



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE, SICHALE JJA)

CIVIL APPLICATION NO 68 "B" OF 2020

BETWEEN

MAHAVIR TRANSPOTERS CONTRACTORS LTD..... APPLICANT

AND

RAMBART MIHESO IFEDHA.....1ST RESPONDENT

ROSEMARY BRENDA MUTENDE..... 2ND RESPONDENT

THE LAND REGISTRAR KAKAMEGA.....3RD RESPONDENT

(Being an application for stay of execution pending hearing and determination of the judgment of the Employment and Land Court at Kakamega (N.A. Matheka, J) dated 6th May, 2020,

in

Kakamega ELC Case No. 207 of 2015)

RULING OF THE COURT

The applicant has moved this Court for orders of stay of execution of the Judgment and Decree in **Kakamega ELC Case No. 207 of 2015**, pending the hearing and determination of an intended appeal to this Court against the Judgment delivered by the Environmental and Land Court on **6th May 2020**.

In the Judgment subject of the intended appeal, the learned Judge of the Environment and Land Court allowed a suit by the 1st respondent and proceeded to revoke the purported transfer of lease from the 2nd respondent to the applicant, of the leasehold interest in the suit property **Block IV/9 Kakamega Municipality**, compel the 2nd respondent to complete the contract she had with the 1st respondent for the sale of the leasehold interest in the suit property and execute all transfer documents and in default, the Deputy Registrar to do so and lastly, issue a permanent injunction to restrain the applicant, the 2nd respondent and the 3rd respondent jointly or severally by themselves, their servants or agents from selling, disposing of, transferring, charging, pledging, leasing, wasting, attempting to take possession of, threatening and or/harassing and/or in any manner interfering with the 1st respondent possession of and quiet enjoyment of the suit property or in any way dealing with the said property and also awarded the costs of the suit to the 1st respondent.

Being aggrieved by the judgment, the applicant filed an application for stay of execution of the judgment before this Court on the main ground that the learned Judge erred in ruling that the sale agreement entered between the 1st and 2nd respondents was valid when the same was signed by other persons purportedly

on their behalf in the absence of a registered power of attorney. Secondly, on the ground that trial court erred in ruling that the full purchase price of the suit property was paid to the 2nd respondent and thirdly, on the ground that the 1st and 2nd respondent did not apply for consent from the Land Control Board with regard to the sale agreement between them as required by the law (Land Control Act). The applicant submits that the grounds raised are arguable and the said intended appeal will be rendered nugatory unless the orders sought are granted.

The application is opposed by the 1st respondent via his Replying Affidavit and written submissions in which he submits that the applicant has not demonstrated that the intended appeal is arguable and further, that he is entitled to the orders sought in the circumstances. The 1st respondent submits that the 3rd respondent has since revoked the suit lease and transferred the same in accordance with the judgment and as a result, there is nothing to warrant the grant of the orders sought in this application, the same having been overtaken by events and in this respect cited the case of **Christopher Mwendiah Owando v. Kenya Industria Estates Ltd & Another [2014] eKLR** and **Stephen Kipkebut T/A Riverside Lodge and Rooms & Another v. Natali Ogola & Another [2013] eKLR**. In the result, the 1st respondent submits that the orders sought herein are not attainable.

This being an application for stay of proceedings, 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 that the applicant has to have an arguable appeal and that the intended appeal if successful, would be rendered nugatory if the order of stay that is sought is not granted.

In law an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, one which is not frivolous. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

Applying the above threshold to the rival positions herein, we are satisfied that the grounds of appeal raised in the draft memorandum of appeal annexed to the application, one of which includes the fact that the 1st respondent may proceed to sell, transfer, charge, lease or alienate the suit property, are arguable, their ultimate success or otherwise notwithstanding.

Turning to the second requirement, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See the case of **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**.

In satisfaction of this requirement, given that the trial court's judgment has been partly executed with regard to revocation of the previous title and transfer of the same to the 1st respondent, the applicant is apprehensive that the 1st respondent may proceed to sell, transfer, charge, lease or alienate the same, which action will be detrimental to the applicant who was a purchaser for value and as a result, submits that it is necessary for this court to preserve the substratum of the intended appeal so that the eventual determination is not rendered nugatory and in addition, that the 1st respondent will not be prejudiced.

It is our considered view that indeed, in the event that the 1st respondent disposes the suit property during the pendency of the appeal and the appeal eventually succeeds, it will be impossible or difficult for the applicant to regain it and the appeal will therefore have been rendered nugatory.

For these reasons, we find that the applicant has satisfied the twin requirements of **Rule 5(2)(b) of the Court Rules**. The application is accordingly allowed with costs in the intended appeal.

Dated and delivered at Nairobi this 19th day of March, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR