



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, WARSAME & J. MOHAMMED, J.J.A)**

**CIVIL APPLICATION NO. 83 OF 2020**

**BETWEEN**

**FRANCIS MWAURA NJINU.....APPLICANT**

**AND**

**HANNAH WANJIKU MBURU.....1<sup>ST</sup> RESPONDENT**

**G.M. MUHORO ADVOCATE.....2<sup>ND</sup> RESPONDENT**

**JUSTUS MUTUKU MUMINA.....3<sup>RD</sup> RESPONDENT**

**JAMES KANGETHE MUMINA.....4<sup>TH</sup> RESPONDENT**

**MUTOKI BROTHERS CO. LTD.....5<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution and injunction pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi, Commercial & Tax Division (Grace Nzioka, J.)*

*dated 25<sup>th</sup> September, 2019*

**in**

**Civil Case No 379 of 2008)**

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**RULING OF THE COURT**

[1] Due to the prevailing circumstances brought about by the COVID 19 epidemic, this application was heard under the current Practice Directions of the Court. The Court deliberated and considered via Skype conference, the application and the written submissions by counsel.

[2] The application before us is by *Francis Mwaaura Njinu* (the applicant) who is seeking: -

*(i) an order of injunction restraining Hannah Wanjiku (1<sup>st</sup> respondent) from accessing, transferring, withdrawing or otherwise dealing with funds held in her bank accounts at National Bank Harambee Avenue;*

*(ii) an order of injunction restraining Muthoki Co. Ltd (5<sup>th</sup> respondent), its agents or directors from sub-dividing, selling, transferring, charging or dealing in any way with property known as Title No 7583/66 situate in Karen; and*

*(iii) an order staying execution of the judgment and decree made on 25<sup>th</sup> September, 2019.*

[3] In the said decree that the applicant wishes to appeal against, the following orders were issued: -

**“1. That the deposit of Kshs. 1,650,000 is recoverable from the 1<sup>st</sup> defendant from the date of payment to the date of refund until payment in full with interest at court rates.**

**2. That payment in any case should be made within 21 days of this order.**

**3. That the refund of Kshs. 300,000 on subdivision and Kshs. 250,000 legal fees is recoverable from the 1<sup>st</sup> and 2<sup>nd</sup> defendants who led the plaintiff to believe the agreement was subsisting all through but is recoverable without interest.**

**4. That Kshs. 232,000 is not recoverable, as the plaintiff could not sell what he did not have, hence the concept of “nemo dat quaod non habet” if anything, there was no evidence from the parties.**

**5. That similarly, there is no basis and/or proof of loss of bargain as the plaintiff participated fully in the transaction and did not exercise his right to terminate the agreement.**

**6. That each party to meet its own costs”**

[4] Being dissatisfied with the above orders, the applicant intends to file an appeal against the said judgment. For purposes of this application, he has filed a Notice of Appeal and a draft memorandum of appeal in his bid to show that he has an arguable appeal. Pending the filling of the said appeal, the appellant filed the instant application which is principally brought under **Rules 5 (2) (b)** of this Court’s Rules among other provisions of the law. The grounds in support of the motion are stated therein and are further augmented by the applicant’s supporting affidavit sworn on 17th March, 2020. Counsel for the applicant also filed written submissions and a list of authorities.

[4] It is reiterated in all those documents that the applicant’s appeal is arguable on the grounds that the learned trial Judge made several errors that are pointed out in the draft memorandum of appeal which contains almost forty (40) grounds of appeal. In brief, the learned Judge is faulted for holding that Title No 7583/66 (the suit land) was subject to land control board consent and thus proceeded to find that the sale agreement between the applicant and the 1st respondent was invalid for lack of consent; that the learned Judge erroneously shifted the responsibility or duty of obtaining the requisite consents in a conveyancing transaction on the applicant which was ordinarily transfer of property a duty of the vendor.

[5] The learned Judge is also faulted for disregarding the terms of the sale agreement dated 16th June, 2005 where she found that the date for performance had expired whereas the parties had entered into another agreement for sale on 24th July, 2006 to sell the suit property to the 5th respondent; by finding that the applicant had approached the court with unclean hands for subdividing the property despite the fact that the applicant had authority to do so from the 1st respondent and finally for failing to award damages to the applicant for loss of bargain and an order of specific performance by taking away the applicant’s right to bargain. Counsel cited several authorities on the principles that guide the Court in granting the orders sought. The case of **Oliver Collins Wanyama vs. Engineers Board of Kenya [2019] eKLR** for the proposition that the High Court had dismissed the matter that was sought to be appealed against, it nonetheless gave an order of injunction because the intended appeal was arguable and unless stay was granted, the appeal would be rendered nugatory. In **National Bank of Kenya vs. Pipeplastic Sankolit (K) Ltd & Another [2001] eKLR** where it was stated *inter alia* that it is not the business of a court to rewrite the contract for the parties.

[6] The application was opposed vide written submissions by the 5<sup>th</sup> respondent. It is indicated that the 3<sup>rd</sup> and 4<sup>th</sup> respondents died in the course of the proceedings before the High Court, however, although the Court was notified, they have continued to feature in this application despite the fact that they have never been substituted. That said, the 5th respondent opposed the appeal on the grounds that it has no connection with the applicant. Moreover, it was submitted that the intended appeal is not arguable as the applicant failed to complete the sale agreement with the 1st respondent and then surreptitiously attempted to sell the same interest in the suit property to other parties when he had no rights or interest that could be exercised in law or in equity. Since the transfer of the suit property was effected, the applicant’s remedy if any lie in damages. Counsel also cited the case of; **Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR** where this Court stated that a party seeking a preservative order of injunction must demonstrate that the appeal is arguable and that if the order is not granted and the intended appeal is successful, it would be rendered nugatory. For those reasons counsel urged that the application be dismissed with costs.

[7] The conditions to be met before a party can obtain relief under **Rule 5(2) (b)** of this Court's Rules which includes an order of injunction that is sought herein are that an applicant has to demonstrate that; first, that the appeal or intended appeal is arguable and that if the relief sought is not granted the appeal/intended appeal will be rendered nugatory if it succeeds. By being arguable, it does not mean an appeal or intended appeal must succeed, but one which raises a *bona fide* issue worthy of consideration by this Court - See **Kenya Tea Growers Association & another vs. Kenya Planters Agricultural Workers Union, Civil Application No. NAI 72 of 2001 (UR)**. It is also trite that demonstration of the existence of even one arguable point will suffice - See **Kenya Railways Corporation vs. Edermann Properties Ltd, Civil Appeal No. NAI 176 of 2012** and **Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 others, Civil Appeal No. NAI.256 of 2013**. Lastly, both limbs must be demonstrated to exist before one can obtain a relief under **rule 5(2) (b)** - See **Republic vs. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31**, and **Reliance Bank Ltd vs. Norlake Investments Ltd. [2012] 1 EA 227** and **Githunguri vs. Jimba Credit Corporation [1988] KLR 88**.

[8] We have applied the above principles to the rival arguments before us herein. We are satisfied that our jurisdiction has been properly invoked as there is a notice of appeal in place dated the 19th October, 2019. Our next task is to determine whether the applicant has brought himself within the ambit of the twin prerequisites for the grant of a relief under the said rule. In support of the first prerequisite, the applicant displayed before us the draft memorandum of appeal. We have perused the same and are in agreement that the complaints as to whether the learned Judge misconstrued the law by holding that the sale transaction was null and void for want of land control board consent; whether the learned Judge disregarded the terms of the sale agreement between the applicant and the 1st respondent and whether the applicant was entitled to damages for loss of bargain are all arguable. We reiterate the principle that even one arguable point will suffice and also an arguable point may not necessarily succeed but one which is not frivolous.

[9] On the second prerequisite, the burden is on the applicant to satisfy the court that the success of an intended appeal will be rendered nugatory if the stay order sought is not granted. The grounds fronted by the applicants in support of this prerequisite are mainly that there is an imminent danger of the 3rd to the 5th respondents accessing, selling, transferring, charging or otherwise dealing in the suit property. The 1st respondent is also likely to withdraw, transfer or otherwise deal with monies held in her accounts rendering the appeal nugatory. We have considered this against the orders that were issued, the subject matter of the intended appeal and we are not persuaded that the appeal will be rendered nugatory for the simple reason that the suit property has already been transferred to the 5th respondent who has been in its possession. In the event that the appeal is successful, such orders of transfer can be reversed.

[10] On the order seeking to injunct the 1<sup>st</sup> respondent from withdrawing monies from her bank accounts for reasons that the decretal sum ordered to be refunded to the applicant will be in excess of Kshs. 10 million, we also find that this is not a satisfactory reason. We say this because the applicant is at liberty to execute the decree at any time but he seems to have preferred to appeal the same decision he is urging to be preserved. Since the outcome of the appeal is unknown, it is better to leave the matter as it is.

[11] Accordingly, we find that the applicant has not satisfied the twin principles in granting the orders sought. Therefore, this application is dismissed with costs to abide the outcome of the intended appeal.

*Dated and delivered at Nairobi this 19<sup>th</sup> day of June, 2020.*

**M. K. KOOME**

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**JUDGE OF APPEAL**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**