



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, J. MOHAMMED & KANTAL, J.J.A.)

CIVIL APPLICATION NO. NAI 102 OF 2019

BETWEEN

JOHN GATHARA KURIA.....APPLICANT

AND

MUNYAMBU NJUGUNA GACHANJO.....1ST RESPONDENT

KEZIAH WANGARI MUNYAMBU.....2ND RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and final

determination of an intended appeal from the Ruling of the High Court of Kenya

at Kiambu (Makau, J.) dated 17th January, 2019

in

HC. Misc. Application No. 444 of 2017)

RULING OF THE COURT

By the Motion brought under **rules 5 (2) (b), 41 and 47** of the **Court of Appeal Rules** the applicant, **John Gathara Kuria** prays in the main that we grant an order of stay of execution of the arbitrator's award and decree of the ruling of the High Court (**Makau, J.**) dated 17th January, 2019 in **HC Misc. Application No. 444 of 2017** pending the hearing and determination of an intended appeal. In grounds in support of the Motion and in an affidavit of the applicant it is said that the High Court declined to set aside an arbitrators' award dated 31st May, 2017 and the respondents (**Munyambu Njuguna Gachanja and Kezia Wangari Munyambu**) were granted leave to enforce the award as a decree of the High Court; that the applicant had filed a Notice of Appeal; that the intended appeal is arguable as the award has contravened the provisions of **Section 35 (2) (A) (iv)** of the "**Arbitrators**" (**sic**) **Act** because the same provided remedies which were not stated in the sale agreement between the parties and a non-contractual obligation had been laid on the applicant and that the applicant stood to be prejudiced and would suffer substantial and irreparable loss unless stay of execution was granted. Further, that vide an agreement for sale dated 25th October, 2013 the applicant contracted to sell to the respondents **L.R. No. Nairobi/Block/82/1589 (the suit property)** for **Ksh.55,500,000** but that in the course of the transaction a dispute had arisen which dispute was referred to arbitration; that the arbitrator made an award where certain remedies were granted to the respondents; that the applicant applied to set aside the award but the application was dismissed by the High Court and an application for leave to appeal was declined.

There is a further affidavit in support of urgency by **Victoria Wambua**, an Advocate in the firm of lawyers on record for the applicant. It says, amongst other things, that the applicant's goods had been proclaimed.

There was no replying affidavit from the respondents.

The agreement for sale is not in our record.

In the ruling delivered on 17th January, 2019 reduced into the Order issued on 19th March, 2019 the applicant's' application to set aside the award was dismissed. The final award of the arbitrator was recognized and was adopted as a decree of the Court. The applicant was ordered

to pay to the respondents' Ksh.832,400 being rent for the month of March, 2014 and net deposits for rent and service charge. The applicant was also ordered to pay to the respondents Ksh.4,096,946.40 for architectural fees, civil engineer's fees, charges payable to the then Nairobi City County, charges payable to National Environmental Management Authority; interest on the sum of Ksh.832,400 and on the sum of Ksh.4,096,946.40 amongst other orders. The applicant's application for leave to appeal was declined.

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

The applicant states that he entered into an agreement to sell to the respondents' the suit property; that a dispute arose in the course of the transaction which dispute was referred to an arbitrator as per contract; that the arbitrator reached a determination which was reduced into an award which award was adopted by the High Court as a decree of the Court. An application for leave to appeal was declined.

We have perused the draft Memorandum of Appeal where three grounds of appeal are taken. These range from an attack on the decision of the Judge who is said to have failed to find that the arbitrator exceeded her jurisdiction; and that the Judge failed to find that the arbitrator gave remedies beyond the four corners of the agreement. These may very well be arguable points on appeal but we doubt that they can stand any chance where leave to appeal was declined. In the event the Motion itself is incompetent.

The applicant has not said how the appeal would be rendered nugatory if stay of execution is not granted. The remedies given by the arbitrator in the award which was adopted as a decree of the High Court involved monetary awards and it has not been shown that the respondents cannot pay back the same if the intended appeal succeeded.

The Motion has no merit and we dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR