



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MURGOR, SICHALE & KANTAI, J.J.A.)

CIVIL APPLICATION NO. E020 OF 2021

BETWEEN

MONICA JACKLINE WAMBUI.....1ST APPLICANT

PAULINE MUKUHI NGANGA.....2ND APPLICANT

AND

LUCY WAIRIMU MWANGI.....RESPONDENT

(Application for stay of execution pending the lodgement, hearing and

determination of an intended appeal from the Judgment of the High Court

of Kenya at Nairobi (Nzioka, J.) dated 18th May, 2020 in H.C.C.C. No. 185 of 2009)

RULING OF THE COURT

The applicants, **Monicah Jackline Wambui** and her daughter **Pauline Mukuhi Nganga** have brought a Motion under **rules 5 (2) (b), 41, 42 and 47** of the **Court of Appeal Rules** praying in the main that we order a stay of execution of the Judgment of **Nzioka, J.** delivered on 18th May, 2020 in **HCCC No. 185 of 2009** pending lodgement, hearing and determination of the intended appeal. It is also prayed that we order that the status quo be maintained and the applicants not be evicted from premises until the application and the intended appeal are determined. The Motion is supported by the grounds on its face and by the affidavit of the 1st applicant. In sum it is said that the applicants are dissatisfied with the said Judgment and have lodged a Notice of Appeal and applied for proceedings in the High Court; that the Judgment constituted a permanent injunction restraining the applicants from interfering with the respondent's quiet possession of the suit property and an order of eviction directed at the applicants to vacate the suit property and to pay mesne profits to the respondent. It is said that the intended appeal raises arguable points and the applicants are likely to suffer irreparable loss and damage as they will be evicted from their property.

It is further stated that the 1st applicant is the initial original registered owner of the disputed property (Maisonette No. 6 Casablanca Villas erected on L.R. No. 209/5927) which was transferred to the respondent, **Lucy Wairimu Mwangi** – “dubiously as I lacked the capacity to comprehend the nature of the transaction due to the depression I suffered at the time”. The applicants say that they will be evicted from their only home (the disputed property) unless the Motion is granted pending the intended appeal.

In a replying affidavit the respondent states that she purchased the disputed property from the 1st applicant by an Agreement for Sale made on 13th January, 2009 for a consideration of Ksh.13,700,000. She says she paid the entire purchase price on the date of the agreement; she was granted immediate possession and commenced renovations of the house which renovations were completed on 26th February, 2009; at paragraphs 6 and 7 of the replying affidavit;

“6. THAT the suit property is in a common compound with other properties managed by Hemmingways Holdings Limited (the Manager) and the 1st Applicant duly informed the Manager and executed the transfer of her share to my name copies of the Transfer of Share and the letter to the Manager dated 16th February 2009 are annexed hereto and marked “LWM-3”.

7. THAT the 1st Applicant also wrote to the utility companies informing them of the change of ownership of the suit property and asked them to change the names of the relevant accounts for electricity and water to my name, copies of the letters dated 16th February 2009 to Kenya Power & Lighting Co. Ltd and Nairobi Water Company are annexed hereto and marked “LWM-4”.”

The respondent further depones that she had completed repairs when she was visited by the 2nd applicant who proposed that the entire purchase price be refunded but she rejected the proposal. According to her the allegation that the 1st applicant lacked capacity to enter into contract was untrue and unfounded, the property having been placed in the market by the 1st applicant in March, 2007 who received various offers for two years before accepting the respondent's offer in January 2009. The respondent details many offers made by others to purchase the property which fell through for various reasons culminating in her winning bid; she denies that the applicants are in possession or occupation contending that the property is occupied by a tenant from who the applicants collect rent. According to the respondent she had been denied taking over a property she had lawfully purchased and been denied rental income for over 12 years.

We have carefully considered the written submissions made by both sides and the Digest and List of Authorities.

For an applicant to succeed in an application of this nature it must be demonstrated, firstly, that the appeal, or intended appeal, as the case may be is arguable, which is the same as saying that the same is not frivolous. Secondly, the applicant must show that the appeal would be rendered nugatory absent stay – *Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR*.

In the Motion before us it is not denied that the 1st applicant was the registered owner of the maisonette in question. It is also not denied that the 1st applicant entered into an Agreement for Sale with the respondent and did, indeed, transfer the maisonette to the respondent. What the applicants are saying is that the 1st applicant lacked capacity to enter into contract because her mental function was affected by depression. This position is disputed by the respondent.

We have looked at the record of the Motion. There is indeed an Agreement for Sale entered into by the 1st applicant and the respondent on 13th January, 2009. The agreement is drawn by a law firm, **Chege Wainaina & Company Advocates** and an Advocate of that firm, **Chege Wainaina** witnessed the signatures of both the 1st applicant and the respondent. Consideration was Ksh.13,700,000 and there is evidence of payment of that sum by cheque. We have also seen an Assignment dated 20th January, 2009 drawn and witnessed by the said law firm and lawyer, it is duly signed by the 1st applicant and the respondent; one ordinary share in Hemingway Holdings Management Limited previously owned by the 1st applicant was transferred to the respondent and the 1st applicant, further took all those steps, and thereafter wrote letters to the various authorities for water, electricity and rates informing them that she had sold the maisonette to the respondent.

The respondent says that the 1st applicant had placed the maisonette in the market for 2 years. No credible evidence has been placed before us to show that the 1st applicant's mental capacity was affected in any way and in those premises we cannot discern any arguable point in the intended appeal. Being of that view we need not go into the nugatory aspect as failure to satisfy the 1st principle in an application of this nature stops the whole issue in its tracks.

The Motion fails and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

A.K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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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