



**Ali v Kung'u & another (Civil Appeal (Application)
220 of 2020) [2022] KECA 914 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 914 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 220 OF 2020
W KARANJA, DK MUSINGA & SG KAIRU, JJA
JULY 8, 2022**

BETWEEN

FATUMA MOHAMMED ALI APPLICANT

AND

KENYA COMMERCIAL BANK 1ST RESPONDENT

PATRICIA WAIRIMU KUNG'U 2ND RESPONDENT

(An application for stay of proceedings under Section 1A and 1B of the Civil Procedure Act and Rule 5 (2) (b) of the Court of Appeal Rules pending the hearing and determination of an appeal from the Judgment of the Environment & Land Court at Nairobi (Bor, J.) dated 5th May 2020 in E.L.C. Case No. 917 of 2005 consolidated with H.C.C No. 5245 of 1988 and H.C.C No. 4886 of 1988)

RULING

1. The appellant/applicant moved this Court by way of a Notice of Motion expressed to be brought under section 1A and 1B of the Civil Procedure Act and rule 5(2) (b) of this Court's Rules seeking stay of execution of the judgment and decree delivered on 5th March 2020 by K. Bor, J. pending hearing and determination of an intended appeal.
2. The application is premised on eight grounds that are set out on the face of the motion and a supporting affidavit sworn by the applicant. The application is opposed by way a replying affidavit sworn by the 1st respondent which is dated 29th October 2020. In a nutshell, the applicant states that the trial judge on her own motion granted her thirty days stay of execution of judgement. The 1st respondent in total disobedience of the court order invaded the suit property and started demolishing sections thereof. The applicant stated further that she has already instituted contempt proceedings against the 1st respondent.



3. The dispute between the applicant and the two respondents revolves around the sale transaction of a property known as LR.37/260/29 by the 1st respondent to the applicant. The trial court after hearing both parties issued the following orders:
 - a. That the purported (sic) sale contract between the plaintiff and defendant was null and void.
 - b. That the appellant was directed to reconstitute to the 1st respondent all the money she collected as rent since 2008 from the suit property within 45 days of the judgment.
 - c. That the transfer and eventual charge against the said property LR.37/260/29 Nairobi was irregular and unlawful for lack of consideration.
4. When the application came up for hearing, Mr. Nyambega, learned counsel for the applicant sought to rely on the supporting affidavit and submissions on record. The 2nd respondent was represented by Mr. Okuta, learned counsel. There was no appearance for the first respondent.
5. Mr. Nyambega submitted that the intended appeal is arguable, and unless the order sought is granted, the appeal, if successful, shall be rendered nugatory.
6. On the issue of arguability, Mr. Nyambega pointed out four points which had been raised in the draft memorandum of appeal which according to him were arguable. Firstly, that the learned judge held that the contract for sale between the applicant and the respondent was void for want of consideration yet it was clear from the pleadings that parties had ascribed a monetary value to the contract. Secondly, that the judgment of the trial court was riddled with contradictions where at one point the judge held that the contract for sale had been rescinded but concluded wrongfully that the same contract was void for want of consideration. Thirdly, the learned judge awarded rent/rent arrears to the respondent yet this claim had not been pleaded. Lastly, counsel argued that the learned judge failed to make a determination as to whether the suit was time barred yet this had been pleaded by the applicant in her defence.
7. On the nugatory aspect, Mr. Nyambega submitted that the 1st respondent has already invaded the subject property and attempted to demolish the house situated thereon; that if the house is demolished, the appeal if successful, would be rendered nugatory since the subject matter of the appeal would have been already destroyed.
8. On her part, the 1st respondent argued that there was no arguable appeal with significant chances of success. The 1st respondent argued that she had already taken possession of the suit property and started carrying out repairs to the house which was in a dilapidated condition; that towards this end, the respondent had already expended a sum of Kshs.400,000.00 in repairs and another sum of Kshs.90,000.00 in payment of accumulated electricity bill. She argued that the applicant is not likely to suffer any harm if the order for stay is not granted for the reasons that:
 - a. The applicant is still the registered owner of the property and the respondent is not in a position to dispose of the property.
 - b. The property is still charged to KCB, the second respondent herein.
 - c. There is a restriction already placed against the title by Benny Roesch who was a party in the consolidated suits.
 - d. The property would still be available for the duration of the appeal save for possession which the respondent had already taken.



9. The 1st respondent argued that the applicant had been unlawfully benefiting from the property and that this court being a court of equity and justice should bring an end to this.
10. The 1st respondent further submitted that the applicant had not demonstrated to this Court her ability to pay the accumulated rent should she lose in the intended appeal. In order to mitigate this situation, the 1st respondent urged this Court to issue an order directing the applicant to deposit in this Court the rent received from the year 2008 pending the hearing and determination of the appeal.
11. The 2nd respondent did not file any replying affidavit and/or submissions.
12. The principles that guide this Court in the exercise of its unfettered discretion under rule 5(2) (b) to grant an order of stay are now well settled. Firstly, an applicant has to satisfy the Court that there is an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or the intended appeal if successful, would be rendered nugatory. See *Multimedia University & another v. Professor Gitile N. Naituli* [2014] eKLR and *Stanley Kangethe Kinyanjui v. Tonny Ketter & others* [2013] eKLR.
13. Looking at the draft memorandum of appeal, we are satisfied that the intended appeal is arguable. We need not say much on the issue of arguability lest we embarrass the bench that shall hear the appeal.
14. Turning to the nugatory aspect of the application, counsel for the applicant argued that the 1st respondent had already invaded the suit property and demolished a section thereof. Counsel further argued that the 1st respondent is likely to demolish the entire house, thus rendering the appeal, if successful, nugatory. In reply, the 1st respondent indicated that she was only performing repair works on the property, which was in a very dilapidated condition.
15. It is our view that the 1st respondent, having taken possession of the suit property as she acknowledged in her replying affidavit, there is nothing to prevent her from using or developing the suit property in a way that may change the character thereof; she may even demolish it. If this were to happen, the appeal if successful would be no more than an academic exercise as the situation may be irreversible and an award of damages may not be adequate.
16. It is our view that the applicant has satisfied both limbs for grant of relief under rule 5(2) (b) of this Court's Rules. The application is therefore merited and we hereby allow the same as prayed. The costs of the application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

