



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), ASIKE-MAKHANDIA & MUSINGA, JJ. A.)

CIVIL APPLICATION NO. 1 OF 2019

BETWEEN

JANE MARETE.....APPLICANT

AND

JOSEPH WAITIKI NDEGWA1ST RESPONDENT

IRENE JULIET OTINGA 2ND RESPONDENT

REGISTRAR OF TITLES MOMBASA.....3RD RESPONDENT

(An application for stay of execution pending the hearing and determination of an intended appeal from the judgment and decree of the Environment and Land Court of Kenya at Mombasa (Omollo, J.) dated 25th October, 2018 in *E.L.C No. 201 of 2008*)

RULING OF THE COURT

By a suit filed in the Environment and Land Court (ELC), the applicant challenged the transfer of LR No. 5608 (Original No. 5203/22) Section 1 Mainland North (“the suit property”) by the 1st respondent to the 2nd respondent which, in her view, was done fraudulently and illegally.

Her claim was anchored on an agreement dated 5th October, 2006 between the 1st respondent and herself for the sale of the suit property in consideration of Kshs. 4,500,000; that upon execution of the agreement and part payment of Kshs. 1,500,000, she took possession of the suit property; that therefore, the 1st respondent lacked the capacity to resell and transfer the suit property to the 2nd respondent; and that furthermore, the authenticity of the transfer instrument was questionable since on the face of it, it was executed on 22nd August, 2007 yet its alleged registration was on 24th July, 2007.

By a judgment dated 25th October, 2018 Omollo, J. dismissed the applicant’s suit in part and directed the 1st respondent to refund Kshs.1, 500,000, the amount already paid as deposit of the purchase price plus interest to the applicant.

In doing so, she found that the agreement between the applicant and 1st respondent had effectively been terminated on account of the applicant’s failure to pay the balance of the purchase price.

In addition, the learned Judge declared the 2nd respondent as the rightful registered owner of the suit property and granted her vacant possession, amongst other orders.

Intent on challenging the above decision on appeal to this Court, the applicant has approached us under Rule 5(2) (b) of this Court’s Rules for the temporary preservation of the suit property by way of an order staying the execution of the impugned judgment, the conditional stay granted by the ELC requiring her to deposit a sum of Kshs. 5,000,000 into a joint interest earning account and stay of proceedings in the ELC, as she brings an appeal.

The applicant has implored us to find that the intended appeal is not frivolous; and that the same would be defeated should she be evicted or should the 2nd respondent alter or worse still, dispose the suit property to a third party. The applicant termed the conditional stay granted by the ELC requiring her to deposit a sum of Kshs. 5,000,000 into a joint interest earning account within 30 days as overbearing and

unconscionable.

As far as the 1st and 2nd respondents were concerned, the motion was not brought in good faith. They have argued that the applicant had failed to disclose that the conditional stay was granted with the consent of the parties' advocates; that at no point did she indicate that the said orders were onerous; that rather, she participated through her advocates in opening the joint interest earning account and deposited a sum of Kshs. 1,800,000; that if indeed she was having difficulty with compliance, she ought to have moved the ELC for review; and that in light of the conditional stay and non-compliance thereof, she had no clean hands with which to approach this Court under **Rule 5(2)(b)** for an equitable remedy.

It is common ground that in an application under **Rule 5(2)(b)**, this Court exercises original discretionary jurisdiction with the objective of preserving the subject matter of an appeal, as the appeal is being processed for determination.

See **Martin Tindi Khaemba vs. Law Society of Kenya & 2 others** [2019] eKLR. This original jurisdiction entails the Court considering an application under the said rule as a court of first instance as opposed to an appellate court even where a similar application has been made in the court below.

However, this Court will only exercise its original jurisdiction under the rule if a similar application has been made but disallowed by the court below in the words of Githinji, J.A in **Equity Bank Limited vs. West Link Mbo Limited** [2013] eKLR:

“It is trite law that in dealing with 5(2)(b) applications, the court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of Order 42 C.P. Rules and refused.” [Emphasis added]

In the case at hand, the applicant lodged an application for stay dated 8th November, 2018 in the ELC which resulted in a conditional stay being granted.

It has been stated without rebuttal from the applicant that the conditional stay was as a result of a consent in which her advocate participated.

In addition, it has not been denied that she partially complied with the consent and deposited some funds.

In those circumstances, we do not think that the applicant deserves the exercise of our discretionary power.

Accordingly, we dismiss the motion before us with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR