



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, GATEMBU, KANTAI JJ. A)

CIVIL APPEAL (APPLICATION) NO. 9 OF 2020

BETWEEN

GERALD RICHARD KAFEERO.....1ST APPLICANT

MARY KAVOSA KAFEERO.....2ND APPLICANT

AND

SUKHDEV SINGH LALY.....RESPONDENT

(Being an application for stay of execution of the judgment of the Environment and Land Court at Nairobi (K. Bor, J.) delivered on 26th November, 2019 in Nairobi ELC Case No. 501 of 2010)

RULING OF THE COURT

1. In their application dated 9th January 2020, the applicants, Gerald Richard Kafeero and Mary Kavosa Kafeero seek, as against the respondent, Sukhdev Singh Laly, an order of stay of execution of the judgment and decree of the Environment and Land Court (ELC) (*K. Bor, J.*) delivered on 26th November 2019 pending the hearing and determination of their appeal. In that judgment, the ELC decreed that the rent receivable (together with interest at commercial rates) accruing from the property known as L.R. No.7741/337 situated in Kitusuru Nairobi is payable to the respondent from the month of January 2011 until the balance of the full purchase price on the property is paid.
2. We have considered the application, the supporting affidavit sworn by the 1st applicant, the written submissions by Manyonge Wanyama & Associates LLP Advocates for the applicants, the replying affidavit sworn by the respondent, and the written submissions by Mwamuye, Kimathi & Kimani Advocates for the respondent.
3. The uncontested facts, in brief, leading to the present application are that by an agreement for sale dated 20th November 2003, the applicants agreed to purchase from the respondent, who agreed to sell the property to them for the purchase price of Kshs.23,000,000. It was agreed that the respondent would continue to collect rent from the tenant in occupation of the property until the payment of the full purchase price by the applicants.
4. The respondent transferred the property to the applicants before the purchase price was paid in full. According to the respondent, he effected the transfer before receiving payment of the full purchase price to enable the applicants obtain financing whereupon the applicants sought to take full possession of the property when there was an outstanding balance on the purchase price of Kshs.6,900,000.00.
5. On their part, the applicants claimed that the rent collected by the respondent from the property from October 2004 to December 2010 in the amount of Kshs.10,140,000.00 surpassed the balance of the purchase price of Kshs.6,900,000.00 by an amount of Kshs.3,240,000.00 which they counterclaimed against respondent.
6. The learned Judge found that there was no agreement for the rent collected to be applied towards the purchase price and that it was an express term of the agreement that the respondent was entitled to collect rent from the property until the applicants paid the full purchase price. It was on that basis that the Judge decreed that the respondent is entitled to the rent proceeds and interest from January 2011 until full payment of the purchase price and in the alternative the immediate payment of balance of the purchase price. That is the judgment which the applicants seek to have stayed pending the hearing and determination of their appeal.
7. The applicants urge that unless the stay of execution is granted, they are at risk of suffering substantial loss and there would be no basis

through which the applicants will exercise their proprietary rights hence rendering the appeal nugatory.

8. The application is opposed mainly on the ground that it was a term of the agreement that the respondent continues collecting rent from the suit property till payment in full of the purchase price; that the applicants breached the terms of the agreement and have not up to now completed paying the full purchase price; and that it was an express term of the contract that the respondent was to collect rent till payment in full of the purchase price.

9. In an application of this nature, the applicants are required to demonstrate that they have an arguable appeal and that the appeal if successful will be rendered nugatory should the orders sought not be granted. With regard to arguability, this Court in the often-cited case of Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR, stated:

“The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

10. Although the applicants have in their memorandum of appeal raised seven grounds of appeal including the complaint that the Judge failed to recognize that once the property was transferred, it conferred on them exclusive rights to the property entitling them to all benefits, it seems to us, *prima facie*, that the learned did no more than enforce the contractual terms between the parties. Considering the implicit concession by the applicants that they did not pay the full purchase price, we doubt, without expressing a concluded view on the matter, that the appeal is arguable.

11. But even on the nugatory aspect, the suit property is already transferred to the applicants and note that the ELC declined the respondent’s prayer for the revocation of the title issued to the applicants. We are not satisfied that the applicants have demonstrated that should we decline the application and the appeal subsequently succeeds, that the same will be rendered nugatory.

12. Consequently, the application fails and is hereby dismissed with costs to the respondent.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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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