



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI, JJA.)

CIVIL APPLICATION NO. 190 OF 2019

BETWEEN

KAMINDI SELFRIDGES SUPERMARKET LIMITED.....APPLICANT

AND

KIAMBU MURUTANI COMPANY LIMITED.....RESPONDENT

(Being an application for stay of execution from the Judgment of the

ENVIRONMENT AND LAND COURT AT THIKA (GACHERU, J.),

dated 15TH November 2019 in ELR No. 77 of 2017)

RULING OF THE COURT

Before us is a notice of motion dated 19th December 2019 brought under Rule 5(2) (b) of the court of appeal rules seeking several prayers but in the main it seeks the following:

1. That the court be pleased to grant stay of execution of the judgment, decree and all consequential orders given on the 15th November 2019 pending the hearing and determination of the appeal.
2. That an order of temporary injunction be lodged with the Kiambu Lands Office and registered against Title No. Kiambu Township Block 11/87 pending further orders of this Honorable Court.
3. That the original certificate of lease in respect of Title No. Kiambu Township Block 11/87 be released back to Messrs. Walker Kontos Advocates pending further orders of the court.
4. That the court be pleased to grant a temporary injunction restraining the Respondent, its Servants, officers, workmen, employees and agents or any other person from occupying, suing, selling, leasing, transferring, charging, pledging, alienating, tempering with, altering or otherwise howsoever dealing with the property known as Title No. Kiambu Township Block 11/87 in any manner that is prejudicial to the appellant/applicant pending the hearing and determination of the appeal.

The suit giving rise to this application pitted the applicant and the respondent in the Environment and land court at Thika ("ELC"). The suit arose out of a disputed sale agreement in respect of one of the properties belonging to the respondent namely, Title no. Kiambu Township Block 11/87 ("the suit premises"). The transaction however fell through forcing the applicant to move to the ELC seeking orders of specific performance to compel the respondent to complete the sale and transfer the suit premises to the applicant. The suit was contested and in a judgment delivered on 15th November 2019, the trial court (Gacheru, J) dismissed the entire suit with costs to the respondent. Whilst the suit was pending hearing the applicant had registered a caution on the suit premises. Similarly the respondent had surrendered the title documents to the applicant's lawyers for purposes of finalizing the transaction. The effect of the judgment was that the caution was lifted and the title documents were returned to the respondent,

Aggrieved by the judgment and decree aforesaid the applicant filed a notice of appeal and subsequently the instant application.

The grounds in support of the motion are that: the applicant had filed a notice of appeal against the judgment, the title documents which

hitherto were being held by Messrs. Walker Kontos as a trustee and officer of the Court had been released to the Respondent, the caution which had been registered against the title by the applicant had been removed and or lifted. Thus the suit premises were in danger of being alienated by the respondent to the detriment the applicant.

The application is supported by an affidavit sworn by one, George Njenga Kamithi a director of the applicant who merely reiterates and expounds on the grounds aforesaid save that he is now apprehensive that following the taxation of costs, the respondent will proceed to execute the decree which act will render the intended appeal innate. Indeed the respondent may proceed to occupy the suit premises pursuant to the court decree. That it has a meritorious appeal as can be gathered from the draft memorandum of appeal annexed to the application

In opposition to the motion the respondent filed a replying affidavit through its counsel, Samwel Mwakandana Kiwinda. He deposed that the decree had already been executed and this was made known to the applicant in the trial court when its application for stay was dismissed for reasons that there was nothing to stay, the decree having been executed fully.

Parties filed written submissions in support of their respective positions on the application. The applicant relied on the case of Daynes Muriithi & 4 others V. Law Society of Kenya & Anor [2016] eKLR to support its proposition that it had an arguable appeal which may be rendered nugatory should the orders of stay and injunction not be granted. The Respondent on the other hand submitted that the applicant's suit having been dismissed, it gave rise to a negative order incapable of being stayed. It relied on several authorities of this court including National Cereals & Produce Board Vs. Enad Supplies Nos. 48 of 2012 and Co-operative Bank Kenya Limited Vs. Banking Insurance & Finance Union Kenya [2015] eKLR.

Our mandate when Rule 5(2) (b) is invoked has been explained in several cases of this court. Indeed it is a procedural innovation designed to empower the court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals without rendering the exercise an academic journey. In short, the applicant must show that it has an arguable appeal and that the said appeal or intended appeal would be rendered nugatory if the orders in the interim are not granted. As stated by this Court in ***Ishmael Kagunyi Thande v Housing Finance of Kenya Limited [2007] eKLR:***

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

However considering what has transpired since the impugned judgment was delivered it might not be necessary to consider the application in those lenses. There is no doubt at all that the decree has been fully executed. The caution placed on the suit property has been removed pursuant to the decree. The title documents have also been released to the respondent. The applicant does not discount these facts at all. If anything he totally concedes to them. Indeed it was made aware of these facts when it was prosecuting a similar application before the trial court and which was dismissed. These facts have not changed and we wonder why the applicant is persisting in making the instant application. The judgment of the trial court having been fully executed there is nothing left to stay. Secondly, the order sought to be stayed is a negative order. The applicant's suit for specific performance having been dismissed by the trial court, it gave rise to a negative order incapable of enforcement and or execution. In the case of *Catherine Njeri Maranga V Serah Chege & Another (2017) eKLR*, this Court while expounding on stay of execution of a negative order stated *“In Kanwal Surjit Singh Dhirman V Keshavji Jivraj Shah (2008) eKLR, the court of appeal observed while dealing with a similar application for stay (of execution) of the order of the superior court made on 18th December 2006 merely dismissing the application for setting aside the judgment and costs. By that order the superior court did not order any of the parties to do anything or refrain from doing anything or pay any sum. It was thus a negative order which is incapable of execution”*. This is the situation that obtains here.

Turning to the injunction sought against the Land Registrar, Kiambu and Messrs Walker Kontos Advocates, we note that they are in the nature of mandatory injunctions. Basically what the applicant is asking us to do is to reverse or undo what has already taken place. The rule under which the application is made does not contemplate or envisage such situation, and even if it did, no case has been made out to warrant the grant of such prayers. Lastly on the injunction to restrain the respondent from alienating or in any manner dealing with the suit premises, we note that the same is registered in the name of the respondent. Pursuant to the judgment and decree. The respondent is now in possession of the suit premises. There is no evidence that the respondent is about to alienate it in any manner. In the circumstances the injunction sought will serve no useful purpose. It is accordingly denied.

The upshot is that this application is bereft of merit and is accordingly dismissed with costs to the respondent.

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

R. N. NAMBUYE

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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