



**Anne Wangeci Schofield t/a Schofield & Associates v Ehsani & another (Civil Application E032 of 2022) [2022] KECA 792 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 792 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E032 OF 2022  
DK MUSINGA, W KARANJA & MSA MAKHANDIA, JJA  
JUNE 24, 2022**

**BETWEEN**

**ANNE WANGECI SCHOFIELD T/A SCHOFIELD & ASSOCIATES APPLICANT**

**AND**

**HOOMAN EHSANI ..... 1<sup>ST</sup> RESPONDENT**

**PALM VALLEY DEVELOPMENT LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application brought under Article 159 of the Constitution, Rule 5(2)(b) of the Court of Appeal Rules, 2010 seeking for injunction pending the hearing and determination of the intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Okwany, J.) dated 16th December, 2021 in ELRC No. 352 of 2016)*

**RULING**

1. Before us is a notice of motion dated February 7, 2022 founded on Article 159 of *the Constitution* and Rule 5(2)(b) of the *Court of Appeal Rules*. The applicant Anne Wangeci Schofield, seeks three sets of injunctions to wit: an injunction to restrain the respondents from selling, charging, transferring or parting with the possession of unsold town houses on development known as Palm Valley Development on LR No 12825/39-42, an injunction to restrain the shareholders of the 2<sup>nd</sup> respondent from sharing profits from the sale of units on the said property; an injunction restrain the 2<sup>nd</sup> respondent from its winding up and transferring the reversionary interest to Palm Valley Estate limited or any other management company, and lastly, that there be preservatory orders for town houses No. T25 and T26 and apartments No. A10 and A 12 all pending the hearing and determination of the intended appeal.
2. The grounds upon which the application is predicated are, inter alia, that the applicant had filed a suit in the High Court seeking damages for breach of a retainer contract between her and the 2<sup>nd</sup> respondent for provision of legal services. That although the said contract had express provisions on how it was



to be terminated was however terminated due to the common law doctrine of frustration. It is on those premises that the applicant claimed damages for the breach of contract, costs and interest. That during the pendency of the suit, the applicant filed in the trial court a similar application against the respondents as the one before us which application was substantively dismissed, thereby prompting the current application. That the legal fees had become due and payable due to the legal services the applicant had rendered to the respondents relating to a joint venture over LR No 12825/39-42. That the respondents were to get a share of the proceeds from the sale of the villas, town houses and apartments while others would be transferred to the shareholders and after completion of the sale, the 2<sup>nd</sup> respondent would transfer its reversionary interest into a management company and thereafter be wound-up. That it follows, therefore, that unless the injunction orders sought are granted, the properties which are the subject of the appeal will be sold to third parties and if the appeal was to succeed, the applicant will be forced to sue the management company owned by at least 88 purchasers, which would be difficult and a travesty of justice thus making it nearly untenable hence the appeal will be rendered nugatory even if it succeeded.

3. That there exists a suit in the High Court which suit is yet to be heard and determined and after her application for injunction was dismissed by the said court the respondents had proceeded with the developments and sale and if this Court does not grant the orders sought, by the time the appeal before this Court and the High Court suit are heard and determined, the development will have been completed and the various units completely sold, hence her legal rights will have been extinguished as ownership will have changed.
4. The application is further supported by the affidavit of Anne Wangeci Schofield dated January 26, 2022, which affidavit reiterates the grounds adumbrated above and further avers that on the 15<sup>th</sup> July 2015, the 2<sup>nd</sup> respondent ratified her appointment as the sole legal provider to the respondents. That further, the board also approved the termination clause to the effect that the termination would be done in writing after completion of 25 units but must have paid the agreed fees up to that time of termination. Further, that the intended appeal had merits; raised serious issues; has high chances of success and would be rendered nugatory if the orders sought are not granted.
5. There was a further affidavit of one Phillip Njuguna Kariuki in support of the application which merely talked of how the applicant was able to tell that the development was nearing completion and the developments were all about to be sold off completely.
6. The respondent did not file any replying affidavit or submissions despite being served by the application on the February 9, 2021. On the other hand, the applicant filed her written submissions. She submitted on the two limbs of arguability and the nugatory aspects of the application.
7. On arguability, the applicant submitted that the grounds set up in the draft memorandum of appeal raised fundamental issues of law and fact as to whether the 2<sup>nd</sup> respondent was properly before this Court, given the fact that being a company it had proceeded to defend the suit without filing a board resolution authorizing him do so, contrary to the provisions of the law. This among other issues made the appeal arguable.
8. On the nugatory aspect, the applicant submitted that through the emails that had been presented to court, it was clear that the project was nearing completion and there were only a few units remaining and which equally were being sold quickly upon completion, hence the joint venture would equally be terminated and thus unless the injunction orders are granted, the intended appeal would be rendered nugatory.



9. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited and the law. This Court's jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
10. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled. For example, this Court in the case of *Trust Bank Limited and another v Investech Bank Limited and 3 others* [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:
 

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
11. We are cognizant of the fact that for such an application to succeed, both limbs must be demonstrated and proved to the Court's satisfaction, and demonstrating only one limb will not suffice. See: *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
12. On the first limb, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant to warrant ventilation before this Court. In the case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR this Court described an arguable appeal in the following terms:
  - vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
  - viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
13. In our view the appeal is arguable. This Court will determine, inter alia, whether the trial Court erred in failing to consider and determine the fact that the 2<sup>nd</sup> respondent was a limited liability company and the 1<sup>st</sup> respondent had to file the board resolution authorizing him to prosecute the suit in accordance with the law. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
14. On the nugatory aspect, 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. See: *Reliance Bank (in liquidation) v Norlake Investments Ltd* [2002] 1 EA 227.
15. The applicant states that unless this Court grants the orders, the respondents will proceed and complete the project and then sell the developed houses; that the 2<sup>nd</sup> respondent will transfer the reversionary interest into the management company and therefore wind-up, hence she will be forced to sue the management company comprising of about 88 occupants to recover the judgment sum if the appeal succeed. We do not actually see why the applicant will not recover her fees even when the



development is complete and sold. The people who instructed the applicant are known to her and the company which is in the business of purchasing land, constructing and selling will indeed suffer great loss if they were to be stopped from conducting their business and finishing, compared to the legal fees which can be recovered at any time from the respondents. There have not been any averments that the respondents will not be able to pay the fees in case the orders sought are not granted. In any case, the applicant still holds vital documents of the respondents including the title which in itself is worthy much more than her fees. We are not persuaded that the nugatory aspect has been demonstrated.

16. As the applicants are required to demonstrate both limbs, having failed to demonstrate the nugatory aspect consigns the application to the realm of dismissal. Accordingly, and for the foregoing reasons, this application fails and is hereby dismissed with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2022.**

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

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

