



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KIAGE, MURGOR & SICHALE, JJ. A]

CIVIL APPEAL (APPLICATION) NO. E433 OF 2020

BETWEEN

MAISHA INVESTMENTS LIMITED.....APPLICANT

VERSUS

MOHAMED HASSANALI

ALIMOHAMED JANMOHAMED.....1<sup>ST</sup> RESPONDENT

FARHANA MOHAMED HASSANALI.....2<sup>ND</sup> RESPONDENT

*(An Application for injunction against the Respondent pending the hearing and determination of an intended Appeal from the judgment of the High Court of Kenya at Nairobi (Mutungi, J) dated 30<sup>th</sup> October 2019 in ELC no. 208 of 2014)*

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RULING OF THE COURT

The Applicant, Maisha Investments Limited, through their advocate, filed a Notice of Motion dated **2<sup>nd</sup> November 2020**, pursuant to **Rule 5 (2) (b)** and **41** of this Court's Rules, 2010, **Order 40 Rule (1)** and **Order 42 Rule 6 (1) Section 1A, 1B, 3A** of the Civil Procedure Act, seeking the following orders:

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**1. Spent.**

**2. THAT an Order of Injunction do issue against the Respondent jointly and severally restraining them whether by themselves or through their agents/ servants/ employees or any other person claiming through or under them from wasting, damaging, charging, encumbering, alienating, selling, removing and transferring, conveying or disposing of the property known as Land Reference number 1338/29 (original number 1338/4/10) pending the hearing and determination of this application.**

**3. THAT an order of injunction do issue against the Respondent jointly and severally restraining them whether by themselves or through their agent/ servants/ employees or any other person claiming through or under them from wasting, damaging, charging, encumbering, alienating, selling, removing and transferring, conveying or disposing of the property known as Land Reference Number 1338/29 (original number 1338/4/10) pending the hearing and determination of this appeal.**

Briefly, the background of the application stems from a dispute between the Applicant and the Respondents over property known as Land Reference Number 1338/29 (original number 1338/4/10) (the suit property). The Respondents forwarded to the Applicant, an agreement for the sale/purchase of the suit property. The Applicant in compliance with the agreement deposited 10% of the purchase price to the Agents, Hass Consult on the **14<sup>th</sup> of November 2012**. The Respondents then opted out of the transaction citing delay on the part of the Applicant. Aggrieved, the Applicant filed a suit in which judgment was delivered on **30<sup>th</sup> October 2019**, by (**Mutungi, J.**) who found in favour of the Respondents.

It is the decision of the Trial Court that precipitated the Notice of Motion now before us. The motion is supported by the affidavit of **Ms Lila Koki Kyalo**, learned counsel having the conduct of this matter on behalf of the Applicant sworn on **2<sup>nd</sup> November 2020** in which she

deposed that the Respondents sent the letter of offer and the Applicant then paid 10% deposit to the agents of the Respondents; that despite the approval of the draft agreement and requests by the Applicant to send the final agreement, the Respondents' Advocate refused and/or ignored to send the said agreement to the Applicant and that the Respondents purported to cancel the sale agreement citing delay on the part of the Applicant. It was further deposed for the Applicant that in the absence of an injunctive order, the Respondents would proceed to sell the suit property consequently defeating the Applicant's claim hence rendering the Appeal nugatory and only of academic relevance.

In opposition to the motion, the Respondents filed a replying affidavit dated **11<sup>th</sup> December, 2020** sworn by **Mohamed Hassanali Alimohamed Janmohamed**, the 1<sup>st</sup> Respondent herein sworn on his own behalf and on behalf of the 2<sup>nd</sup> Respondent denying that the Applicant has an arguable appeal with reasonable chances of success as the orders sought are based on a non-existent sale agreement and that there was nothing to injunct or stay as there was no agreement of sale signed by all parties.

In the Respondents' submissions dated **11<sup>th</sup> December 2020**, it was stated that the Applicant had not demonstrated a *prima facie* case and hence there could be no arguable appeal under the circumstances. They also submitted that there was no contract in writing signed by either the vendors or the purchaser.

We have considered the application, the rival affidavits, and the submissions made by counsel and the law. The Principles for consideration in an application such as the one before us are now well settled. In the case of Stanley *Kang'ethe Kinyanjui vs. Tony Keter & 5 others [2013] eKLR* as follows:

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- i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 others v Nderitu & Another (1989) KLR 459.**
- ii) The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.**
- iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.**
- iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.**
- v) An applicant must satisfy the court on both of the twin principles.**
- vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.**
- vii) 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. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.**
- viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.**
- ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.**
- x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.**
- xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim”. International laboratory for Research on Animal Diseases v. kinyua, [1990] KLR 403**

[In our view, we find that it is arguable whether a contract had come into existence given that the Respondents had forwarded an agreement to the Applicant, and although this agreement was not executed by all the parties, it led to the payment of 10% of the purchase price. It is also arguable as to whether the exchange of an intended agreement that precipitated payment of the 10% deposit is binding to the parties and hence, the limb of arguability is satisfied. As for the 2<sup>nd</sup> limb of whether the intended appeal will be rendered nugatory, absent stay, we note that the subject matter of the suit is land. Further, we were told that the Respondent is in the process of selling it to another buyer. In our view, the second limb has also been satisfied as, if the Respondent was to proceed to sell the suit property, then this will be outside the reach of the Applicant.

The upshot of the above is that the motion of **20<sup>th</sup> November, 2020** is hereby allowed. Costs of the motion to abide the outcome of the appeal.

It is so ordered.

**Dated and delivered at Nairobi this 9<sup>th</sup> 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