43, & 47 of the *Court of Appeal Rules*. The Applicants seek an order of stay of execution pending the hearing and determination of the application and/or their intended appeal from the judgement and decree of the High Court given on 6th November 2014.
2. The Applicant and the Respondent had entered into an agreement dated 6th November, 2005 in which the Applicants were to sell to the Respondent Plot Nos. Kwale/Galu Kinondo/ 1174, 1175, 1176 and 1177, hereinafter the suit properties for a consideration of KShs. 23 million. That as part of the consideration of the suit properties the Respondent was to hand over to the Applicant a flat in Germany on the date of completion which was 1st February 2006.
3. The Applicants case before the High Court was that the Respondent handed over the flat to them on 1st November 2007, and hence claimed interest at 15% interest per annum for period between 31st December 2006 and 1st November 2007. The Respondent in her defence filed a defence and counter-claim in which she pleaded frustration of the agreement by the Applicants by failing to sign



the necessary documentation for the transfer of the suit properties, and sought an order of specific performance to effect the Applicants provide all the documents necessary to effect transfer of the suit properties to the Respondent. The High Court found in favour of the Respondent and entered judgment against the Applicants as sought with an order to pay interest on the sum of Kshs. 23 million from 1st February 2008 to the date the transfer to the suit properties is delivered to the Respondent.

4. In the affidavit sworn in support of the application by Benjamin Osundwa Amadi and Yolanda Firth dated 3rd November 2021, it is deposed that the time to lodge appeal lapsed and that the Applicant moved this Court for leave to extend time to file the same, However, the application for enlargement of time was dismissed on 25th November 2016. That pending before this Court, is an application to reverse the dismissal. In addition, that during the pendency of the application the Respondent has proceeded to attach the Applicants' goods despite the ruling/order delivered on 30th July 2021 by the High Court in HCCC No. 133 of 2007, granting stay of execution for ninety (90) days. The Applicants further assert in their written submissions that their intended appeal raises triable issues with high chances of success and unless the temporary orders for stay are granted pending hearing inter parties of this application, the intended appeal will be rendered nugatory.
5. Mr. Amadi for the Applicants in his oral submissions before the virtual court relied on his written submissions and authorities and grounds on the face of the application. He submitted that time lapsed for filing of a Notice of Appeal, and an application to extend time before this court was dismissed. He submitted that the matter was pending reference to a full bench of this court.
6. The Respondent opposes this application by way of grounds of objection in which four grounds are raised, that the application is misconceived for invoking Rule (5) (2) (b) of the Court of Appeal Rules for the grant stay of execution; that the Applicants/intended Appellants have not filed a valid Notice of Appeal on time in accordance with Rule 75 (1) and (2); and that neither have they obtained leave to file the Notice of Appeal out of time.
7. Mr. Ndegwa for the Respondent, in his brief submission in virtual court urged that in absence of a valid Notice of Appeal, this court has no jurisdiction to entertain the application and no discretion in the matter. Further that there was no rule providing for stay of execution pending hearing of a reference before a full bench.
8. We have considered the application, the submissions by counsel for both parties. An issue of jurisdiction has arisen and Rule 5(2)(b) of the Court of Appeal Rules answers to this, and provides:

“(a)

b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
9. It is admitted by the Applicants advocate that there is no Notice of Appeal before this court in respect of this matter, and that the application seeking extension of time was dismissed, and that the same is pending reference before a full bench. An integral principle in an application for stay of execution is the requirement that the Applicant demonstrates that the appeal in respect to which the application has been brought is first, arguable, and secondly, that the appeal will be rendered nugatory if the stay sought is not granted. Without a notice of appeal filed before us, the twin principles that the Applicants need to establish before their prayers are granted cannot be met. We agree with the Respondent that we lack the jurisdiction to entertain this application as it is incompetent for the reasons we have given herein above.



10. In the circumstances this application is struck out with costs to the Respondent,

DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF APRIL 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

