IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WARSAME & MURGOR, JJ.A)

CIVIL APPLICATION NO. 24 OF 2018

BETWEEN

MANCHAR SINGH SAGOO AKA MR. SAGOO......................1ST APPLICANT

SURINDER KAUR SAGOO AKA MRS. SAGOO....................2ND APPLICANT

AND

CAROLINE NJERI MWICIGI..1ST RESPONDENT

PRAMOD PATEL...2ND RESPONDENT

KANDIE KIMUTAI & CO. ADVOCATES...........................3RD RESPONDENT

THE HON. ATTORNEY GENERAL ON BEHALF OF

THE REGISTRAR OF TITLES...4TH RESPONDENT

(Being an application for stay of execution pending the lodgment hearing and determination of an intended appeal from the Judgment and Orders made by the Environment and Lands Court of Kenya at Nairobi (K. Bor, J.), dated 25th ***January, 2018 in*** **ELRC No. 117 of 2016 (Previously Civil Suit No.372 of 2006**

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RULING OF THE COURT

This is a Notice of Motion application dated the 2nd February, 2018 brought under provisions of ***Rule 5(2)(b)*** of the rules of this Court. The application has been brought by the intended appellants, **Manchar Singh Sagoo aka Mr. Sagoo** and **Surinder Kaur Sagoo aka Mrs. Sagoo** (hereafter referred to as “the applicants) against **Caroline Njeri Mwicigi** (hereinafter referred to as “the respondent”). The application seeks an order of stay of execution of the judgment of the Environment and Land Court, Nairobi delivered on 25th January, 2018 pending the lodgment, hearing and determination of the intended appeal.

The application is premised on eight grounds set out on the face of the application. The application is also supported by the affidavit of the 1st applicant. The application is opposed by way of replying affidavit sworn by the 1st respondent on the 7th March, 2018.

A brief background of the application is important. On or about the 28th June, 2005 the applicants and the respondent entered into an agreement for sale of the applicants’ parcel of land known as Land Reference Number 7785/792 for Kenya shillings Ten Million (Kshs.10,000,000.00). It was agreed that the applicants would pay a deposit of Kenya Shillings One Million (Kshs.1,000,000.00) and the balance thereof was to be deposited with the applicants’ advocates in exchange of a professional undertaking pending the registration of the transfer in favour of the applicants.

Under the agreement the completion date was to be on the 5th October, 2005 and the respondent was to deposit her title over the sale property with the applicants’ advocates upon payment of the deposit. It would appear that the applicants despite their advocates being supplied with the title, failed to complete the sale transaction by paying the balance of the purchase price. This culminated in the respondent’s advocate issuing the applicants with a notice dated the 24th November, 2005 to complete the transaction by the 22nd day after service of the completion notice failure to which the respondent would be entitled to rescind the sale agreement.

According to the respondent the applicants failed to comply with the notice and the agreement stood rescinded on the 16th December, 2005 when the completion notice expired. However, the applicants went ahead and transferred the property which action the respondent deemed irregular because ostensibly she had cancelled the transaction. On learning of the transfer the respondent moved the High Court and sought *inter alia* an order directing the applicants to return the title over the suit property bearing her name and an order directing the Registrar of Titles to cancel entry number 2 on the certificate of title.

In her plaint the respondent averred that the transfer had been procured fraudulently, illegally and without her consent. The applicants filed a defence and acknowledged receipt of the recession notice date the 24th November, 2005 but argued that they complied with the notice before it expired. In her judgment the learned judge found that the respondent had proved her case on a balance of probabilities and went ahead to award her the reliefs she sought in her amended plaint.

It is that judgment of the superior court below that culminated in the application for stay now before us. When the matter came up for hearing Mr. Samir Inamdar and Mr. John Odera Were appeared for the applicants and Ms. Agnes Njoroge appeared for the 1st respondent. In his submissions Mr. Inamdar pointed out the two tests to be considered for grant of orders under **Rule 5(2)(b)** of this Court's Rules. That is, that the applicants need to demonstrate an arguable appeal and that the appeal will be rendered nugatory unless the orders of stay are granted. Counsel argued that a party who gives the notice to complete must himself be willing, ready and in a position to complete. Counsel argued that the 1st respondent was not in a position to complete because she did not have a vlaid clearance certificate. He contended that 1st respondent failed to hand over the completion documents.

Counsel further submitted that the 1st respondent waived her right to rescind the agreement when she gave the clearance certificate; and that the 1st respondent was stopped from relying on the notice to complete. On the nugatory aspect, counsel argued that the matter involved a property which is in dispute; that the land was meant to be sold to another party and that in the replying affidavit the 1st respondent stated that there is an application to register the decree. Counsel contended that the applicants were not in possession of the land and that it is in the interest of the parties that the land is preserved.

On her part Ms. Njoroge submitted that the appeal has no merit because the judgment of the superior court was clear. She argued that the applicants have already secured a stay by holding the title documents; that that there was a valid clearance certificate which was forwarded together with the transfer on the 8th November, 2005; that the balance of the purchase price was not forwarded within seven days but was forwarded on the 23rd January, 2006; and that the applicants unilaterally deposited Kshs.8,970,000/= and not Kshs.9,000,000/= that was the balance.

Counsel argued that the appeal would not be rendered nugatory because the balance of purchase price is with the court and that the 1st respondent had never been paid her money all these years. Counsel further argued that the principles applicable in granting stay are twofold and both have to be met by applicants before stay of execution can be granted. The applicant has failed to discharge that burden, she submitted.

Both counsel filed authorities in support of their position. Without need to list them out, we have considered the cases cited and may make reference to them where necessary in the course of this ruling.

As rightly noted and argued by both counsel, it is now well settled on the principles on how this court exercises its jurisdiction under **Rule 5(2)(b)** of this Court's Rules. As we always do in the circumstances, we follow the two laid down principles. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal that merits to be heard (see ***Githunguri v Jimba Corporation Limited*** ***(1988) KLR 838***); and second this Court should ensure that the appeal, if successful, should not be rendered nugatory. See **Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd, Civil Application Number Nai. 93/02 (UR)**. Both limbs must be demonstrated to exist before one can obtain relief under Rule 5(2)(b). (See **Republic v Kenya Anti-Corruption Commission & 2 Others** ***[2009] KLR 31***). The appeal may not only be arguable but also raising a point of law as was held in ***Cooperative Bank of*** **Kenya Limited v Banking Insurance and Finance** ***Union (Kenya) [2014] eKLR***.

We have applied the principles to the present circumstances. In considering whether the appeal is arguable, we have considered the applicants' arguments and the draft memorandum appeal. We have also perused the trial court's decision the basis for the intended appeal. This Court, in the case of ***Kenya Tea Growers*** **Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001** addressed what is considered to be an arguable appeal thus,

> **"He (the applicants) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision."**

It is trite too that demonstration of the existence of even one arguable point will suffice in favour of the applicants. (See ***Kenya Railways Corporation v Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012*** and ***Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 others, Civil Appeal No. NAI 256 of 2013)***.

From the memorandum of appeal and the submissions made by learned counsel for the applicants we are of the considered view that the applicants have not demonstrated that they have an arguable point of appeal. In their submissions the applicants contend that by the time of issuance of the completion notice by the 1st respondent, the 1st respondent had not yet given them the clearance certificate and therefore was not ready to complete. However, the applicants have not provided any *prima facie* evidence that the 1st respondent gave out the clearance certificate after issuing of the completion notice on 24th November, 2005. On the contrary we note that from paragraph 33 of the judgment that the learned Judge noted that the 1st respondent's advocates had forwarded the transfer together with the rates clearance certificate on the 8th November, 2005 and urged the applicants' advocates to move with dispatch since the clearance would expire on the 18th December, 2005. We have no reason to doubt the finding of the learned judge since no evidence to the contrary was provided by the applicants. In our view this is therefore not an arguable point.

From the draft memorandum of appeal, the applicants state that the judge erred by not making a finding that sale agreement had not been rescinded at the time when the full purchase price was paid. It is important to determine when the applicants paid the balance of the purchase price. From the judgment the learned judge states that:-

> **"The 3*rd Defendant wrote to the 4th Defendant on***
>
> **23/1/2016.**
>
> **The letter read:**
>
> **''I refer to the above transaction and write *to confirm that the valuer has accepted the value of Kshs.10 million and the transfer is being registered.?***
>
> **The letter forwarded a cheque for Kshs.8,985,000/= *being the balance of the purchase price."***

The 3rd Defendant who is the 3rd respondent in this application was the applicants' advocates handling the transaction and the 4th Defendant was the 1st respondent's advocates. From the letter it is evident that the applicants paid the balance of the purchase price on the 23rd January, 2006. This was long after the notice issued by the respondent on the 24th October, 2005 had expired. It is therefore doubtful whether the applicants paid the balance of the purchase price before expiry of the notice. Though the applicants argued that the notice was extended, the 1st respondent vehemently denied this and we are of the view that this is an issue that can best be dealt with in the main appeal.

We think we have said enough to demonstrate that the applicants have not satisfied the first limb of the test under **Rule 5(2)(b)** by showing that the appeal is arguable. Having failed on the first limb it is not necessary for us to delve into the 2nd limb on whether the appeal would be rendered nugatory if it is successful because as we have noted above both limbs must be demonstrated to exist before one can be granted relief under the rule.

The upshot of the above is that we dismiss the applicants' Notice of Motion application dated the 2nd February, 2018. Costs of this application to abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 8th day of June, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

M. WARSAME

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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

DEPUTY REGISTRAR