



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAL, JJA

CIVIL APPLICATION NO. 453 OF 2019

AFRITRACK INVESTMENTS (E.A) LIMITED.....APPLICANT

AND

JANE WAMUYU MWAL.....1ST RESPONDENT

WAINAINA & KARIMI ADVOCATES.....2ND RESPONDENT

(Being an application for stay of proceedings pending hearing and determination of the ruling/order of the High Court at Nairobi (W. A. Okwany, J.) dated 18th July 2019,

in

HCC No. 300 of 2012 consolidated with HCCC No. 235 of 2014)

RULING OF THE COURT

Before us is a notice of motion dated 25th June 2020 brought under **Rules 5(2)(b)** of the Court of Appeal Rules (“**the rules**”) and all other enabling provisions of law, substantively seeking orders that:

:“1 Pending the hearing and determination of the appeal herein, the Honourable Court be pleased to issue an order staying proceedings in the High Court Civil Suit No. 300 of 2012 consolidated with HCCC No. 235 of 2014.

2. Costs of this application be provided for.”

In summary, the applicant’s case as gathered from the averments in the application, the grounds in support thereof, the supporting affidavit, the annexures thereto and written submissions appear to be that, it filed a suit against the 1st respondent on 4th May 2012 seeking inter alia an order for special damages arising from a breach of the sale agreement dated 11th March 2011 in respect of **Land Reference Number 14902/18** for a purchase price of Kshs. 54,000,000.00. The suit was consolidated with **HCCC No. 235 of 2014** where the applicant had been sued by its erstwhile advocates over the same transaction. When the suit came up for hearing, the applicant realized that the suit had been filed in the wrong Court as it ought to have been instituted in the Environment and Land Court (“**ELC**”) as it involved occupation and use of land. Through an application dated 19th February 2020, the applicant sought the High Court to transfer the case to ELC for hearing and determination as it was the forum clothed with jurisdiction pursuant to Article 162 (2) of the Constitution to entertain the dispute. On 18th July 2019, the High Court (Okwany J.) upon hearing the parties declined the transfer sought, holding that it had requisite jurisdiction to hear and determine the matter notwithstanding that it touched on land. It reasoned that the central issue in the dispute was breach of a sale agreement and the consequences arising therefrom.

Aggrieved, the applicant filed a Notice of Appeal dated 16th September 2019 intending to appeal against the whole of the said ruling and order. In the meantime, it approached the High Court on 18th October 2019 with an application for stay of proceedings pending the hearing and determination of the appeal. Though the application was opposed, it

was nonetheless allowed on condition that the applicant deposits kshs. 17,000,000.00 with interest in Court within 30 days of the ruling, failing which the order of stay of proceedings granted would automatically lapse, and the respondents would be at liberty to fix the case for hearing.

It appears that the applicant was unable to meet the terms of conditional stay of proceedings aforesaid. Instead the applicant filed the instant application. The applicant claims that the appeal is not idle but serious and would be rendered nugatory if stay of proceedings is not ordered. The applicant has raised five grounds that he will urge whose gist is that the High Court lacked jurisdiction to determine an issue that relates to use and occupation of land as it is the exclusive jurisdiction of the ELC. The applicant further contends that the learned judge ignored a binding authority of this Court that explicitly specified which land matters the High Court can entertain and determine. Further that the appeal will be rendered nugatory if stay is not granted as the suit may proceed to hearing in a wrong forum which may not be reversible

On the other hand, the respondents through the 1st and 2nd respondents' submissions and replying affidavit respectively take the view that this application is an abuse of the court process as there is already an order of stay of proceedings in place. On that premise they are not averse to the application as long as the applicant complies with the conditional stay already granted.

We have considered the record in light of the above rival pleadings and submissions. This being an application for stay proceedings, the applicant has to satisfy the twin requirements of **Rule 5(2)(b)** of the rules as restated in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (2013) eKLR**. The requirements are that the intended appeal is arguable and secondly, that the said appeal could be rendered nugatory if the order of stay sought is not granted and the appeal is successful

In satisfaction of the first requirement, the applicant argues that the High Court lacks jurisdiction to determine the issues in dispute in the pending suit as they relate to use and occupation of land. That this is the exclusive jurisdiction of the ELC. In law an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court. 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 memorandum of appeal annexed to the application 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**.

We note though that the High Court has already given a conditional stay. For the applicant to move to this court and ask for the same prayer that has already been granted by the trial court cannot be anything but an abuse of the process of the court. The applicant has not sufficiently explained himself regarding what became of the conditional stay he was granted by the trial court. If the applicant felt the conditions were onerous it should have gone back to the same court for review or even proffered an appeal. In those circumstances we do not see how the appeal shall be rendered nugatory, absent stay.

In the result, we find that the applicant has failed to satisfy the twin requirement of the rule. The application therefore fails and is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 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