



Dhiman v Shah (Civil Application 317 of 2019) [2022] KECA 633 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KECA 633 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 317 OF 2019
HM OKWENGU, MSA MAKHANDIA & S OLE KANTAI, JJA

JULY 8, 2022

BETWEEN

KANWAL SARJIT SINGH DHIMAN APPLICANT

AND

KESHAVJI JIVRAJ SHAH RESPONDENT

(An application for stay of execution of the Judgment of the High Court of Kenya at Nairobi (Makau, J.) dated 19th September, 2019 in H.C.C.C. No. 205 of 1999)

RULING

1. By a Memoranda of Agreement dated 17th December, 1996 entered by the applicant Kanwal Sarjit Dhiman (as borrower) and the respondent Keshavji Jivraj Shah (the lender) it was agreed that the lender advances to the borrower KSh.13,000,000 in three installments; the sum would attract interest at 36% per annum and unpaid interest would also attract interest at the said rate; amongst other conditions agreed in the Agreement.
2. In a suit filed at the High Court of Kenya at Nairobi it was contended that the applicant had failed to repay the loan as per the agreement and it was prayed that Judgment be entered for the respondent in the sum of KSh.13,813,132/25 with interest at 36% per annum from 1st February, 1999 until payment in full, that the land parcel offered by the applicant to the respondent as security for the loan be sold by public auction and in the event of there being a deficit on sale a personal decree be issued against the applicant for the unrealized amount; costs and interest be awarded. The applicant filed a statement of defence and counterclaim praying that there be a declaration that the agreement between the parties was null and void and unenforceable in law; the court be pleased to order revocation of the applicant's title and rectification of the register in favour of the applicant and costs be awarded to the applicant.
3. The history of the matter then becomes long and winded. It does appear that Judgment was entered in favour of the respondent; public auction took place where according to the Certificate of Sale issued by the High Court on 11th August, 2006 the subject property (L.R. No. 209/8192/8 Lavington, Nairobi)



was sold to the respondent for KSh.17,000,000 at a public auction conducted on 27th February, 2004. There is a Vesting Order given by the High Court on 13th June, 2006.

4. There was an appeal to this Court being Nairobi Civil Appeal No. 33 of 2007 against order of the High Court which had refused an application to review an ex parte Judgment of 19th June, 1999 where the applicant had also prayed that orders of the High Court be set aside and the applicant be granted leave to defend the suit. This Court in a Judgment delivered on 31st July, 2013 allowed the appeal in effect setting aside the ex parte Judgment. Draft defence was deemed as duly filed upon payment of requisite court fees within 7 days.
5. The restored suit was then heard (by Makau, J.) who in the said Judgment allowed the respondent's claim and dismissed the counter-claim. The Judge ordered that the respondent pay stamp duty for the Memoranda of Agreement; he declared that the suit property belonged to the respondent and the applicant was ordered to grant the respondent vacant possession within 60 days.
6. By Motion on Notice brought under rule 5 of the *Court of Appeal Rules* we are asked to grant an order restraining the respondent from evicting, dealing with or interfering with the applicant's stay in the suit property pending the hearing and determination of an intended appeal. We are also asked to stay the decree of the High Court as ordered in terms 2, 3 and 4 of the Judgment pending hearing and determination of the intended appeal.
7. In grounds on the face of the Motion and in an affidavit of the applicant it is said amongst other things that the respondent has initiated steps towards execution of the Judgment and decree; that the suit property has already been decreed to belong to the respondent and that he can deal with it as he wishes including selling it and if that happened it would render the intended appeal nugatory. The said affidavit repeats the history we have given in this ruling adding that the respondent breached the agreement by not making money advances as agreed; that the applicant had made part payment to the respondent which had not been factored into the repayment schedule; that the Judge erred in ordering that public auction and vesting order were in force when there was a Judgment of this Court setting aside ex-parte Judgment; amongst other things.
8. In a replying affidavit the respondent also gives a history of how he advanced money to the applicant; the applicant had defaulted in repayment contrary to the agreement; that on being sued the applicant had failed to enter appearance or file defence leading to entry of a default Judgment; the suit property had been sold at a public auction. He denies that he has commenced execution process and denies that there is an arguable appeal contending that he is entitled to the fruits of the Judgment.
9. When the Motion came up for hearing before us on 15th March, 2022 the applicant was represented by learned counsel Mr. Muchangi Nduati but there was no appearance for the respondent. We allowed the hearing of the Motion to proceed after we were satisfied that M/S S. Musalia Mwenesi Advocates on record for the respondent had been served with a hearing notice on 8th March, 2022 at 11.20 a.m. Both parties had filed written submissions. The respondent had taken a Preliminary Objection dated 21st December 2020 where it was stated that the Motion was an abuse of the process of the Court and was incompetent; there is an issue on definition of "appeal" and "appellant" and it is stated that there is no legal representative of the deceased and the Motion is incompetent. Counsel for the respondent was not present at the hearing to take these objections and we shall say no more about them except to note that there was an application to substitute a deceased which was allowed by this Court.
10. In a highlight of written submissions Mr. Nduati submitted that there are substantive issues in the intended appeal. He referred us to the draft Memorandum of Appeal and submitted that the intended



appeal is not frivolous. Counsel further submitted that if stay is not granted the applicant who is in possession will be evicted.

11. In written submissions in opposition to the Motion the respondent relies on his replying affidavit which we have addressed in this ruling and fully supports the Judgment of the High Court.
12. The principles that govern an application of this nature are well known. For an applicant to succeed he must show, firstly that the appeal, or intended appeal, as the case may be, is arguable which is the same as saying that the appeal is not frivolous. Secondly, the applicant must demonstrate that the appeal would be rendered nugatory absent stay – these principles are well summarized in various pronouncements of this Court such as in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
13. We have perused draft Memorandum of Appeal where the applicant has taken 9 grounds of appeal. It is intended to be argued, for instance, that the Judge erred in law and in principle in finding that the vesting order and other consequential orders were still in force despite this Court having set aside the ex parte Judgment. The applicant also intends to argue on appeal that the Judge erred in holding that the Memorandum of Agreement was enforceable in law despite the parties having materially deviated from its terms. These, to us, amongst others, are arguable points on appeal; they are not idle and it has been held by this Court that an arguable point on appeal is not one which must succeed; it is one that requires full consideration by the Court – See, for instance, the case of *Dennis Mogambi Mongare v Attorney General & 3 Others* [2012] eKLR.
14. On the nugatory aspect which an applicant is required to satisfy the record shows that the applicant is in possession of the suit property which was transferred to the respondent. It is submitted for the applicant, and we agree, that in those circumstances the applicant can be evicted; the suit property can be transferred to a third party and put beyond the applicant’s reach if the appeal was to succeed.
15. We are in the circumstances inclined to exercise discretion in favour of the applicant. We allow the Motion. Let an appeal be filed and be determined within 1 year in default the stay granted here will lapse. Costs of the Motion will be in the appeal.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

