



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (GITHINJI, MUSINGA & MURGOR, J.J.A)

CIVIL APPLICATION NO. NAI. 302 OF 2014 (UR.225/2014)

BETWEEN

NORTHWOOD DEVELOPMENT

COMPANY LIMITED.....APPLICANT

AND

HUSEIN ALIBHAI PIRBHAI.....1ST RESPONDENT

ZOHER HUSEIN PIRBHAI.....2ND RESPONDENT

HOUSING FINANCE COMPANY OF KENYA.....3RD RESPONDENT

(An application for a stay of execution of the Ruling and order of the High Court of Kenya at Nairobi (Mutungi, J) dated 23rd October May, 2014

in

H.C.ELC. NO. 185 of 2011)

RULING OF THE COURT

Before us is a Notice of Motion dated 19th November 2014 that arises from the ruling and order of *Mutungi, J.* made on 23rd October 2014, in which the applicant prays for orders that:

1. *Spent*
2. *Pending the hearing and determination of this application, stay of execution do issue of that part of the Ruling requiring the applicant to comply with clause 1 (v) of the order of 11th March 2013 and to effect the transfer of Town House No. 8 on property L.R. 7336/44 to the 1st and 2nd respondents within the next 60 days from the date of the Ruling.*
3. *Pending the hearing and determination of the intended appeal, stay of execution do issue of that part of the Ruling requiring the applicant to comply with clause 1 (v) of the order*

of 11th March 2013 and to effect the transfer of Town House No. 8 on property L.R. 7336/44 to the 1st and 2nd respondents within the next 60 days from the date of the Ruling.

4. *Costs in the cause.*

Briefly, the facts as they relate to the application are that on 29th May 2008 the applicant and the 1st and 2nd respondent entered into a sale agreement for the sale of property L. R. No. 7336/44 in respect of Town House No. 8 (***“the suit property”***) to the 1st and 2nd respondents. The 1st and 2nd respondents filed a suit against the applicant in the HCCC No. 185 of 2011 alleging breach of contract by failure to transfer the property. At the hearing of the suit on 11th March, 2013 the following consent judgment was entered:-

“i) *That the plaintiff’s claim in respect of Town House No. 8 on property L.R. No. 7336/44 Miotoni Lane Karen Nairobi be and is hereby settled on the following terms:-*

ii) *That the sum of Kshs 10,000,000 deposited in court on 7th March 2012 be and be and is hereby released to the 2nd Defendant (HFCK LTD);*

iii) *That on receipt of the sum of Kshs.10,000,000 the 2nd defendant do execute and release to the Plaintiffs’ partial discharge of charge of property L.R. No. 7336/44 in respect of Town House No. 8 on that property L.R. No. 7336/44.*

iv) *That the 1st defendant do give the plaintiff’s possession of Town House No. 8 on property No. L.R. 7336/44 within 2 days of the date hereof.*

v) *That the 1st Defendant do specifically perform the agreement for the sale of Town House No. 8 on the property L.R. No. 7336/44 and transfer the property to the Plaintiffs in terms of the agreement for sale dated 29th May 2008.*

vi) *That all parties bear their own costs in respect of Town House No. 8 on property L.R. 7336/44.*

vii) *That there be liberty to apply.”*

There were other further orders relating to payment of charges, the filing and serving of an amended defence and counterclaim, *inter alia*.

According to the 1st and 2nd respondents, the applicant failed and or refused to comply with the terms of the Consent order which provoked the filing in the High Court of a Notice of Motion dated 26th September 2013 under **Order 52 Rule 2 (2)** of the **Supreme Court Rules** and **section 5** of the **Judicature Act, section 1A,1B and 3A, 63 (c) and (e)** of the **Civil Procedure Act, Order 40 Rule 3 (1) and (2), Order 51** of the **Civil Procedure Rules** seeking for orders that leave be granted to the 1st and 2nd respondents herein to commence contempt of court proceedings against the directors of the applicant, **George Ngatia Mbau** and **Anthony Mbau**; that George Ngatia Mbau and Anthony Mbau be cited for contempt of court and be punished by way of imprisonment for upto 6 months and fined by attachment of their personal properties until they purge their contempt; they be denied audience, and the deputy Registrar of the High Court be ordered to execute and deliver to the 1st and 2nd respondents within 10 days a transfer and lease over the suit property in terms of the agreement for sale dated 29th May 2008 and the Consent order dated 11th March 2013.

In its ruling dated 23rd October 2014 the High Court found that clause 1 (iv) of the Consent order that required the applicant to specifically perform the agreement for sale of the suit property to be transferred

to the 1st and 2nd respondents was couched in a manner as to give rise to an ambiguity in the order, and that the 1st and 2nd respondents had failed to prove that the applicant and its directors were in contempt of the Consent order of 11th March 2013.

The High Court also issued a further order requiring the applicant to comply with clause (iv) of the Consent order and to transfer the suit property to the 1st and 2nd respondents within the next 60 days from the date of the ruling.

Being dissatisfied with the ruling of the High Court the applicant filed this Notice of Motion which is before us under **Rule 5(2)(b)** of the **Court of Appeal Rules** which is premised on several grounds on its face and on a supporting affidavit sworn by **Anthony Mbau**. In summary, it was deponed that in issuing the supplementary order the learned judge failed to appreciate that the Consent order was entered into by the parties, and that any ambiguity should only be remedied by a further consent of the parties; that the court fell into error when it issued the supplementary order as there was no application before the court for a variation of the Consent order. The applicant was dissatisfied with the ruling of the High Court and had filed a Notice of Appeal against the decision; and that the 60 days granted to effect the transfer of the suit property to the 1st and 2nd respondents was due to expire on 3rd December 2014.

In a replying affidavit dated 15th December 2014 sworn by **Zoher Husein Pirbhai**, it was deponed that the suit before the High Court sought to compel the applicant to specifically perform the obligations under the agreement for sale dated 29th May 2008 to transfer the suit property to the 1st and 2nd respondents, and to further restrain the applicant from alienating or encumbering the suit property pending the hearing and determination of the suit. At the time of filing the suit, there was a balance of Kshs. 10,000,000 due in respect of the purchase price, which was payable to the applicant within 30 days from the date of transmission by the applicant of the City Council of Nairobi letter confirming authority to occupy the suit property which the applicant had yet to transmit to the 1st and 2nd respondents. The application for injunction was allowed on condition that the 1st and 2nd respondents deposited the balance of Kshs.10,000,000 in court within 14 days from the date of the order. In compliance with the order, the balance was deposited in court on 23rd February 2012. It was not until after issuance of the Consent order that the applicant filed an amended defence and counterclaim alleging delay of payment of the balance of the purchase price, and claiming interest on the delayed payment, the quantum of which was not pleaded or particularized. In their reply to the counterclaim, the deponent contended that the claim for interest was *res judicata* in the light of the Consent order, and that in any event, the balance of Kshs.10,000,000 was not payable as the applicant was yet to transmit to them the City Council of Nairobi letter of authority to occupy the suit property. Consequently, the deponent took the view that no error was committed by the learned judge in issuing the supplemental order.

When the application came up for hearing before us, **Mr. Paul Ogunde**, learned counsel for the appellant submitted that the appeal was arguable as the 1st and 2nd respondents prayed for a specific determination from the High Court which was that the applicant and its directors were in contempt of court, for failing to comply with the terms of Consent order. The court had found that there was indeed an ambiguity on the face of the Consent Order, but Counsel contended that, the learned judge erred in issuing a supplementary order without affording the parties an opportunity to address the court on the question of the ambiguity, given the differences in the interpretation of the Consent order. Counsel continued that, the court fell into further error when it varied the Consent order without the parties' consent.

On whether the success of the appeal would be rendered nugatory if the stay of execution was refused, counsel submitted that the decision of the High Court directing the applicant to execute the transfer in favour of the respondents was erroneous, as if the suit property, the subject of the dispute, was transferred, the substratum of the appeal would be lost. Counsel relied on the case of **Sammy Koskei vs Grace Boit [2013] eKLR** where an order of status quo was issued to preserve the subject matter. Counsel concluded that an order of status quo to preserve the property would be in the best interest of all the parties until all outstanding issues, including the claim for accrued interest were resolved.

Mr. Osundwa, learned Counsel for the 1st and 2nd respondents opposed the application and argued that there was no evidence of any substantial loss that would be suffered by the applicant. Counsel submitted that there was no ambiguity in the Consent order. Prayer 3 of the application requested for orders for the transfer of the property in terms of the agreement, which the court granted, and as a result the supplemental order was not erroneous. The Consent order settled all outstanding issues between the parties, and the applicant could not now turn around and demand interest. Counsel argued that the sale agreement incorporated an interest clause which the applicant had ignored. The agreement also provided for arbitration, and the applicant was at liberty to invoke the arbitration provision to resolve the dispute on interest which it has failed to do. Counsel submitted that the 1st and 2nd respondents were willing to deposit the interest in court, but the computation had not been made known to them, and that the belated demand for interest was a means by which to delay the transfer of the suit property. Counsel conceded that the executed transfer could always be deposited with the deputy Registrar pending the hearing and determination of the intended appeal.

In his reply, Mr. Ogunde argued that depositing the title with the deputy Registrar would not be a deterrent against third party claims, and so opposed the proposition.

Ms. Mugo, holding brief for Mr. Issa, learned counsel for the 3rd respondent as third party, informed us that, the 3rd respondent would remain neutral for the purposes of this application, and that since the issuance of the Consent order, the amount of Kshs 10,000,000 had been paid to the 3rd respondent on 8th August 2013. In compliance with the Consent order, the 3rd respondent had drawn up the requisite partial discharge.

We have considered the arguments, submissions and the obtaining circumstances in respect of this application for stay of execution brought pursuant to **rule 5(2) (b)** of the Court of Appeal Rules. The principles which guide the Court in considering applications made under that rule are now well settled and we need only restate them from **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)**, thus: -

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”***

And in **Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001** the Court addressed what was considered to be an arguable appeal thus,

“He (the applicant) 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”

On the first aspect as to whether the application is arguable and not frivolous, one of the applicant’s complaints is that the learned judge did not give the parties an opportunity to address him on the ambiguity that had arisen from the Consent order. The other was that, the court wrongly varied the parties’ Consent order without affording them an opportunity to vary the consent themselves. Without going into the merits of the intended appeal as this will be the preserve of another bench, we take the view that the question of ambiguity on the face of the Consent order is arguable, and it is certainly a matter for resolution by this Court.

On whether the appeal would be rendered nugatory if the stay of execution is declined, the applicant contends that if the suit property is transferred to the 1st and 2nd respondents, the substratum of the appeal would be lost, yet, there remains an outstanding dispute on the interest payable on late payment of the balance of the purchase price. On the other hand, the 1st and 2nd respondents argue that, there is nothing to forestall the transfer of the suit property as they have complied with the terms of the agreement and the Consent order, having paid the entire purchase price, and taken possession of the suit property. The only outstanding obligation being, the execution of the transfer by the applicant. In their view, the claim for unascertained interest, at this late stage is an afterthought and designed to deny them the ownership of the suit property.

In considering whether a money decree or a liquidated claim would render the success of an appeal nugatory, this Court in the case of **Kenya Hotel Properties Limited vs Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06)** stated thus:-

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all”.

In this application, what appears to be at stake is a demand for interest by the applicant on late payment of the balance of the purchase price. It is not a money decree at this stage as, such amount (if any), is yet to be ascertained by the court below. Needless to say, there has been no suggestion that the 1st and 2nd respondents are “men of straw” and will be unable to pay the accrued interest if so determined by the court. If anything, it was submitted that if the amount was known, they would not have hesitated to deposit such amount in court. We have considered the terms of the Consent order dated 11th March 2013, where item (iv) states thus:-

“That the 1st Defendant do specifically perform the agreement for sale of Town House No. 8 on property L.R. No 7336/44 and transfer the property to the Plaintiffs in terms of the agreement for sale dated 29th May 2008.”

There is no doubt that the Consent order intended that the suit property would be transferred to the 1st and 2nd respondent, who have so far, paid the entire purchase price, save the claimed interest on account of late payment of the agreed purchase price. The 1st and 2nd respondents have also offered to deposit the executed transfer with the Deputy Registrar of the High Court, if need be.

In seeking to balance the interests of the respective parties, the approach to be taken in determining whether or not to grant a stay of execution should ensure that the applicant is not denied their dues under the sale agreement, should the appeal be successful, while at the same time, the respondents’ interest in the suit property should be safeguarded in the event that the intended appeal does not succeed. In our view, the balance tilts in favour of the 1st and 2nd respondent, but having regard to the nature of the case, we also consider that the subject matter, the suit property herein, should continue to be safeguarded.

Accordingly, we order that the Notice of Motion dated 19th November 2014 be dismissed, subject to the condition that, the executed transfer and lease in respect of the suit property be deposited by the applicant with the Deputy Registrar of this Court within seven (7) days from the date of the registration and that there be no dealing with the suit property pending the hearing an determination of the intended appeal or further orders of the Court.

The costs of the application will be in the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 20TH day of FEBRUARY, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR