



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, MURGOR & SICHALE, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E380 OF 2020

BETWEEN

CHARLES MWITI MUGAMBI....APPELLANT/APPLICANT

AND

ERIC MWENDA KANYUURU.....1ST RESPONDENT

ZAKAYO KIMATHI MUGANIA.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

(Application for stay of execution pending the hearing and determination of the appeal from the judgment and decree of the Environment and Land Court at Nairobi (*Bor, J.*) dated 27th February 2020 in ELC NO. 143 OF 2017)

RULING OF THE COURT

By the motion dated 3rd November, 2020 brought under **Rule 5(2)(b)** of this **Court's Rules**, the applicant **Charles Mwiti Mugambi** seeks an order of stay of execution of the judgment and decree issued against him by the Environment and Land Court at Nairobi, pending the hearing and determination of his appeal against the same.

The application is founded on four grounds including that; the court issued a judgment which *inter alia* directed specific actions against the applicant and the 2nd Respondent which have the effect of nullifying the registration of L.R No.12672/51 situated in Runda, Nairobi, in the name of the 2nd respondent and vesting its ownership and possession upon the 1st respondent; and, the enforcement of the orders appealed from would amount to the court re-writing & altering the terms of an agreement for sale which had been rescinded pursuant to a notice of rescission issued on 8th March 2013, following the 1st respondent's default in paying the balance of the purchase price.

In an affidavit sworn on 5th November 2020 in support of the Motion, the applicant deposes that the agreement for Cessation of Business, Dissolution of Partnership and Sale dated 29th August 2012 between him, one **David Mwenda Maingi** and the 1st respondent stipulated that the 1st respondent would pay Ksh. 9,000,000 being the balance payable after execution of the agreement in three equal instalments, on 30th November 2012, 28th February 2013, and 31st May 2013, towards purchase of the suit property L.R No.12672/51. The 1st respondent defaulted in paying the 1st instalment on 30th November 2012, and subsequently made some piecemeal payments amounting to Ksh. 500,000.

The applicant avers that the 1st respondent further defaulted in paying the rest of the instalments to the tune of Ksh. 8,500,000 resulting in the applicant serving him with a notice dated 8th March 2013 pursuant to a termination/rescission clause, requiring him to remedy the situation. The 1st respondent having not made good his default at the lapse of the notice, the applicant sold the suit property to the 2nd respondent under an agreement for sale dated 19th July 2016.

The 1st respondent opposed the application through a replying affidavit sworn on 10th March 2021 and written submissions dated the same day. He affirms that through a tripartite agreement dated 29th August 2021, he agreed to purchase the suit property from the applicant at a sum of Ksh. 16,000,000, excluding the buildings which belonged to one David Mwenda Maingi, for which he paid Ksh. 8,000,000. The 1st respondent further deposes that the Agreement for Sale had a clause to the effect that in the event the applicant wished to terminate the contract for breach, he would give the 1st respondent 21 days' written notice, and upon lapse thereof if the 1st respondent had not complied,

the applicant would refund the 1st respondent all monies paid to him, less the sum forfeited, within three months of the date of the lapse of the notice.

The 1st respondent affirms that indeed the applicant issued him with a 21-day completion notice for failure to pay outstanding instalments. The notice lapsed without the 1st respondent acting on it and therefore, it is contended, the applicant ought to have refunded the 1st respondent Ksh. 5,900,000, which was the amount due to him after forfeiture of Ksh. 1,600,000. The 1st respondent avers that the applicant failed to make such refund and subsequently sold the suit property to the 2nd respondent.

Through submissions dated 11th March 2021, the 2nd respondent supports the applicant's Motion, stating that the application presents an arguable case, and that the appeal will be rendered nugatory if the order of stay is not granted.

We have given due consideration to the application, the affidavits, the contending submissions and the law. It is trite that an applicant for relief under **Rule 5(2)(b)** needs to demonstrate that he has an arguable appeal. This merely means an appeal that raises at least one *bona fide* issue worthy of the Court's consideration on appeal or, put another way, the appeal is not frivolous. That does not mean however, an appeal that must necessarily succeed. The second matter which the applicant must show is that the appeal would be rendered nugatory without the Court's intervention in the interim. An appeal would be rendered nugatory if damage of a great or irreversible character, prejudicial or probably destructive of the substratum of the appeal, would have occurred in the intervening period. A full discussion of these principles and the notable jurisprudence on them is found in this Court's decision in **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 2 OTHERS [2013] eKLR.**

The applicant argues that the trial court deviated from the parameters set for granting specific performance orders. In our view, this is a matter to be explored on appeal, whether or not it will succeed.

On whether the appeal would be rendered nugatory, we note the applicant's contention that the court orders have the effect of conferring absolute title and possession of the suit property upon the 1st respondent, with the result that he may charge, sell or transfer the suit property during the pendency of the appeal.

We are persuaded that taking all the circumstances of this case into consideration, it would be in the interests of justice that orders do issue to preserve the subject matter, and that the *status quo ante* the impugned judgment be preserved pending the hearing and determination of the appeal. The application is accordingly allowed. We direct that the appeal be processed and fast-tracked for hearing on priority.

The costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR