



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OKWENGU, MUSINGA & GATEMBU, J.J.A.)**

**CIVIL APPEAL (APPLICATION) NO. 43 OF 2020**

**Between**

**LICINUS INVESTMENTS LIMITED.....APPELLANT**

**AND**

**MAURIZIO DALPIAZ.....RESPONDENT**

***(An Application for stay of execution against the Judgment***

***and Decree of the Environment and Land Court at Malindi***

***(Olola, J.) delivered on 30th January 2020 in Malindi ELC Case No. 206 of 2016)***

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**RULING OF THE COURT**

[1] This is an application for stay of execution against the judgment and decree of the Environment and Land Court (**Olola, J.**), delivered on 30th January 2020. The litigation resulting in the judgment was originated by a plaintiff filed in the High Court by **Licinus Investments Limited (the applicant)**, and later transferred to Malindi Environment and Land Court.

[2] In the judgment subject of the intended appeal, the learned Judge of the superior court granted orders in favour of the defendant, **Maurizio Dalpiaz** (the respondent herein), and against the applicant as follows:

- a) **An order of specific performance to issue compelling the plaintiff to comply with the agreements dated 24<sup>th</sup> November and 28<sup>th</sup> September 2006 and to execute all necessary steps to complete the transaction within 90 days from the date hereof.**
- b) **In default of compliance, the deputy Registrar of this court to execute all necessary documents to ensure the transfer of the property to the Defendant's name.**
- c) **The Defendant shall have the costs of the Plaintiff's suit as well as that of the Counterclaim.**

[3] The applicant being dissatisfied with this decision has moved this Court under Rule 5(2) (b) of the Court of Appeal Rules, 2010 seeking stay of execution of the judgment pending an appeal. The applicant has filed a memorandum of appeal in which he raises the following four grounds:

- (i) **The learned Judge erred in law and in fact by dismissing the Appellant's case despite the overwhelming evidence and issuing allowing.**
- (ii) **The learned judge erred in law and fact by allowing a prayer for specific performance by ordering transfer of the suit land when there was evidence of an earlier judgment in favor of the respondent thereby unjustly enriching the Respondent.**
- (iii) **The learned judge erred in law and fact by granting the Respondent both the main prayer and alternative prayer. The judge granted an alternative prayer for transfer of land as sought in the counterclaim when there was admission and evidence that the Respondent had already been granted judgment by another court for refund of the purchase price, which refund had also been sought as the main prayer in the counterclaim.**

**(iv) The learned judge erred in law by ordering the Appellant to pay the costs of the case and counterclaim.**

[4] In the affidavit sworn in support of the motion by the applicant's advocate, **Duncan Nyongesa**, it is deposed that the 90 days given by the learned Judge were due to expire and that unless the order of stay of execution is granted, there is a risk that the suit property will be transferred to the respondent who may dispose of it and put it out of the applicant's reach. The applicant has also filed written submissions in which the Court is urged that the intended appeal is arguable and may be rendered nugatory if the orders sought are not issued.

[5] In a replying affidavit sworn by the respondent, he explains that he purchased the suit property pursuant to a sale agreement entered between him and the applicant, and that he has paid the full purchase price and has been put in possession of the suit property, but the applicant has failed or refused to transfer the suit property to him. The respondent maintains that the memorandum of appeal does not raise any arguable issues. The respondent has also filed written submissions in which he maintains that the applicant has not satisfied the twin principles for granting the orders for stay of execution and urges the court to dismiss the applicant's motion.

[6] This being an application for stay of execution, the applicant has to satisfy the twin requirements of Rule 5(2)(b) of the Court of Appeal Rules. As restated in **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others** (2013) eKLR, the requirements are first that the applicant has an arguable appeal; and secondly, that the intended appeal if successful, would be rendered nugatory if the order of stay that is sought is not granted.

[7] On the first requirement, it is evident that the subject matter of the appeal is a parcel of land, which the superior court ordered in its judgment to be transferred to the respondent. The applicant submitted that if the stay of execution is not granted by this Court, the respondent will have the suit property transferred to himself and may further transfer the suit property to third parties, thereby making it difficult to have the parcel of land back in the event the appeal is successful.

[8] The respondent argued that the appeal cannot be rendered nugatory in the event the orders sought are not granted, as the applicant has already been paid the full purchase price and the respondent is in possession. The respondent relied on **Kenya shell Limited vs Benjamin Karuga Kibiru & Anor** [1986] eKLR.

[9] On the second issue regarding arguability of the appeal, the applicant argued that the superior court erred by allowing the respondent's prayer for specific performance and ordering transfer of the suit property to the respondent when the respondent had already been granted the prayer for refund of the purchase price in a different suit. It was further submitted that the superior court granted both the main prayer and the alternative prayer, which is unjust and amounted to double enrichment to the respondent and this raises an arguable issue. Reliance was placed on **Olive Mwihaki Mugenda & Another v Okiya Omtata Okoiti & 4 others** [2016] eKLR where it was held that:

**“where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so. Both cannot be granted in a blanket form”**

[10] We have considered this application, the submissions and the authorities cited. It is trite that the jurisdiction of this Court to entertain an application for stay of execution under Rule 5(2)(b) stems from an appeal against the judgment subject of the intended execution, and the filing of a notice of appeal is sufficient to invoke that jurisdiction. In this matter the applicant has not exhibited any notice of appeal that has been filed, but has only annexed a memorandum of appeal which does not bear any signature or appeal number nor does it bear any evidence that it has been filed. What this means is that there is nothing to demonstrate to this Court that the applicant has filed or intends to file any appeal. Its application under Rule 5(2)(b) of the Court Rules is therefore incompetent as the Court's jurisdiction has not been properly invoked.

[11] The above notwithstanding, for an application brought under Rule 5 (2)(b) of the Court of Appeal Rules to be successful, an applicant must satisfy the twin principle of arguability of the appeal and the appeal being rendered nugatory (**Stanley Kangethe Kinyanjui v Tony Ketter & 5 others** (supra)).

[12] In regard to the first limb on the arguability of the appeal, as was stated in **Joseph Gitahi Gachau & Another v Pioneer Holdings (A)ltd and 2 others**, [2009] eKLR, an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court. As per the memorandum of appeal that has been exhibited, the applicant has taken issue with the learned judge having granted the respondent an order for specific performance, when there was a judgment that had been given in another court for refund of the purchase price, in our view this raises an arguable issue that is not frivolous.

[13] On the nugatory aspect which is the second limb, as was stated in **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others** (supra), an appeal is said to be rendered nugatory where the resulting effect if the order sought is not granted, is likely to be irreversible such as to render the appeal if successful, a mere academic exercise.

[14] It is a common ground that the respondent has been in possession of the suit property pursuant to an agreement of sale entered into between the applicant and the respondent. The dispute is the payment of the purchase price which the applicant contends the respondent did not pay in full, but the respondent maintains he has paid. The applicant has not demonstrated that the respondent cannot pay the money in the event that it succeeds in the appeal. Moreover, the applicant has not demonstrated any real threat of disposal of the suit property. The applicant has therefore failed to satisfy the second limb, as it has not shown that its appeal, if successful, is likely to be rendered nugatory. As the applicant needed to prove both limbs of the requirement of Rule 5(2)(b) of the Court Rules the application must fail.

[15] For the above reasons, we find that the applicant's motion is not only incompetent but also lacks merit. It is accordingly dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of February, 2021.**

**HANNAH OKWENGU**

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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**