



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 91 OF 2020

BETWEEN

H.E. DR. MUKHISA KITUYI.....APPLICANT

AND

HON. DR. PATRICK MWEU MUSIMBA.....RESPONDENT

*(An application for stay of execution of the ruling and decree of the High Court
of Kenya at Nairobi (Okwany, J.) dated 11th December, 2019 in H.C.C.C No. E110 of 2018)*

RULING OF THE COURT

1. **H. E. Dr. Mukhisa Kituyi** (the applicant) filed in this appeal an application dated 22nd April, 2020 under **Rule 5 (2)(b)** of the *Court of Appeal Rules* praying for a number of orders. Some of the orders are spent but of relevance is that he is seeking an order:

• *That pending the hearing and determination of the appeal, there be a stay of execution of the decree of the High Court dated 11th December, 2019.*

2. The application is anchored on the grounds that not only is the applicant's appeal arguable but would also be rendered nugatory if the stay sought is not granted.

3. The salient facts that led to the application were that **Hon. Dr. Patrick Mweu Musimba** (the respondent) instituted a suit against the applicant by a plaint filed on 9th October, 2018 in the High Court being H.C.C.C No. E110 of 2018. The long and short of his claim was that on 19th June, 2013 he advanced a sum of Kshs. 35,000,000.00 to the applicant by way of a bank transfer. Thereafter, the applicant refused to repay the amount hence he sought *inter alia* judgment in the sum of Kshs. 35,000,000.00 together with interest thereon until payment in full.

4. In turn, the applicant entered appearance and filed a statement of defence on 22nd November, 2018 denying the respondent's claim. His defence was to the effect that the sum in question was not advanced to him. Rather, the sum was in respect of a deposit for the purchase of his property described as **L.R No. 194/34** (the Property) situated in Karen by the respondent. After the respondent failed to complete the transfer transaction the said deposit was forfeited.

5. Consequently, the respondent by an application dated 8th January, 2019 entreated the High Court to strike out the applicant's defence on account that it did not disclose a reasonable defence. The basis of the respondent's position was that albeit the applicant alleging that the sum in issue was a deposit for purchase of land, he failed to give particulars and produce an agreement for sale to that effect as required by **Section 3(3)** of the *Law of Contract Act*. It was the respondent's view that if indeed there was such an agreement for sale the applicant should have given the particulars in the witness statement and attached a copy in the list of documents as required under **Order 7 Rule 5** of the *Civil Procedure Rules, 2010*. All in all, the applicant's defence would prejudice, embarrass and delay a fair trial. In addition, the respondent prayed for summary judgment to be entered against the applicant in the terms of his plaint.

6. In response, the applicant lodged grounds of opposition dated 11th March, 2019. The gist of his opposition was that the pleadings raised *ex facie* triable issues. For instance, whether the sum which was paid to the applicant was a deposit for the purchase of land or a loan could only be determined on merit and in a full trial. More so, considering that the respondent's bank transfer print-out which was annexed to his list of documents disclosed the payment as relating to the purchase of property.

7. Upon considering the application, the grounds of opposition together with the written submissions filed on behalf of the parties, the High Court (Okwany, J.) found in favour of the respondent by a ruling dated 11th December, 2019. In her own words the learned Judge expressed as follows:-

“12. From the above foregoing facts, I find that that (sic) the issue of whether the payment was in respect of a loan or for purchase of land does not take away the fact that the applicant parted with the tidy sum of Kshs. 35 million. It was therefore incumbent upon the respondent, if indeed he wanted this court to believe that he sold land to the applicant for which he was paid Kshs. 35 million, to present the land sale agreement as proof of such sale as is envisaged under Section 3(3) of the Law of Contract Act and in compliance with Order 7 Rule 5 of the Civil Procedure Rules.

13. My take is that the mere fact that the Bank Transfer document shows that the payment was for the purchase of land does not connote that any such sale actually took place. The respondent further alleged that the applicant did not complete the transaction and therefore forfeited the sum of Kshs 35 million deposit he had paid for the land. I find that if indeed there was such forfeiture, nothing would have been easier than for the respondent to avail to this court, a copy of the duly signed sale agreement containing such a clause.

14. I note that the respondent did not avail any documents to support his case and I find that this is a clear case of the respondent owing the applicant (sic) sum of Kshs. 35 million. In a nutshell, I find that the application dated 8th January 2019 is merited and I therefore allow it as prayed with costs to the plaintiff.”

8. Aggrieved with the above decision, the applicant lodged an appeal before this Court and subsequently, the instant application. To counter the application, the respondent filed grounds of opposition dated 17th July, 2020. According to the respondent, the applicant was guilty of inordinate delay having filed the application almost four months after delivery of the impugned ruling. Further, the respondent was doubtful as to the arguability of the appeal. The application was prosecuted by way of written submissions filed on behalf of the parties by their respective counsel.

9. It was the applicant’s contention that he had established the twin principles which call upon this Court to exercise its discretion in his favour by granting the stay sought. In that regard, the appellant cited Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR. Expounding on this line of argument, it was submitted that following the impugned ruling, the respondent is legally emboldened to commence the execution process to recover the decretal amount. Besides, the respondent had already filed a party and party bill of costs which is pending determination. As far as the applicant is concerned, the appeal would be rendered nugatory and a mere academic exercise should execution take place.

10. On the arguability of the appeal, the applicant relied on the memorandum of appeal on record to submit that it raised issues which warrant consideration by this Court on an appeal. The applicant argued that the question of whether the decretal amount was a loan or for the purchase of land was a triable issue disclosed by his defence. Further, in light of the fact that the respondent’s own bank transfer slip which he attached in his list of documents indicated that the transfer of the amount in question was purchase price for land. The applicant went on to submit that the appeal seeks to reaffirm the old age principle of natural justice which requires that a person should not be condemned unheard. In conclusion, the applicant urged the Court to do justice between the parties and ensure that each party is granted an opportunity to put his respective case forward.

11. The respondent, on the other hand, opposed the application and submitted that the appeal is not arguable and has little to no chances of success. To buttress the contention that the appeal is frivolous, the respondent argued that the only issue which was before the learned Judge was whether the decretal amount was a loan or for the purchase of property. In his view, the onus lay with the applicant by virtue of **Section 107** of the **Evidence Act** to prove his allegation that the amount paid for the Property, was purchase price which he failed to do. The respondent contended that as such, the learned Judge could not be faulted for striking out the applicant’s statement of defence.

12. The respondent asserted that the applicant’s appeal would not be rendered nugatory if the orders sought were not granted. This is because the applicant had not made any allegation that the respondent would be incapable of refunding the money decree in the event his appeal was successful. Furthermore, it was submitted that the respondent is perfectly capable of paying any sums which may be awarded to the applicant by this Court after the determination of the appeal. Towards that end, the respondent made reference to this Court’s decision in Kenya Hotel Properties Limited vs. Willesden Properties Limited [2007] eKLR.

13. The respondent urged that in the event that this Court is inclined to grant the stay sought, it should be on the condition that the applicant deposits the entire decretal amount in an interest earning account in the joint names of counsel for both the parties within 14 days from the date of this ruling.

Determination

14. We have considered the application, grounds of opposition the written submissions on record, the authorities cited and the law. The principles governing the exercise of this Court’s discretion under **Rule 5(2)(b)** of this Court’s Rules are well settled as appreciated by the parties. An applicant must establish firstly, that the intended appeal or appeal in question is arguable and secondly, the appeal or intended appeal would be rendered nugatory if the orders sought are not granted. See this Court’s decision in Okuya Omtatah Okoit & another vs. Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 3 others [2015] eKLR.

15. On the arguability of the appeal, we take caution not to make any definitive findings on the merits of the appeal which is not the subject of our consideration. Having considered the memorandum of appeal on record, we find that the question of whether the amount paid to the applicant was a loan or a deposit for purchase of the Property raised a triable issue which ought to be ventilated before this Court in the appeal.

16. On the second consideration of the nugatory aspect, we cannot help but note that apart from deposing that the appeal would be rendered nugatory if the decree is executed, the applicant did not demonstrate how the appeal would be defeated if the order sought is denied and the appeal succeeds. Whilst it is not in dispute that the decree in question is a money decree, the applicant has not established, let alone made any allegations that the respondent would not be able to refund the amount in the event that the appeal succeeds. In other words, there is nothing to suggest that the respondent is impecunious. See this Court's decision in **Salaries Remuneration Commission vs. County Government of Kakamega & 4 others [2019] eKLR**. In our view, execution is a natural consequence of delivery of judgment or decision by a court. Therefore, execution by itself without demonstration of any injury or hardship which would be incapable of being reversed if the appeal is successful, is not sufficient to establish that an appeal would be rendered nugatory in the event it succeeds.

17. Accordingly, the applicant having failed to establish the twin principles for the grant of an order of stay of execution, we find that the application dated 22nd April, 2020 lacks merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 20th day of November, 2020.

R. N NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR