



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, SICHALE AND ODEK, J.J.A

CIVIL APPLICATION NO. 122 OF 2019 (UR 116/ 2019)

BETWEEN

CHARLES AKELO ONG'WEN.....APPLICANT

AND

BEATRICE MUTHIO NZIOKA.....RESPONDENT

(Being an application for stay of execution of the Judgment of the Environment and Land Case (Nyamweya, J.) dated 8th December, 2014

in

ELC CASE No. 272 OF 2009)

RULING OF THE COURT

[1] At the centre of the dispute before the High court was a row over a property known as *Nairobi/Block 140/40/70 Unit 70 Nyayo Estate Embakasi* (suit property). The application by way of a Notice of Motion before us dated 15th April, 2019 seeks primarily an order of stay of execution of the judgment dated 8th December, 2014 by Nyamweya, J., pending the hearing and determination of the intended appeal.

[2] A brief background of the matter is that *Charles Akelo Ong'wen* (applicant) entered into a tenant purchase agreement over the suit property with the (NSSF) March, 2000 at a purchase price of Ksh. 2,250,000 to be paid in instalments. The applicant subsequently entered into another agreement with *Beatrice Muthio Nzioki* (respondent) on 23rd January, 2001 to sell the same suit property at an agreed price of Ksh. 3,520,000 out of which the applicant was paid a deposit of Ksh. 777,000 at the execution of the agreement. The balance was to be paid on completion and the respondent was to obtain a loan from the Barclays Bank of Kenya for the balance. However, the applicant reneged on the agreement thereby refusing to execute the conveyancing documents so as to effect the transfer and purported to rescind the agreement. Nonetheless as the applicant had signed an addendum to the tenant purchase agreement and a variation authorizing NSSF to effect the transfer, and on that strength the charge over the suit property in favour of Barclays Bank was registered and so was the transfer in favour of the respondent.

[3] The applicant purported to rescind the agreement; declined to accept the balance of the purchase price and to vacate from the suit premises, the respondent sued him for breach of contract, frustration, and sabotage among other breaches. On the part of the applicant, he filed a statement of defence and counterclaim. He admitted that he entered into an agreement of sale with the respondent as aforesaid and the deposit was paid; he however denied that he executed any documents with the Barclays Bank whom he had no relationship with. The applicant also denied having breached the terms of the sale agreement and averred that he signed the addendum to the tenant purchase agreement at the instigation of a law firm of *Kiplagat & Co Advocates* who misrepresented to him that the respondent would perform her obligations but alas! the respondent proceeded to register the suit property fraudulently. He therefore sought in the counterclaim a sum of Ksh. 785,400 as capital gain and the balance of Ksh. 1,489,000 among others.

[4] The dispute was determined by Nyamweya, J. vide a judgment dated 8th December, 2014 where the following orders were made;-

“1. That the Defendant’s purported rescission of the agreement for sale dated 23/1/2008 entered into with the Plaintiff was unlawful, invalid and null and void.

2. The Plaintiff herein namely Beatrice Muthio Nzioka, is hereby declared the legal owner of, and entitled to possession of the property comprised in Title No. Nairobi/Block 140/40/70

3. That the Defendant herein namely Charles Akelo On'gwen, by himself, his licensees, servants, agents and/or employees is hereby ordered to vacate the property known as Title No. Nairobi/Block 140/40/70 within 60 days of the date of service by the Plaintiff of the orders given herein, failing which orders of eviction shall issue.

4. That in lieu of payment of special damages of Kshs. 1,474,000/= and monthly payments of Kshs. 22,000/= from the date of this judgment until giving of vacant possession of Title No. Nairobi/Block 140/40/70 that the Defendant is liable to pay the Plaintiff, the said amount shall be set off against the balance of the purchase price due to the Defendant from the Plaintiff of Kshs .1,566,654/=. Any balance outstanding after such set off shall be deposited in Court to the account of the Defendant.

5. The Plaintiff is awarded the costs of this suit.”

[5] The applicant intends to appeal against the aforesaid orders and pursuant thereto filed a Notice of Appeal and the instant application. During the plenary hearing, **Mr. Mwesigwa** learned counsel for the appellant urged us to grant an order of stay to forestall any execution of the decree which if executed would expose the applicant and his family to untold suffering as it would result to an eviction from the suit property where the applicant and his family have lived for over nineteen (19) years. Counsel cited the case of **Kenya Wildlife Service vs. Jipe Safari Lodge Ltd [2018]** where this Court emphasized the principles for granting an order of stay under the provisions of **Rule 5 (2)(b)**. That is for an applicant to succeed he or she must demonstrate that the appeal or the intended appeal is not only arguable, but also that unless the Court grants an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.

[6] Turning to the grounds of appeal counsel submitted that the applicant was not accorded a right to be heard or to present his case; that the court declined to allow an adjournment and to take into consideration his clients evidence that he was the beneficiary of the suit property and that the respondent had failed to honour the terms of the agreement. Counsel also pointed out that the sum of Ksh. 1 million deposited as security in court on 27th December, 2018 should continue to be held until the appeal is heard and determined.

[7] Opposing this application was **Mr. Maweu**, learned counsel for the respondent who relied on his clients replying affidavit sworn on 21st June, 2019 and the list of authorities. According to counsel for the respondent, the applicant has not established an arguable appeal. Referring to the draft memorandum of appeal, counsel pointed out that the entire appeal is predicated on the ground that the applicant was denied a hearing. Paragraph 3 of the replying affidavit set out the whole scenario of how the applicant was given three opportunities to present his case and he squandered it by absenting himself in court. He nonetheless cross-examined the respondent and filed his closing submissions. Thus the decision was rendered on merit. There was incontrovertible evidence that the applicant sold the suit property to the respondent; she paid the applicant a deposit and cleared the outstanding loan on his behalf to **NSSF**. The applicant declined to accept the balance of the purchase price and declined to give vacant possession, so the court directed that the balance be applied to offset the *mesne profits* as one cannot have his cake and eat it.

[8] This is what is stated in the said affidavit in the respondent's own words:-

“3. THAT I have looked at my file record of pleadings, applications, decrees, orders and proceedings generally from which it is the position THAT;-

i. The hearing before the trial court started on 11.11.2013 when I testified in chief. The matter was put off to 10.03.2014 for further hearing, at the request of the applicant who sought an adjournment through his legal counsel.

ii. On 10.03.2014 the applicant's counsel successfully sought another postponement of the intended further hearing, to 09.06.2014.

iii. On this later date 09.06.2014 neither the applicant nor his advocate attended court, in consequence whereof the hearing was closed by order of the trial judge.

iv. Upon being served with a Notice for final submissions, the applicant dutifully filed and served its written arguments through his lawyer, urging that my suit be dismissed with costs, but saying nothing about its counterclaim. I refer to page 1-15 of Exhibit Bundle “A” herewith being a copy of the said notice and written submissions.

v. In view of the above, the applicant was thus disinterested in challenging my evidence and/or adducing evidence in rebuttal, else had waived/surrendered his right to.

vi. In the final judgment dated 08/12/2014 a copy of which I have exhibited at page 16-40 of the bundle herewith, the trial court nonetheless analysed the applicant's written statement of defence, witness statement and legal submissions which were ably considered and allowed to the extend of the cross-claim for a set-off as is evidence on page 9-16, 20-21 and 24 of the judgment.

vii. On 19/12/2014 the applicant was served with the court decree that required him to vacate the suit premises in Title No. NAIROBI/BLOCK140/40/70 within 60 days thereof, i.e on or before 14/03/2015. I refer to the affidavit of service at page 41 – 43 herewith as availed to me by my advocates.

viii. By his application dated 15/03/2015 (excerpt attached at page 44-62), the applicant sought to set aside the judgment dated 18.12.2014 and managed to obtain a temporary stay of execution which lasted until 14.11.2018 when the application was dismissed in a ruling by the court. The ruling has not been challenged or appealed, yet the applicant now seeks a second bite at

the cherry, which I believe is irregular.

ix. The applicant lodged yet another application dated 11.12.2018 and obtained ex-parte interim orders of stay (pg. 63-70). This latter application was compromised in my presence vide the orders of 18.03.2019 (not 19/03/2019 was wrongly indicated on the extracted version). I believe in my lawyer's advice that the Notice of Appeal herein filed on 18.04.2019 is fatally time-barred, null and void, and the application is prima facie incompetent."

[9] On the nugatory aspect, counsel submitted that the respondent is servicing a mortgage that she secured towards the purchase price of the suit property, she has been denied both the income and the vacant possession of the property; yet she too has a family that has been forced to seek accommodation elsewhere. Further counsel submitted that the respondent has no desire to sell the suit property. As a matter of fact counsel said that they are willing to give an undertaking that if given possession of the property it will not be sold. Moreover even in the unlikely event of any loss, counsel submitted that the respondent is a senior officer with Kenya Power and also a director of a parastatal and she would be able to pay any damages. Counsel urged us to dismiss the application with costs.

[10] As it has been stressed by both parties and it is a well-established principal of this Court, a party seeking orders under **Rule 5 (2) (b)** of this Court Rules which are discretionary in nature, must satisfy the two conditions; that is the intended appeal is arguable and unless the order of stay is granted, the appeal if successful would be rendered nugatory. This has been stated in a plethora of cases determined by this Court, among them the case of **Trust Bank Limited & Another vs. Investech Bank Limited & 3 Others, Civil Appeal Nos. 258 & 315 OF 1994** (unreported):

"The jurisdiction of the court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable or put another way, it is not frivolous and secondly, that unless he is granted a stay the appeal or intended appeal if successful, will be rendered nugatory. There are guiding principles but these principles must be considered against facts and circumstances of each case."

[11] We do not wish to delve into the merit of the appeal, that being the mandate of the Bench that will deal with it, save to say all we have to determine is whether this application meets the threshold that has been established. Looking at the application as a whole, the main ground is that the applicant was denied a hearing and that the trial court failed to consider the applicant's evidence. We have gone through the record as well as the replying affidavit by the respondent which we have reproduced in this Ruling as it gives blow by blow account of the many opportunities that were given to the applicant at the hearing to present his case. The Judge also fastidiously went over the evidence and our provisional view of the matter is that we are unconvinced about the arguability of the appeal. In **Butt vs. Rent Restriction Tribunal (1982) KLR 417 at pages 419 & 420**, Madan, JA (as he then was) said:

"It is the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory: per Brett LJ in Wilson vs Chuch (No 2) 12 CHPP (1879 454 at p. 459)."

[12] On the nugatory aspect of the matter, this was a sale transaction where the applicant entered into a sale agreement of his own house where he says he has lived with his family for 19 years. With respect, the applicant turned his house into a commercial project to generate money, therefore even if the appeal was successful any damages suffered can be paid with money. After all the respondent claims that she is capable of repaying and further gave an undertaking that the suit property will not be sold. Taking into account our view on the twin issues of arguability and nugatory aspects arising from this matter, we are not convinced that the application deserves the exercise of this Court's discretion in favour of the applicant.

[13] On the deposit paid by the applicant as security for costs, that remains his to be refunded as the application for stay is unsuccessful.

The upshot of the foregoing is that the instant application is dismissed with costs to the respondent. However as per the respondent's own undertaking we do order that the suit property should not be transferred to a third party until the appeal is heard and determined.

Dated and delivered at Nairobi this 19th day of July, 2019.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR