IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & M'INOTI JJ.A.)

CIVIL APPLICATION NO. NAI. 214 OF 2018 (UR 170/2018)

BETWEEN

SALIM HUSSEIN DUNGARWALLA.....….....….....…….....APPLICANT

AND

UZIMA PRESS LIMITED.....…….....……..1ST RESPONDENT

RIGHT END PROPERTIES LIMITED.....2ND RESPONDENT

REGISTRAR OF TITLES.....3RD RESPONDENT

(Application for injunction pending the hearing and determination of an intended appeal from the judgment and decree of the Environment and Land Court at Nairobi (Bor, J.) dated 4th July 2018

in

ELCC No. 2315 of 2007)

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RULING OF THE COURT

Neelam Dungarwalla, who has substituted ***Salim Hussein Dungarwalla*** as the applicant in this matter, has moved the Court under ***rule 5(2) (b)*** of the ***Court of Appeal Rules*** for an order of injunction to restrain the respondents from disposing, selling, alienating or transferring the property known as ***LR No. 1870/X/24 (the suit property)*** pending the hearing and determination of an intended appeal from the judgment of the ***Environment and Land Court*** at ***Nairobi (Bor, J.)*** dated 4th July 2018. For convenience we shall refer to both ***Neelam Dungarwalla*** and ***Salim Hussein Dungarwalla*** as the applicant. By the judgment that the applicant intends to appeal, the trial court dismissed the applicant's suit for specific performance of an agreement that he had entered into with the ***1st respondent, Uzima Press Ltd***, for the sale and transfer of the suit property. The court also allowed the 1st respondent's counterclaim against the applicant for a declaration that it had rescinded the said agreement and was lawfully entitled to transfer the suit property to the ***2nd respondent, Right End Properties Ltd.***

The background to the litigation is that on 23rd June 2005 the applicant and the 1st respondent entered into an agreement for sale of the suit property for the sum of ***Kshs 27 million***. The applicant paid a deposit of ***Kshs 2.7 million*** and the balance was payable within 60 days of the date of the signing of the agreement, which was the completion date. The agreement however, allowed the parties to vary the completion date by mutual agreement. The applicant was not able to complete the transaction within the stipulated time and sought extension of time, which the 1st respondent granted.

Soon thereafter, the applicant advised the 1st respondent that he was assigning and transferring the suit property to the 2nd respondent. The consideration for the assignment between the applicant and the 2nd respondent was ***Kshs 47 million***. On 24th May 2007, the 1st respondent wrote to the applicant rescinding the agreement on the grounds that when the applicant approached the 2nd respondent for assignment of the agreement, he fraudulently altered the agreement for sale to indicate the agreed purchase between him and the 1st respondent was ***Kshs 37 million*** rather than Kshs 27 million. Subsequently the 1st respondent entered into an agreement for sale of the suit property to the 2nd respondent for ***Kshs 40 million***.

That is what propelled the applicant to file a suit in the Environment and Land Court for a declaration that the agreement between him and the 1st respondent was still in force, an order for specific performance of the same, and an injunction to restrain the 1st respondent from selling or transferring the suit property. On its part, the 1st respondent filed a defence and counterclaim for a declaration that it had rescinded

the agreement with the applicant and that it was entitled to complete the transaction with the 2nd respondent.

After hearing the suit, the learned judge found that the 1st respondent had validly rescinded the agreement between it and the applicant and further that the applicant did not establish a case for specific performance because he had not come to court with clean hands and had not demonstrated ability to complete the transaction. As for the counterclaim, the learned judge found it meritorious and allowed the same. The applicant was aggrieved and filed a notice of appeal, followed by this application for an injunction to restrain sale and transfer of the suit property. At the hearing of the application, it was common ground that the suit property had already been transferred to the 2nd respondent.

In support of the application, ***Mr. Ngugi,*** learned counsel for the applicant, submitted that the intended appeal was arguable because the learned judge erred by holding that the 1st respondent had properly rescinded the contract whereas there was no notice of rescission as required by the agreement or the ***Law Society Conditions of Sale*** and for allowing the counterclaim when fraud was not proved to the required standard. Counsel also contended that the trial court erred by ignoring evidence that the applicant was ready and willing to complete the transaction. It was also the applicant's view that the transfer of the suit property in the name of the 2nd respondent was in violation of the doctrine of *lis pendens*. He relied on the Judgment of this Court in ***Mohamed Sheikh Abubakar v. Zakarius M. Mbaya [2019] eKLR*** is support of that contention.

On whether the intended appeal would be rendered nugatory if it succeeded in the absence of the orders sought by the applicant, counsel submitted that there was likelihood of the 2nd respondent selling and transferring the suit property, thus putting it beyond the reach of the applicant. The applicant relied on the ruling of this Court in ***Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others [2013] eKLR*** and submitted that he had satisfied all the conditions for grant of an application under rule 5(2) (b) of the rules of this Court.

Neither the 1st respondent nor its advocate attended court, although the latter was duly served with a hearing notice.

The 2nd respondent, represented by its learned counsel, ***Mr. Mulanya*** opposed the application contending that the same had been overtaken by events after the suit property was transferred to the 2nd respondent. On whether the applicant had presented an arguable appeal, counsel submitted that he had not because the learned judge properly found that he was the one who had fraudulently altered the agreement and therefore the 1st respondent was entitled to rescind it. On whether the appeal would be rendered nugatory, counsel submitted that the applicant had not placed before the Court any material, which could justify that conclusion. He accordingly urged us to dismiss the application with costs.

We have carefully considered the judgment of the trial court, the intended grounds of appeal, the submissions by learned counsel, as well as the authorities that were cited. It is trite that to entitle an applicant to a remedy under rule 5(2)(b) of the Rules of this Court, he or she must satisfy two principles. First, it must be demonstrated that the intended appeal is arguable and secondly that unless the remedy sought is granted the appeal will be rendered nugatory if it eventually succeeds. The Court explained the rationale of this approach as follows in ***Ahmed Musa Ismael v. Kumba ole Ntamorua & 4 Others , CA. No. 256 of 2013:***

> ***"An applicant must show that he has an arguable appeal and further that unless we grant the orders sought, his appeal, if successful, will be rendered nugatory. An arguable appeal need not raise a multiplicity of explorable points, a single one will suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal-it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication. The second limb, and both must be established, is an indication that stays or injunctions are not automatic. Rather they are granted to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual."***
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> (See also ***Githunguri v. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838).***

On the first principle, the applicant intends to urge that fraud was not proved on his part to the required standard, which is above a balance of probabilities, though not as high as beyond reasonable doubt. He also intends to contend that there was no proper rescission of the contract between him and the 1st respondent. In our minds, these are *bona fide* issues that this Court is entitled to consider in full. We shall not say more at this stage, because it is for the Court when it hears the appeal, to delve into the merits or demerits of those assertions. In ***Njuguna S. Ndungu v. EACC & 3 Others, CA No. Nai. 304 of 2014,*** this Court aptly stated:

> ***"A decision on an interlocutory application such as the one before us does not involve a determination of, or even an opinion on, the merits of the appeal proper."***

As regards the second principle, the applicant has not placed before us any material on the basis of which we can conclude that his intended appeal will be rendered nugatory. As has been stated time and again, whether or not an appeal will be rendered nugatory depends on the peculiar circumstances of each application, and it is therefore incumbent on the applicant to demonstrate how the appeal will be rendered nugatory. (See ***Stanley Kangethe Kinyanjui v. Tony Keter & 5 Others*** (supra). The applicant has not demonstrated, let alone suggested that the 2nd respondent, in whose name the suit property is now registered, intends to sell or transfer it to a third party. Even if the suit property were alienated, the applicant has not suggested that the respondents cannot adequately compensate him for its full value. The applicant is merely inviting us to surmise and speculate, which we cannot do.

To be entitled to the remedy he has sought, the applicant must satisfy both principles. In ***Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31,*** the Court stated thus:

> ***"In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb".***

Having failed to satisfy the second principle, we have no option but to dismiss this application. Costs of the application shall abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Nairobi this 22nd day of November, 2019

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

……..

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR