



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, MUSINGA & GATEMBU, J.J.A.)**

**CIVIL APPLICATION NO. 91 OF 2018**

**BETWEEN**

**MARGARET WANJIKU GODWIN.....APPLICANT**

**AND**

**HENRY MWANGI GATAL.....1<sup>ST</sup> RESPONDENT**

**SAMUEL MWAURA MUNGAL.....2<sup>ND</sup> RESPONDENT**

**SHEZAD JALALDIN FAZAL.....3<sup>RD</sup> RESPONDENT**

**CAROLINE WAITHERA MWANGI.....4<sup>TH</sup> RESPONDENT**

*(Application for stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (L. Gacheru, J.) dated 9<sup>th</sup> February 2018)*

**in**

**ELC Case No. 59 of 2012)**

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**RULING OF THE COURT**

1. The application before us dated 28<sup>th</sup> March, 2018 has been brought pursuant to **rule 5(2) (b)** of the **Court of Appeal Rules**. The applicant seeks stay of execution of the judgment delivered by the trial court on 9<sup>th</sup> February, 2018 pending hearing and determination of the applicant's appeal. It is imperative that we briefly outline the background to this dispute before we proceed to apply the principles to the instant application.

2. It is an undisputed fact that the applicant, **Margaret Wanjiku Godwin**, was the registered owner and vendor of a parcel of land, **LR No. 13084/5 (suit property)** located in Karen, Nairobi. On 18<sup>th</sup> August 2011. She entered into a sale agreement with the 1<sup>st</sup> and 2<sup>nd</sup> respondents (**purchasers**) in which the applicant agreed to sell to the two respondents the suit property at a consideration of Kshs 12,000,000/=.

3. At clause 7 of the agreement, it was mutually agreed that the completion date was to be 90 days from the date of execution, i.e. on **18<sup>th</sup> November 2011**, or such other date as the parties may agree in writing, time being of the essence.

4. However, it appears that before the completion date a dispute arose in which the purchasers alleged that despite having complied with all the other terms of the sale agreement and even paying a total of Kshs 7,000,000/= to the applicant, she proceeded to sell the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> respondents without notice.

5. The applicant on the other hand contended that the purchasers were the ones in breach of the sale agreement by reason of their failure to pay the balance of the purchase price by the completion date as stipulated in the agreement, which prompted her to enter into another

agreement with 3<sup>rd</sup> and 4<sup>th</sup> respondents (the interested parties) on 21<sup>st</sup> November 2011.

6. In the result the 1<sup>st</sup> and 2<sup>nd</sup> respondents brought an action in ELC Case No. 59 of 2012 in which they sought:

- a) *Specific performance of the sale agreement dated 18<sup>th</sup> August 2011 and entered into between the plaintiffs and the defendants.*
- b) *A permanent injunction to issue restraining the defendant whether by herself, servants, agents and or otherwise from disposing off in or any way interfering with the plaintiff's rights on L.R. No. 13084/5, situated in Karen, Nairobi.*
- c) *Any other remedy that this Honourable Court may deem just in the circumstances.*
- d) *Costs of the suit at court rates.*

7. These issues were tried before the High Court (**Gacheru, J.**) at the end of which the learned Judge in her judgment partially found in favour, of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, holding, *inter alia*, that:

***“Having now carefully considered the available evidence, the Court finds and holds that the Plaintiffs have not proved their case on the required standard in terms of prayers No. (a) and (b) of the Plaint dated 6<sup>th</sup> February 2012. The said prayers are consequently disallowed. However, the Plaintiffs are entitled to payment of damages in the tune of Kshs.5,000,000/= by the Defendant herein. Further the Plaintiffs are entitled to costs of the suit and interest thereon payable by the Defendant herein”.***

8. The applicant intends to challenge part of that decision in the intended appeal, being the award of the general damages of Kshs 5,000,000/= together with costs of the suit and interest to the respondents. In the meantime, she has moved this Court under its **rule 5(2) (b)** to stay the decree issued pursuant to the judgment.

9. From the grounds proffered in this application and from those enumerated in the draft memorandum of appeal, the applicant contends mainly that:

- (i) *That the learned judge erred in granting damages not pleaded or prayed for by the respondent as their claim was for specific performance and permanent injunction.*
- (ii) *That there is a danger that the respondents will move to execute the colossal decree of Kshs 5,000,000/= to her detriment.*
- (iii) *That unless the respondents are restrained by this Court they will move to execute for the decretal sum and as a consequence the substratum of the appeal will be destroyed and the appeal will be rendered nugatory.*

10. For a court to grant a stay of execution, it emphatically requires that the applicant satisfies two requirements, first, that the appeal is arguable and not frivolous and secondly, that if the stay sought is not granted and the appeal ultimately succeeds, such appeal shall be rendered nugatory. See **Githunguri v Jimba Credit Corporation Limited (1988) LLR 286.**

11. On the first limb of arguability, it has been submitted by the applicant that the grounds set out in the draft memorandum of appeal demonstrate that the applicant has an arguable appeal. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> respondents maintain that there is no arguable appeal to warrant grant of stay of execution.

12. Having perused the draft memorandum of appeal, there is no doubt that these grounds indeed raise arguable issues in the sense that they are not frivolous, and that they deserve this Court's consideration. In the case of **Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union, Civil Application No 72 of 2001**, which the applicant relied on, this Court held that the applicant need not show that such appeal is likely to succeed, it is enough to show that there is at least one issue upon which the Court should pronounce its decision.

13. In our view, one of the issues raised is that the trial court awarded general damages that were not pleaded or prayed for without justification. The aspect of arguability has therefore been established.

14. We now turn to consider the second limb, namely; whether the intended appeal will be rendered nugatory if stay is not granted.

15. The applicant argued that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have failed to demonstrate that they have the financial capability to refund the substantial amount of Kshs 5,000,000/= should the appeal succeed.

16. In opposition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents maintained that by virtue of the 1<sup>st</sup> respondent being an Architect practicing in the name of Gem Archplans and the 2<sup>nd</sup> respondent an engineer by profession, they are in a position to refund the applicant the Kshs 5,000,000/= in the event that her appeal is successful. In any event, the fact that they managed to pay Kshs 7,000,000/= as deposit for the suit property is an indication that they are people of means, the respondents averred. They

were equally apprehensive that if stay was granted the decretal sum may not be available to them by the time the intended appeal is determined.

17. It is pertinent that when considering this aspect, the Court should bear in mind that the interests of both parties are balanced with the objective of not exposing any of them to substantial or irreparable loss. In the case of **Mukuma v Abuoga (1988) KLR 645** at 647 the Court observed:

***“... but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo.”***

18. In the circumstances of this matter we do not think that the success of the appeal will be rendered nugatory if this application were to be disallowed. However, the respondents in their replying affidavit dated 13<sup>th</sup> December 2018 depose that in the event that stay is allowed, the applicant be ordered to deposit the whole decretal sum in a joint account to be opened by the advocates for the parties for the reasons that the applicant resides out of the country and she does not have any known assets that may be attached once the appeal is finalized.

19. We find the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s concern legitimate. In the case of **Ujagar Singh v Runda Coffee Estates Limited [1966] EA 263**, the court therein observed thus:

***“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”***

20. For our part, we reiterate that indeed the Court can, in the interest of justice and in special circumstances, issue orders but only when such an action is not prejudicial to either party. The intention is never to deny the successful party the fruits of his judgment or to shut out the unsuccessful party from challenging the impugned decision on appeal to this Court.

21. As this Court held in the case of **Siegfried Busch v MCSK [2013] eKLR**:

***“...It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”***

21. We note and applaud the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ willingness to hold in abeyance the fruits of their judgment by urging that the decretal sum be deposited in a joint account in the alternative of being paid. It is therefore in the interests of justice that a conditional stay of execution pending the hearing and determination of the appeal be granted so that the interests of both parties are catered for.

22. Accordingly, the upshot is that the applicant’s Notice of Motion is hereby allowed in the following terms:

***1. THAT there shall be a stay of execution of the judgment of Justice Gacheru in ELC No. 59 of 2012 pending the hearing and determination of the intended appeal on condition that the applicant shall deposit into an interest earning account in the joint names of the parties’ advocates the sum of Kshs 5,000,000, within thirty (30) days from the date hereof.***

***2. The applicant to file her appeal within 60 days from the date hereof.***

***3. Costs of the application herein shall be in the appeal***

Dated and Delivered at NAIROBI this 5<sup>th</sup> day of April, 2019.

H.M. OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**