



REPUBLIC OF KENYA



KENYA LAW
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**Easy Properties Limited v Kituyi (Civil Appeal (Application)
E406 of 2020) [2022] KECA 1209 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1209 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E406 OF 2020
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
NOVEMBER 4, 2022**

BETWEEN

EASY PROPERTIES LIMITED APPELLANT

AND

ESTHER KITUYI RESPONDENT

*(Being an application for stay of execution pending appeal from the Judgment
and Decree of the Environment and Land Court of Kenya at Nairobi
(E. O. Obaga, J.) delivered on 21st March 2019 in ELC No. 15 Of 2012)*

RULING

1. On or about February 8, 2011, the respondent entered into a sale agreement with the applicant for the purchase of a three-bedroomed apartment in Block A Unit No A17 erected on LR No 12715/552 Mombasa Road, Nairobi, (the suit property) for a sum or price of Kshs 6,450,000, which she paid by various instalments during the period between February 14, 2011 and March 7, 2011 together with additional amounts on account of legal, registration and stamp duty charges, including disbursements, all amounting to Kshs 7,697,000.
2. Subsequently, by a sale agreement dated December 19, 2011, the applicant sold the suit property to one Katherine N Kisila, thereby prompting the respondent to institute civil proceedings against the applicant in Nairobi ELC Case No 15 of 2012 praying for:
 - “(a) A permanent injunction against the defendants, by themselves, their servants and agents restraining them and each of them from transferring, selling, charging, leasing, licensing and from in any manner whatsoever alienating the property known as Apartment No A17 Block A erected on LR No 12715/552 Mombasa Road;



- b. A mandatory order of injunction against the defendants to deliver vacant possession to the plaintiff and to transfer title in favour of the plaintiff of the property known as Apartment No A17 Block A erected on LR No 12715/552 Mombasa Road;
 - c. A mandatory injunction against the first defendant to deliver to the plaintiff absolute and unconditional use of the borehole at the premises;
 - d. A mandatory injunction against the first defendant to construct at the premises a swimming pool and yield the same absolutely and unconditionally to the Plaintiff as proprietor of Apartment No A17 Block A erected on LR No 12715/552 Mombasa Road;
 - e. Costs of this suit;
 - f. Alternatively to (b), (c) and (d) above, the first defendant to reimburse the plaintiff the purchase price of Kshs 7,697,000.00/= with interest at commercial bank rates from March, 2011 until payment in full;
 - g. General damages for loss of bargain.”
3. In its defence dated February 20, 2012, the applicant averred that one Job Tirimba, the applicant’s sales agent, had removed from the applicant’s receipt book some of the copies of payment receipts issued to the respondent in acknowledgement of payments made by the respondent towards purchase of the suit property. On the other hand, the applicant confirmed the payments having been made, but sought to avoid liability by pleading that the said sales agent had been charged in criminal case No 5019 of 2011 in Makadara Chief Magistrate’s Court.
 4. On March 21, 2019, the ELC (E O Obaga, J) entered judgment for the respondent against the applicant for a refund of Kshs 7,697,000 with interest at court rates with effect from March 7, 2011 until payment in full. The learned judge also ordered that the applicant bears the costs of the suit.
 5. Dissatisfied with the judgment of the trial court, the applicant lodged an appeal on 10 grounds set out in its undated memorandum of appeal, which we need not replicate here, save to observe that the applicant faulted the learned Judge for: finding that the respondent had paid the purchase price; failing to appreciate that the respondent had made some payments in cash instead of by way of RTGS as advised in the sale agreement; by finding that the moneys not remitted by the applicant’s sales agent to the applicant was a matter between the two; failing to find that the respondent was in breach of contract; by directing the applicant to refund the purchase price (Kshs 7,697,000) while it only received part of the payment amounting to 10% of the purchase price; and for failing to find that the receipts produced in court were the subject of criminal investigations in the case against its sales agent.
 6. By a notice of motion dated July 7, 2021, the applicant seeks stay of execution of the judgment entered on March 21, 2019 in favour of the respondent pending appeal, together with costs of the application. The applicant’s motion is supported by the annexed affidavit of Pamela Onyambu, the applicant’s Managing Director, sworn on July 7, 2021. The application is also made on the 3 grounds set out on its face, namely: that the applicant is aggrieved by the trial court’s decision and has filed an appeal; that it has an arguable appeal with a high probability of success; that unless the application is allowed, its appeal would be rendered nugatory; and that it would only be fair and just, and in the interest of justice for this court to grant the orders sought.



7. It is noteworthy that, even though the respondent did not file any reply or written submissions, the rules of this court require us to consider the applicant's motion on its merits.
8. We have carefully considered this application and the applicant's written submissions, as well as the cited authorities. The fate of the application before us, having been made under rule 5(2) (b) of the Court of Appeal Rules, is predicated on the twin principle enunciated in the case of Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR where this court restated the principles to be applied in considering applications for stay of execution or injunctive relief pending appeal, namely: that the applicant must demonstrate that he or she has an arguable appeal; and that the appeal, if successful, would be rendered nugatory absent stay.
9. It is also instructive that a single *bona fide* arguable issue is sufficient, and that an arguable appeal is not necessarily one that must succeed. The issue falling to be determined in this application is whether the applicant has satisfied the twin principle under rule 5(2) (b) of this court's rules to merit the orders sought.
10. It is not in dispute that the respondent paid to the applicant or to its sales agent the purchase price in respect of the suit property. It is also common ground that the applicant subsequently sold the property to a third party, and that the respondent did not get value for her money. The applicant has not denied that various instalments were paid and received by its sales agent, who it blames for failing to remit the proceeds of sale, and against whom criminal proceedings were instituted.
11. Having carefully considered the applicant's notice of motion, the grounds on which it is anchored, the impugned judgment and the applicant's memorandum of appeal, the affidavit in support of the motion, and the applicant's written submissions, we reach the inescapable conclusion that the applicant has no arguable appeal. Accordingly, we need not consider the second limb of the twin principle. In conclusion, the applicant's motion lacks merit and is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2022.

K M'INOTI

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JUDGE OF APPEAL

DR K I LAIBUTA

.....

JUDGE OF APPEAL

M GACHOKA – CI Arb, FCIARB

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

