



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & KANTAL, JJA)

CIVIL APPLICATION NO. E335 OF 2020

BETWEEN

WINNIE MUKOLWE (Sued as Administrator of the Estate of

David Nyambu Jonathan Kituri-Deceased) & 12 OTHERS.....APPLICANTS/APPELLANTS

AND

LUCY WANJIKU MUCHAI T/A BELLAVIN INVESTMENTS.....RESPONDENT

(Being an application for stay of execution pending hearing and

determination of the order of the Environment and Land

Court (L. Gacheru, J.) dated 15th October, 2020

in

Thika ELC No. 175 of 2019)

RULING OF THE COURT

Before us is a Notice of Motion dated 28th October, 2020 substantively under **Rule 5(2) (b)** of the Court of Appeal Rules, and all enabling provisions of law, seeking an order of stay of execution of the Ruling of **L. Gacheru, J.** dated and delivered on 15th October, 2020 and stay of further proceedings in Thika ELC No. 175 of 2019 pending hearing and determination of the intended appeal of the Applicants herein together with an attendant order for costs to be borne by the Respondent.

It is supported by grounds on its body and a supporting affidavit of **Winnie Mukolwe**, the Applicant herein on her own behalf and on behalf of the other Applicants together with annexures thereto. It has been opposed by a replying affidavit of **Lucy Wanjiku Muchai**, the Respondent, sworn on 20th January, 2021. It was canvassed virtually through rival pleadings, written submissions and legal authorities filed by the rival parties herein, in the absence of learned counsel for the respective parties and without oral highlighting.

The background to the application albeit in summary form is that the Applicants are the lawful owners of **LR. No. 10090/24** (the suit property), being beneficiaries under a certificate of confirmation of grant issued on 26th January, 1996 in Nairobi High Court Succession Cause No. 713 of 1994. The parties entered into contested sale agreements with the Respondent over the sale of the suit property dated 14th February, 2008 and 2nd April, 2008 respectively vide which the Respondent agreed to purchase and Applicants agreed to sell the suit property at a consideration price of Kshs. 25,000,000/=. The Respondent allegedly only paid a deposit of Kshs. 5 million and defaulted on the payment of the balance. Both sale agreements expired by effluxion of time before firstly, completion of payment of the agreed purchase price and secondly before obtaining consent of the Area Land Control Board.

Against the above background, the Respondent filed a suit against the Applicants in Thika being ELC 175 of 2019, asserting a purchaser's interest in the suit property. She sought specific performance of the contested agreements and a permanent injunction to restrain Applicants from dealing with the property in any manner detrimental to her purchaser's interest.

Simultaneously, with the filing of the suit, she filed an interim application seeking preservation of the suit property pending hearing and

determination of the suit. Applicants filed a replying affidavit on 13th December, 2019 in opposition to the interim application, to which the Respondent filed a supplementary affidavit on 17th December, 2019. The Applicants also filed a further replying affidavit on 2nd March, 2021 in response to the Respondent's supplementary affidavit.

The interim application was canvassed through written submissions giving rise to the intended impugned ruling dated 15th October, 2020 vide which the learned Judge issued a temporary injunction stopping Applicants from selling, transferring, charging, alienating, gifting, disposing, subdividing, developing or dealing with the suit property pending hearing and determination of the suit based on grounds that the Respondent had established a *prima facie* purchaser's interest over the suit property.

The Applicants were aggrieved and filed a notice of appeal on 23rd October, 2020, intending to appeal against the whole of the said ruling on which they have anchored the application under consideration.

Relying on grounds in the body of the application, averments in the supporting affidavits as well as annexures, they contend that they have satisfied the twin principles for granting relief under **Rule 5(2) (b)** of the Court **Rules**.

In satisfaction of the first of the twin principles for granting relief under the above rule, Applicants rely on an annexed draft memorandum of appeal raising six (6) grounds of appeal, which may be paraphrased that the learned Judge erroneously held that: the Respondent had established a *prima facie* purchaser's interests in the suit property and therefore failed to appreciate that: she had only paid a fraction of the purchase price and had therefore breached the said agreement; failed to appreciate that the completion date for the alleged sale agreements, and which had not been extended had long lapsed; relied on a mere allegation by the Respondent that she had a purchaser's interest in the suit property to constitute a *prima facie* case and therefore erroneously held that the Respondent would suffer irreparable harm that could not be compensated in damages when all she had done under the alleged sale agreements was to pay a deposit of Kshs.5, 000,000 and in the absence of demonstration that Applicants would not be in a position to refund the same. Lastly, that the learned trial Judge also erred in holding that a balance of convenience tilted in favour of the Respondent who had only paid a deposit and had no attachment to the suit property to deny Applicants enjoyment and use of their property as deemed fit, all of which they contend are arguable with high chances of success.

As for satisfaction of the 2nd prerequisite, Applicants contend that an order issued by the learned Judge has the effect of denying them rights of absolute use of the suit property and yet they are the owners. It is also not only highly prejudicial but also oppressive of them considering that they are elderly and need freedom in the use of the suit property for their sustenance. According to them, the Respondent will not be in a position to compensate them for that loss they will incur if proceedings are not stayed. They are also apprehensive that Judgment may also be given in favour of the Respondent before the appeal is heard.

To buttress the above submissions, Applicants rely on the following authorities: the case of **National Bank of Kenya Limited & Another vs. Geoffrey Wahome Muota & Another [2016] eKLR** for holding *inter alia* that demonstration of existence of one *bona fide* issue deserving consideration on the merits on appeal is sufficient to satisfy the first prerequisite for grant of relief under **Rule 5(2)(b)** of the Court's rules; **Mohamed Jawayoliqbal** (personal representative of the Estate of the late **Ghulam Rasool Jammohamed**) **vs. George Boniface Mbogua** [2019] eKLR for the holding *inter alia* that, a purchaser cannot acquire any rights under a sale agreement until the full purchase price is settled; **Nabro Properties Limited vs. Sky Structures Limited & 2 Others [2002] eKLR** for the holding *inter alia*, that, where a sale agreement is not completed within the completion period, it becomes incapable of enforcement; **Nguruman Limited vs. Jan Bond Nielsen & 2 Others [2014] eKLR** for the holding *inter alia* that, harm can only be said to be irreparable where no amount of money can adequately compensate the aggrieved party for the loss suffered as a result of sustaining a stay order; and lastly, the case of **Josephine Koki Raymond vs. Philomena Kanini Maingi & Another [2018] eKLR** in support of their contention that, in the circumstances prevailing herein, the intended appeal will be rendered nugatory as the Respondent will not be in a position to compensate them for loss suffered if the relief sought were declined on account of her impecuniosity.

In rebuttal, the Respondent both in her averments in her replying affidavit and written submissions concede filing the suit simultaneously with an interim application for an injunction seeking to protect the substratum of the suit in which she had sought substantive orders for specific performance and a permanent injunction to restrain Applicants from dealing with the suit property in a manner that would be detrimental to her purchaser's interest in the suit property pending hearing and determination of the suit; that facts presented before this Court by Applicants in support of the application under consideration are the same facts that were presented before the trial court, evaluated and on the basis of which the learned trial Judge exercised discretion judiciously in granting the *status quo* order which according to the Respondent was the most appropriate order to grant in the circumstances prevailing herein in the best interests of all parties to the suit.

The Respondent further contends that the sole purpose as to why Applicants are seeking relief in the manner sought herein is for them to be allowed to deal with the substratum of the suit as deemed fit, not only to the detriment of the Respondent's purchaser's interests in the suit property but also to render the trial before the ELC an academic exercise.

On whether Applicants have satisfied the first of the twin principles for granting of relief under **Rule 5(2) (b)** of the Court's **Rules**, the Respondent relies on the case of **JMK versus PNK [2019] eKLR** and submits that this threshold has not been satisfied for the Applicants' failure either to file an appeal or annex a draft memorandum of appeal to demonstrate issues they intend to raise on appeal for the court to gauge their arguability.

Turning to the alleged satisfaction of the second prerequisite under the said rule, the Respondent relies on the case of **Benson Khwatege Wafula vs. Director of Public Prosecution; Ethics and Anti-Corruption & 2 Others (Interested Parties) [2020] eKLR** and submits that: the order of *status quo* granted by the trial court is in the nature of a negative order and therefore incapable of being stayed. Second, that the orders granted were as a result of a proper exercise of judicial discretion by the learned Judge in the best interest of both parties and are unlikely to be upset on appeal.

We have considered the record in light of the rival pleadings, submissions and legal authorities relied upon by the respective parties in support of their opposing positions herein. As restated by the Court in the **Stanley Kengethe Kinyanjui vs. Tony Ketter & 5 Others [2013]**

eKLR, the requirement for grant of relief under **Rule 5(2)(b)** of the **Court of Appeal Rules** is demonstration, firstly, that the intended appeal is arguable and secondly, that it will be rendered nugatory if the order of stay sought is not granted.

In satisfaction of the first requirement under this Rule, Applicants rely on the contents of a draft memorandum of appeal annexed to the application whose contents have been paraphrased above and which we find no need to rehash.

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) Limited, Civil Application No. Nai 345 of 2004**.

Applying the above threshold, to the rival position herein on this issue, we are satisfied that all the six proposed grounds of appeal paraphrased above are all 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**.

Applying this threshold to the rival position herein on this issue, we agree with the learned Judge and reiterate the position taken by the Court in **Niaz Mohammed Janmohammed vs. Commissioner for Lands & 4 Others [1996] eKLR** and **Olympic Sports House Ltd vs. School Equipment Centre Ltd [2012]eKLR**, that preservation of the *status quo* as was before the commencement of the litigation giving rise to the intended appeal would be in the best interests of both parties as the order simply ensures that no rights of either party are tampered with until crystallized or otherwise by the full hearing of the suit. Second, ordering stay of proceedings in the manner sought by Applicants will also be highly punitive of both parties as it will delay the crystallization of the competing rights of the respective parties to the suit especially those of Applicants who claim to be aged and frail. The sooner the trial is completed the better for them. Sanctioning the order granted by the learned Judge would in our view, satisfy the principle of equality of arms in the dispensation of justice.

In the circumstances, we find that since Applicants have only satisfied one of the twin principles for granting relief under **Rule 5(2) (b)** of the **Court of Appeal Rules** and considering that in law, in order to succeed under the said **Rule**, both principles have to be satisfied, the application herein therefore fails 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

.....

JUDGE OF APPEAL

S. Ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR