



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & MURGOR J.J.A.)

CIVIL APPLICATION NO. 109 OF 2020

BETWEEN

ATTORNEY GENERAL.....APPLICANT

AND

MIKE MAINA KAMAU.....RESPONDENT

(Being an application for stay of execution from the judgment of the Environment

and Land Court of Kenya at Thika (Gacheru, J) dated 29th November 2017

in

Nairobi ELC Case Number 1303 Of 2014)

RULING OF THE COURT

By a notice of motion dated 7th May, 2020 brought under *sections 3, 3A and 3B* of the ***Appellate Jurisdiction Act***, and ***rule 5(2) (b)*** of the ***Court of Appeal Rules 2010*** and ***Article 159 of the Constitution*** and supported by the affidavit of ***Prof. Arch Paul M. Maringa***, the Principal Secretary sworn on behalf of the Ministry of Transport, Infrastructure, Housing and Urban Development and represented by the applicant, the Hon Attorney General, the applicant has sought orders staying execution of judgment of the Environment and Land Court pending the hearing and determination of the appeal.

The motion was premised on the grounds that in its judgment delivered on 29th November 2017, the Environment and Land Court (*Gacheru, J*) wrongly declared ***the respondent, Mike Maina Kamau*** as the absolute and indefeasible owner of L.R. 15045/4 (*the suit property*) on which he (the respondent) was constructing a house and which the applicant had subsequently demolished; that the court was wrong to award the respondent compensation of Kshs.591,372,702 being the full replacement value of the house that had yet to be completed; that, having regard to the circumstances of the case, had also wrongly awarded the respondent compensation of Kshs. 50,000,000 for pain and suffering and a further amount of Kshs. 10,000,000 for exemplary damages. That the Judge failed to consider the applicant's defence and dismissed its counterclaim and for the aforesaid grounds the applicant asserted that the intended appeal is arguable. It was further argued that the respondent had since obtained orders of mandamus which he was in the process of executing against the Principal Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development, which if executed, and the decretal sums paid, would render the appeal nugatory, hence the need for this Court's intervention.

By replying affidavits on 15th June 2020, a further reply sworn on 2nd July 2020, and in his written submissions, the respondent deposed that following delivery of the judgment, he had made several demands for satisfaction of the decree, but despite settlement meetings, the decree was yet to be honoured; that in any event the applicant's Notice of Appeal was filed out of time and without leave of this Court, and therefore the application for stay of execution could not be entertained.

It was further deponed that the intended appeal would not be rendered nugatory as the order was with reference to a money decree, and in the event the appeal succeeded he had sufficient assets both within and outside the country that were valued in excess of the decretal sums which rendered him capable of refunding any sums paid. It was also the respondent's contention that if the stay of execution was granted, he stood to suffer extreme prejudice as he has long been waiting to enjoy the fruits of his judgment.

We have considered the motion, the affidavits and the parties' submissions. Before we address the application for stay of execution, the respondent has charged that this Court has no jurisdiction to entertain the motion because the Notice of Appeal was filed out of time and without leave of the Court. He also contended that he has filed an application under this Court's rules to strike out the Notice of Appeal which is pending before this Court.

The crucial nature of a Notice of Appeal in the appellate process cannot be overstated. Indeed, in the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, the Supreme Court pronounced its jurisdictional role as follows;

"A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. [Emphasis added]."

In this case, it is not disputed that a Notice of Appeal was filed, and that an application to strike it out is still pending before this Court. It is nonetheless to be borne in mind, that what is before us for determination is a **rule 5 (2) (b)** application and not the application to strike out.

That said, we turn to consider the application that is before us. In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied as exemplified in the case of Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR is that;

"The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory."

In addressing whether the intended appeal is arguable, the applicant has included a draft memorandum of appeal in the application. One ground is that the learned Judge awarded the respondent the full replacement value of a house yet the house was incomplete as it was still under construction. Another ground was that the trial court did not consider the applicant's defence and the counterclaim. Since there is the possibility that matters that ought to have been considered were not - see Kenya Breweries Ltd vs Godfrey Odoyo, Civil Appeal No. 127 of 2007, we are satisfied that the intended appeal is arguable.

As to whether the appeal would be rendered nugatory in the event that it were to succeed, the applicant has stated that an order of mandamus has been issued which was in the process of being executed against the Principal Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development, that could result in payment of the decretal amount; that such payment would place tax payers money in jeopardy, as there is no certainty that the respondent will refund it. Though the respondent has asserted that he has the full capability of repaying any sums paid, it cannot be overlooked that the sums involved are substantial. Furthermore, the assets referred to have not been identified, and it was not disclosed whether they were within the applicant's reach.

Additionally, in the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji [2014] eKLR, the Supreme Court has mandated the consideration of the third principle of "public interest" in the granting of conservatory orders. As such, the case of East African Cables Limited vs Public Procurement Complaints, Review and Appeals Board & another [2007] eKLR aptly addresses circumstances such as this wherein this Court stated thus;

"We think that in the particular circumstances of this case, if we allow the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that the advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action, and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."

We concur with the views outlined. The decretal sums hereto are enormous, and there is a real risk of the sums being paid whilst the intended appeal is pending which would place taxpayer's money in jeopardy, in the event the appeal was to succeed. This would be contrary to the public interest, and could render the appeal nugatory, should we refuse to grant the reliefs sought.

Accordingly, the motion dated 7th May 2020 is allowed, we forestall payment of the decretal sums, and order a stay of execution of the judgment and decree pending the hearing and determination of the intended appeal. Costs in the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR