



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: UKO (P), MURGOR, KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. NAI 329 OF 2018 (UR 266 OF 2018)**

**BETWEEN**

**REGNOIL KENYA LIMITED.....APPLICANT**

**AND**

**WINFRED NJERI KARANJA.....RESPONDENT**

***(An application for stay of execution order arising from the Judgment of the***

***High Court of Kenya at Nairobi ( Hon. Justice J.A Makau,J )***

***dated 27<sup>th</sup> September, 2018 in***

***HCCC No. 595 of 2014)***

**\*\*\*\*\***

**RULING OF THE COURT**

This Notice of Motion dated 12<sup>th</sup> November 2018 is made under **section 3A** of the **Appellate Jurisdictions Act** and **rules 5(2) (b)** of the **Court of Appeal Rules**, and has been brought for orders that-

*“1. This Honourable Court be pleased to grant a stay of execution of the judgment delivered on the 27<sup>th</sup> September, 2018 by Honourable Justice J.A. Makau and the Decree of court issued on 9<sup>th</sup> October, 2018 in HCCC NO. 595 of 2014 pending the hearing and determination of the intended appeal.*

*2. This Honourable Court be pleased to grant a stay of any further proceedings pursuant to the judgment delivered on the 27<sup>th</sup> September, 2018 by Honourable Justice J.A. Makau and the Decree of court issued on 9<sup>th</sup> October, 2018 in HCCC NO. 595 OF 2014 pending the hearing and determination of the intended appeal and or on such terms as the court may deem just.*

*3. This Honourable Court be pleased to grant any such orders as it may deem fit and just to grant.*

*4. The costs of this application do abide the outcome of the intended appeal herein.”*

The motion was brought pursuant to a judgment of 27<sup>th</sup> September, 2018 of the High Court ( Makau, J.) and is predicated on the grounds in summary that, the learned judge failed to appreciate that since the subject matter of the suit was an agreement for sale, general damages were not capable of being awarded; that the learned judge rewrote for the parties the agreement when he dismissed the applicant’s counter claim and granted the respondent an alternative prayer directing the applicant to hand over the suit premises to the respondent, and at its own costs of Kshs. 2,150,694/52, make good the defects specified in the bill of quantities within 60 days, which cost would be apportioned between the parties, and the agreed balance of the purchase price of Kshs. 3,000,000/= being paid to the applicant within the said period; that the learned judge wrongly found that the claim of Kshs. 2,150,694/52 was a claim for special damages which ought to have been specifically pleaded and strictly proved.

It was contended that there is the possibility of the respondent proceeding to take possession of the applicant’s suit property upon the lapse of 60 days without paying the balance of the purchase price and also proceed to execute for the general damages awarded; that the execution of

the decree by the taking of possession of the suit premises would be prejudicial to the applicant, since the respondent had already transferred the title into her name and charged it with the Kenya Commercial Bank against a facility of Kshs. 7,000,000/= in 2013, but has yet to pay the applicant the balance of the purchase price; that unless restrained the outcome of the intended appeal would be rendered utterly nugatory; that furthermore, the applicant has given an undertaking as to damages and shall abide by such terms as this Honourable Court may impose in order to secure the orders sought.

The motion was supported by the sworn affidavit of **Mohamed Maalim Kulmia Adan**, a director of the applicant on 12<sup>th</sup> November 2018, which affidavit reiterated the grounds of the motion.

As a brief background to the application, by a sale agreement dated 2<sup>nd</sup> November 2011, the respondent purchased from the applicant Maisonette No. 262 at Diamond Park Estate, Nairobi (*the suit premises*) at Kshs. 11,700,000. The respondent says she paid sum of Kshs 8,700,000 and that the difference was to be paid by the bank, but as the applicant failed to complete the house in accordance with the specifications of the sample house and to rectify the defects the balance could not be paid. The applicant on the other hand contends that the house was completed according to specification, and that the respondent had failed to pay Kshs. 3,000,000 as the balance owing towards the suit premises; that in addition, the title of the suit premises had been transferred into the respondent's name on 8<sup>th</sup> March, 2013, who subsequently charged it to the Kenya Commercial Bank.

The trial Judge Onguto, J, heard the parties, but in a judgment written and delivered by Makau, J on 27<sup>th</sup> September, 2018, the learned judge ordered that the cost of making good the house as at the date of judgment was Kshs. 2,150,694/52; that the applicant would make good the defects to the suit premises in the terms of the sale agreement and a bill of quantities report; that a certificate of completion be issued and the suit premises be physically handed over to the respondent within 60 days from the date of judgment, and that the respondent would pay balance of the purchase price in terms of the contract.

In the alternative, the judge ordered that, the applicant hands over or puts the respondent into physical occupation of the suit premises, and make good the defects within 60 days at the applicant's cost of Kshs. 2,150,694/52 (which cost has been agreed at Kshs. 3,000,000) would be apportioned from the balance of the purchase price and was payable to the applicant within the 60 days period. Also awarded were general damages for breach of contract assessed at Kshs. 1,500,000. The applicant's counter-claim was dismissed, and the applicant awarded the costs of the counter-claim.

In a replying affidavit sworn by the respondent on 10<sup>th</sup> January 2019, it was deponed that the breach of contract arose from the applicant's failure to ensure that the suit premises corresponded to the sample house, and that the respondent was ready, willing and able to pay the balance of the purchase price of Kshs. 2,150,694.52 upon rectification of the defects. The respondent further deponed that the applicant was misleading this Court that there was no basis for refunding Kshs. 8,700,000, when in fact she had prayed that she be refunded all amounts paid to the applicant in the event it failed to complete the house according to specifications; that the application and the appeal are based on facts that were canvassed and well considered in the judgment and hence the appeal had no chance of success.

On behalf of the applicant, learned counsel Ms. Kamende submitted that the appeal was arguable, as despite the respondent having admitted that she was in breach of the contract, the High Court had awarded general damages, yet general damages cannot be awarded for breach of contract. Counsel also asserted that the award for mesne profits was premature, and that special damages awarded was not proved.

On whether the intended appeal would be rendered nugatory if we were to decline to grant the orders sought and the appeal were to succeed, counsel submitted that the court ordered the respondent to move into the house and repair it at the cost of Kshs. 2,150,694.52, but failed to appreciate that the balance of the purchase price had yet to be paid, so that by taking possession of the suit premises, the substratum of the appeal would be lost.

**Mr. Leparmarai** learned counsel for the respondent holding brief for Mr. Gichohi submitted that general damages for breach of contract was awardable; that the applicant had breached the contract by failing to complete the suit premises in accordance with the specification of the sample house. Counsel argued that since the decree was a money decree, it was capable of being refunded, and therefore the intended appeal would not be rendered nugatory; and that no prejudice would be visited on the applicant if the application was dismissed.

In reply Ms. Kamende pointed out that the respondent had admitted that she was not in employment, and as a consequence it was clear that she was not in a position to repay the balance of the purchase price due.

We have considered the pleading and the submissions of the parties. In the case of **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, Civil Application No. NAI. 31/2012**, this Court stated *inter alia*;

***“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's decision to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”***

It is therefore well established that, two principles guide the court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal arguable, or in other words, that it is not capricious or frivolous. Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory.

We would also add that in dealing with applications under **rule 5(2) (b)**, the court exercises original jurisdiction which does not constitute an appeal from the trial judge's decision to this Court. See

**Ruben & Others vs Nderitu & Another [1989] KLR 459.**

As to whether the appeal is arguable, the applicant has set out a plethora of grounds in the draft memorandum of appeal. To be precise, there are 25 grounds of appeal. For the intended appeal to be termed as arguable, “*All that is needed in law is that there be even one arguable point and that will suffice.*” See the case of **Commissioner of Customs vs Anil Doshi, [2007] eKLR.**

Among the grounds complained of is that, the learned judge misdirected himself by failing to appreciate that the subject matter of the suit between the parties having been based on an agreement for sale, general damages were not awardable. Another ground was that, the court dismissed the applicant’s counter-claim seeking a recession of the sale contract having failed to appreciate that the respondent had breached the contract, and in the same breath granted the respondent an alternative prayer which was that the applicant hands over the suit premises to the respondent and also make good the defects specified in the Bill of Quantities within 60 days at its costs, and that Kshs. 2,150,694/52 or thereabout to be apportioned within the balance of the purchase price of Kshs. 3,000,000, after which the balance should be paid to the applicant within the said period.

In considering these grounds, it appears that the applicant’s contestation is that the orders issued were in respect of matters that were not pleaded, orders issued were in respect of matters that were not prayed, and that general damages cannot be awarded for breach of contract. Having regard to the facts of the case, we consider the complaints to be justifiable grounds of appeal, and as such, we are satisfied that the intended appeal is arguable.

Turning to whether the appeal will be rendered nugatory if we were to decline to grant the orders sought and the intended appeal were to succeed, from the averments, it is not in dispute that the suit premises is currently registered in the respondent’s name and has been charged to the Kenya Commercial Bank as security for facilities advanced to her in respect of the purchase price. It is also not in dispute that though the respondent has paid Kshs. 8,700,000 as part of the purchase, a balance of Kshs. 3,000,000 is yet to be paid. With respect to the applicant on the other hand, it has not been controverted that it still retains possession of the suit premises, but there is still the matter of the outstanding dispute on whether it is under an obligation to rectify defects in the suit premises.

Given the respondent is the title holder of the suit premises, we think that by handing over possession to her would place the applicant in a precarious position as it will no longer have any control over the suit premises over which it still claims that it is entitled to the balance of the purchase price. With the title registered in her name, should possession and control over the suit premises be handed over to the respondent, there would be nothing to preclude her from disposing of the suit premises before the suit is heard and determined, which would in effect render the appeal nugatory if it were to succeed. In other words, there is the possibility that the substratum of the appeal could be removed from the sphere of this court to the applicant’s detriment. Our view is that it would be in the best interest of the parties if the prevailing circumstances were to subsist pending the hearing and determination of the intended appeal.

Consequently, we find that the applicant has also demonstrated the second limb, and satisfied us that the intended appeal would be rendered nugatory if we do not allow this application. The application is therefore merited, and we allow it as prayed. The costs of the application shall abide the appeal.

**Dated and Delivered at Nairobi this 10<sup>th</sup> day of May, 2019.**

**W. OUKO (P)**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**