



REPUBLIC OF KENYA



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Flavemart Enterprises Limited v Kenya Railways Corporation (Civil Application 50 of 2020) [2021] KECA 334 (KLR) (17 December 2021) (Ruling)

Neutral citation: [2021] KECA 334 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 50 OF 2020
HM OKWENGU, MA WARSAME & J MOHAMMED, JJA
DECEMBER 17, 2021

BETWEEN

FLAVEMART ENTERPRISES LIMITED APPLICANT

AND

KENYA RAILWAYS CORPORATION RESPONDENT

(Being an application for stay of a decree of the High Court pending the lodging, hearing and determination of an intended Appeal from the judgment and decree of the High Court of Kenya at Kisumu (Olao, J.) dated at Bungoma on 30th October 2019, delivered by (Ombwayo, J.) in Kisumu on 15th November 2019 in Kisumu High Court ELC Case No. 48 of 2013)

RULING

1. By way of a notice of motion dated 6th May, 2020, Flavemart Enterprises Limited (the applicant) seeks orders that:
 - a. an order of stay of execution do issue staying the execution of the judgement and decree of Olao, J. dated at Bungoma on 30th October, 2019, delivered by Ombwayo, J. at Kisumu on 15th November, 2019 the Environment and Land Court ELC Case 48 of 2013, pending inter partes hearing of the appeal.
 - b. That the costs of this application be provided for.
2. In this motion that is filed under Rule 5(2)(b) of the *Court of Appeal Rules* (the Rules of this Court), Kenya Railways Corporation is the respondent herein.
3. The background to the application is that the applicant filed suit in the ELC claiming to be the registered proprietor and/or grantee of the land parcel known as Kisumu Municipality Block 11/7 (the suit property) having acquired the same on 11th March, 2011; that in February, 2013 the respondent without the applicant's authority or consent, under the misguided belief that it owned the suit



- property threatened to enter, occupy the same and evict the applicant; and that the respondent's said acts amounted to trespass and is illegal and void ab initio.
4. The respondent filed a defence and counter-claim in which it pleaded, inter alia, that it is the true registered owner of the suit property having obtained title on 10th December, 1976; that it sold the suit property to Dube Holdings Ltd on 22nd December, 2011; and that the respondent discovered that the suit property had been transferred to Riegate Development who had allegedly purchased the same from the applicant.
 5. The learned Judge found that the applicant was incorporated on 16th August, 2011 while a lease in respect of the suit property was issued on 11th March, 2011; that the applicant did not have capacity to hold title until 16th August, 2011 when it came into existence; that there is sufficient evidence led by the respondent in its counter-claim to show that it is the rightful owner of the suit property and the purported transfer to the applicant was illegal, null and void; and that there is uncontroverted evidence that the respondent holds the original lease to the suit property issued on 10th December, 1976 to the then East African Railways Corporation. The learned Judge held that in the circumstances, the applicant is not entitled to the declaration that it is the registered proprietor of the suit property.
 6. Aggrieved by that decision, the applicant filed a notice of appeal and the instant application. In the written submissions filed on behalf of the applicant, learned counsel, Rayola O. Olel submitted that the intended appeal is arguable on grounds inter alia, whether the appellant was incorporated after the title to the suit property was issued thereby invalidating the registration of the suit property in favour of the applicant; and whether the suit property was transferred to the respondent by the East African Railways Corporation.
 7. On the nugatory aspect, it was counsel's submission that the intended appeal will be rendered nugatory as the respondent sought to evict the applicant on 25th November, 2019; that in the respondent's pleading which is captured in the impugned judgment, the respondent was categorical that it sold the suit property to Dube Holdings Limited and intend to transfer the suit property to the said company; that if stay is not granted, the applicant will be evicted and the suit property demolished by Dube Holdings Limited who are not parties to the litigation; that the applicant has extensively developed the suit property and has tenants therein and stands to lose rental income; and that the respondent will suffer no prejudice if the stay sought is granted. Counsel proposed that the respondent's interest on the suit property be secured by way of registration of a prohibition over the suit property pending the hearing and determination of the intended appeal.
 8. The application was opposed by way of written submissions filed by Tom Mutei & Co. Advocates, who appeared for the respondent. Counsel submitted that the applicant filed the notice of appeal on 18th November, 2019 and have since not complied with Rule 81 of this Court's Rules as it has not filed its record of appeal within the statutory period of 60 days from the date of lodging the notice of appeal; that the statutory time within which the applicant was required to file the notice of appeal lapsed and no application has been made seeking extension of time within which to file the notice and record of appeal; and that in the absence of a record of appeal and a memorandum of appeal, this Court can neither empathize nor sympathize with the applicant's contention that the intended appeal is arguable.
 9. It was counsel's further contention that it is trite law that equity does not act in vain and justice shall not be served in a vacuum; that the intended appeal is not arguable as none exists and the instant application has no basis; that the intended appeal is frivolous as the applicant was a non-existing entity at the time it was registered as the proprietor of the suit property; that the applicant's title is in the circumstances a nullity; and that the applicant has not produced any evidence to controvert that finding in the High Court and in the instant application.



10. On the nugatory aspect, counsel submitted that the intended appeal will not be rendered nugatory if stay is not granted and the appeal succeeds; that in the absence of a notice of appeal and memorandum of appeal, this Court cannot emphasize nor sympathize with the applicant's contention that the intended appeal will be rendered nugatory if stay is not granted and the appeal succeeds. It was counsel's further submission that in the impugned ruling, the High Court dismissed the applicant's motion for stay and declined to grant stay with reasons; that the applicant has not demonstrated that they were dissatisfied with the ruling dated 30th April, 2020, by filing a notice of appeal in compliance with Rule 74 of this Court's Rules; and in the absence of a challenge to the ruling, the applicant is bound by the decision of the High Court and the instant application is an exercise in futility and must fail. Counsel urged us to dismiss the instant application with costs to the respondent.

Determination

11. We have considered the application, the rival submissions, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
12. Before we delve into the merits of the instant application, we find it prudent to dispose of an issue raised by the respondent in its submissions namely that the instant application is incompetent. The respondent submitted that the applicant has failed to file the record of appeal within the statutory period of sixty (60) days from the date of the notice of appeal was filed and the intended appeal is therefore incompetent.
13. On the other hand, the applicant submitted that it filed a notice of appeal on 18th November, 2019 (3 days after delivery of the impugned judgment) and also requested for proceedings. Counsel further submitted that the impugned judgment was delivered on 15th November, 2019 and not on 30th October, 2019 and the notice of appeal was therefore filed timeously.
14. The procedure for faulting an incompetent notice of appeal is provided in Rules 83 & 84 which provide inter alia as follows:

Rule 83 of the Court of Appeal Rules provides as follows:

83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court on its own motion or on an application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

Rule 84 of the Court of Appeal Rules provides as follows:

84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.

15. From the record, no cross application has been filed by the respondent seeking to strike out the notice of appeal on which the instant application is anchored in terms of the procedure laid down in either



Rules 83 or 84 of the Rules of the Court as the case may be. The above being the correct position in law for faulting a defective notice of appeal, we decline the respondent's invitation through his written submissions for us to fault the notice of appeal on which the instant application is anchored. We therefore find the application properly laid before us. We proceed to determine the merit of the instant application.

16. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR* where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

17. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

18. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR (Civil Application No. Nai. 31 of 2012)* this Court described an arguable appeal in the following terms:

- “vii). 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.
- 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.”

19. We have carefully considered the grounds set out in the motion. In our view there is contestation regarding the ownership of the suit property. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the Bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

20. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:

- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- 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 reversible; 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 impecunity, the onus shifts to the latter to rebut the allegation."

21. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, from the record, eviction is imminent. It is notable that the respondent claims that it will suffer prejudice if the orders sought are granted as it sold the suit property to Dube Holdings Limited. The applicant disputes this claim. We are therefore called to consider the conflicting claims of both sides. We find that in the circumstances of the instant application, the balance of the scales of justice tilt in favour of granting the orders sought as the applicant faces the risk of being evicted from the suit premises and thus face hardship.

22. In the circumstances, the applicant has satisfied both limbs of the requirements under Rule 5(2)(b) of this Court's Rules. The Notice of Motion dated 6th May, 2020 is hereby allowed. We grant a stay of execution of the judgment and decree of the High Court delivered on 15th November, 2019, pending the hearing and determination of the intended appeal. Costs of the application to abide by the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

