



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & WARSAME, JJ.A)

CIVIL APPLICATION (NAI) NO. 70 OF 2020

BETWEEN

REUBEN KIOKO MUTYAENEAPPLICANT

AND

ENDERMANN PROPERTY LIMITED.....1ST RESPONDENT

KCB BANK LIMITED.....2ND RESPONDENT

(Being an application for stay of execution and/or stay of further proceedings and injunction orders of the Environment and Land Court at Machakos (Angote, J.) delivered on 21st February, 2020 in ELC Petition No. 19 of 2018)

RULING OF THE COURT

1. Before us is the applicant's application dated 6th March, 2020 seeking an order of stay of execution of a judgment of the Environment and Land Court at Machakos (*Angote, J.*) delivered on 21st February, 2020 which dismissed the applicant's suit for wrongful revocation of the contract for the purchase of House No. 2103, the suit property.

2. The background in brief is that on 13th June, 2017 the applicant visited the 1st respondent's ongoing housing project located on L.R. Mavoko/27317/2 where he identified the suit property selling at KShs.3,000,000.00. The initial completion date was 30th June 2017 which the 1st respondent extended to 15th September, 2017 after the applicant paid the deposit of KShs.500,000.00. On 19th January, 2018 the 1st respondent extended the completion date yet again to 30th April, 2018 when the purchase price of the suit property was revised to KShs.3,900,000/=

3. Consequently, the applicant and the 1st respondent entered into a new contract after the applicant paid the requisite deposit of KShs.500,000.00 while the 2nd respondent would finance the balance of the purchase price of KShs.3,400,000.00. The applicant thereafter applied for an equity release loan facility secured by a further charge over his property, Machakos/Kiandani/2833. The loan was approved on 4th June, 2018 but the 1st respondent cancelled the sale on 18th July, 2018 citing failure to clear the balance of the purchase prices despite several extended deadlines. The applicant was aggrieved by the termination of the sale transaction hence filed a suit the ELC in Machakos. On hearing the suit, the trial court dismissed the applicant's case with no orders as to costs. The trial court further ordered that the 1st respondent refunds the deposit paid less 10%.

4. As a result, the applicant lodged an appeal against the trial court's judgment delivered on 21st February, 2020 while seeking an order for stay of execution and/or stay of further proceedings against the said judgement along with injunctive orders;

a. Restraining the 1st respondent from selling the suit property.

b. Preserving the funds approved by the 2nd respondent for purchase of the suit property.

5. As to arguability of the intended appeal, the applicant submitted that the court wrongfully limited his constitutional right to property and that the decision of the court was skewed as it relied on the 1st respondent's "Reply to Petition and submissions" which were not disclosed to him.

6. As to whether the intended appeal will be rendered nugatory, the applicant submitted that in the in the absence of adjudication over the

funds held by the 2nd respondent for the purchase of the suit property, the 2nd respondent continues to retain and illegally benefit from funds recovered from the processed mortgage loan application. Consequently, the execution of the decree of the trial court will render the outcome of the intended appeal nugatory since the suit property will be sold to a different buyer rendering the funds availed by the 2nd respondent and the legal charge registered against Machakos/Kiandani/2833 obsolete.

7. In concluding, the applicant submitted that the 1st respondent will suffer no prejudice should we grant the orders for stay and the injunction sought since the deposit of KShs.500,000,00 and the house unit in dispute are in the 1st respondent's custody. It is the case of the 2nd respondent that the orders issued by the trial court are incapable of being stayed, that there is nothing the trial court issued to be done to warrant a stay of execution. In essence there are no positive orders to execute against the applicant.

8. We have considered the application along with the arguments in support thereof. We also note that the 1st respondent did not file any documents in the instant application. At the heart of a successful application under Rule 5(2)(b) of this Court's Rules, is the requirement that the applicant must satisfy this Court that the intended appeal is arguable and that unless the orders sought are granted, the appeal if successful, will be rendered nugatory. As stated by the Court in **Ishmael Kagunyi Thande vs. Housing Finance Company Limited Civil Application No. 156 of 2006 (UR)**:

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

9. An arguable appeal is not one which must necessarily succeed but one which ought to be argued before the Court. On whether an appeal is arguable, this Court has further acknowledged that for an appeal to be considered arguable, a single *bonafide* ground of appeal will suffice. (See **Stanley Kang'ethe vs. Tony Keter & 5 Others (2013) eKLR**).

10. On arguability, the applicant has submitted that his right to property has been infringed, that the suit property is likely to be sold and transferred to a 3rd party and that the termination of the sale agreement was illegal. We therefore think that the applicant has surmounted the first hurdle.

11. As to whether the appeal will be rendered nugatory, it is common ground that the learned judge in dismissing the applicant's Petition dated 2nd October, 2018 merely ordered that the 1st respondent refunds the deposit paid by the applicant less 10%. The instant application does not show how applicant is at risk of losing anything. This Court addressed the question of risk and loss suffered by an applicant in its decision in **Catherine Njeri Maranga vs. Serah Chege & Another [2017] eKLR** as follows;

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...” (Emphasis supplied)

12. In addition to the prayer for stay of execution, the applicant sought injunctive orders/prayers to restrain the 1st respondent from selling, advertising, transferring, leasing, renting or interfering with the suit property pending the hearing and determination of the intended appeal. Again the applicant sought an injunctive order against the 2nd respondent so as to preserve the approved funds for the purchase of the suit property. Our view on the foregoing is whether the application is for stay of execution, injunction, or stay of further proceedings, the consideration and applicable principles are the same and serve the same purpose. (See **Oliver Collins Wanyama v Engineers Board of Kenya [2019] eKLR**).

13. Consequently, we hold that the appeal will not be rendered nugatory as the applicant has not satisfied the twin requirements for the grant of the orders sought, the application is therefore dismissed with costs.

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

W. KARANJA

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true *Copy of the original*.

Signed

DEPUTY REGISTRAR