



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. 27 OF 2015

BETWEEN

PATRIZIA BINI
.....APPLICANT

AND

MELINA INVESTMENTS LIMITED.....1ST
RESPONDENT

GUISEPPINO VALSESIA.....2ND RESPONDENT

PAOLA SASSO.....3RD RESPONDENT

ROBERTO SASSO.....4TH
RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the High Court of Kenya (Environment and Land Court) at Malindi (Angote, J.) dated 8th May, 2015,

in

EL . CC. No.11 of 2012)

RULING OF THE COURT

The application to which this ruling relates has been brought pursuant to **Rule 5(2) (b) of the Court of Appeal Rules** which traditionally requires the applicant to satisfy two requirements. Those requirements are today, as it were, old hat and we shall only restate them, not to reinvent them but to remind ourselves of the confines of our jurisdiction in considering the application.

Any person who has been aggrieved by a decision of a superior court below and wishes to challenge that decision on appeal to this court, and in the meantime would like the execution of the decree or order resulting from that decision stayed pending the hearing and determination of the appeal or intended appeal must demonstrate, first that the appeal is not frivolous and secondly that if the stay sought is not granted and the appeal ultimately succeeds, such appeal shall be rendered nugatory. See Githunguri v

An application for stay of execution under this rule calls for a balance of interests, the main purpose being to ensure that an appeal, that is worthy and contains substance which *prima facie* shows reasonable probability that the judgment of the court below may be upset, is not rendered useless if the *res* was to dissipate or be wasted before the determination of the appeal. See **M.M.Butt v The Rent Restriction Tribunal** Civil Application No.6 of 1979. The intention is never to deny the successful party of the fruits of his judgment or to shut out the unsuccessful party from challenging the impugned decision on appeal to this Court. Before we apply these principles to the instant application, it is imperative that we briefly outline the background to this dispute.

It is undisputed fact that the applicant, Patrizia Bini, an Italian national and the 1st respondent, Melina Investment Limited in which the 2nd, 3rd and 4th respondents (also Italian nationals), are directors and shareholders executed a pre-sale agreement on 23rd May, 2011 in which the latter agreed to sell and the former agreed to purchase a residential villa developed within a property known as **Chembe/Kibabamshe 402, Nyumba Baharini Village** (the suit premises). It was a term of the agreement that in consideration, the applicant would pay €150,000 for the unit, broken down as follows;

- i) €30,000 as deposit prior to execution of the pre-sale agreement
- ii) €45,000 for the completion of works on the fence, parking, staff quarters, electricity connection, plumbing and sewage systems. These works were to be completed not later than 30th November, 2011
- iii) €75,000 the final settlement to be paid by 21st December, 2011 when the property would be transferred to the applicant.

At clause 7 it was mutually agreed that should the works on the property remain incomplete by 30th November, 2011 the applicant would be free to rescind the agreement and be entitled to receive from the respondents within thirty days of the notice of withdrawal **“more than twice the amount of the deposit including the works carried out on the 1st floor of the extension agreed €30,000 (sic)”**

From the description of the agreement as a pre-sale agreement, it appears to us that upon compliance with the terms therein the parties would enter into a formal sale agreement and thereafter the property would be transferred in favour of the applicant. A dispute however arose between the parties before this stage was reached with each side accusing the other of violating the terms of the aforesaid pre-sale agreement. At the time the dispute arose the applicant had paid €75,000 and maintained that she had complied with all the other terms of the pre-sale agreement. She accused the respondents of purporting to sell to her a property in which they had no proprietary interest; that despite having paid €75,000 to the 1st respondents the latter had failed to complete the works on the common areas; that the 1st respondent had failed to give the applicant a sub-lease; that the 1st respondent unilaterally changed the terms of the pre-sale agreement; that the 1st respondent did not disclose the existence of a restriction imposed on the suit premises by the Government and made a misrepresentation that it had received all the necessary approvals for development of the suit premises; that the 1st respondent failed to obtain site plans and drawings of the suit premises from the relevant bodies; and that the 1st respondent failed to issue the applicant with the sub-lease. In the result the applicant brought an action in ELC Case No.11 of 2011 in which she sought;

- (a) a refund of €301,145 and/or in the alternative,
 - specific performance of the pre-sale contract of 23rd May 2011, specifically directing the completion of the works and conferment on the applicant of a good title to the suit premises by the 1st respondent.
- (b) general damages for fraud, inconvenience

(c) costs of the suit and interest on (a) and (b) above.

In the meantime the applicant made a report to the police leading to the arrest and the preferring of criminal charges against the 2nd & 4th respondents, who were accused of obtaining money by false pretences contrary to **section 313** of the Penal Code. The charges were however subsequently withdrawn by the Director of Public Prosecutions under **Section 87 (a)** of the Criminal Procedure Code.

The respondents on the other hand contended that they complied fully with the pre-sale agreement and that the applicant was the party in breach by reason of her failure or refusal to;

- i) execute the sub-lease
- ii) pay the balance of the purchase price in the sum of €75,000
- iii) obtain consent of the 1st respondent and pay the balance of €75,000 before taking possession
- iv) obtain the 1st respondent's consent before making structural alterations and undertaking additional construction of the suit premises.

The respondents counterclaimed and sought declarations that;

- (a) the applicant was in breach of the pre-sale agreement
- (b) the funds so far paid by the applicant pursuant to the pre-sale agreement are not recoverable,
- (c) with effect from 9th December, 2011 the applicant was a trespasser on the suit premises.

The respondents further claimed damages for breach of the pre-sale agreement, malicious and false criminal complaint and confinement of the 2nd and 4th respondents, loss of mesne profit and rent from 9th December, 2011 to the date of the suit, slander and an order of vacant possession and/or eviction of the applicant from the suit premises.

These issues were tried before the High Court (**Angote, J.**) at the end of which the learned Judge in his judgment found in favour of the respondents, holding, *inter alia*, that;

- i) the construction of the suit property was approved in 2008 by the then Municipal Council of Malindi,
- ii) by the time the applicant was permitted to occupy the suit premises the sale was not complete as she had not signed the sub-lease and was therefore a mere prospective purchaser, a licensee,
- iii) the license was withdrawn by a notice of termination on 9th December, 2011 thereby converting the applicant's status after this period to that of a trespasser
- iv) as a result of that the respondents were entitled to an award of damages for trespass (but not mesne profit) and also to an order of eviction.
- v) the claim for damages for unlawful arrest and detention was not proved,
- vi) similarly the claim for a refund of €301,145 that the applicant alleged to have lost in the transaction could not succeed on account of the fact that the applicant herself breached the pre-sale agreement,
- vii) in any case, when the applicant took possession of the suit premises the works were complete; as a result thereof no order for specific performance could issue.

On the other hand the learned Judge in finding in favour of the respondent's counter-claim held, *inter alia*, that the applicant, for the reasons of failure to sign the sub-lease, to pay service charge; for taking possession without consent of the 1st respondent and for failing to pay the balance of the purchase price, was in breach of the pre-sale agreement and the 1st respondent was consequently entitled to damages for trespass. Those damages were assessed by the learned Judge at Kshs.150,000 per month from 9th December, 2011 to the date of the judgment, translating to Kshs.7,000,000. The only basis for the award was the fact that the suit premises "is a high-end storeyed house fronting the sea"

In the end the learned Judge entered judgment for the respondents and ordered the applicant to,

- i) pay Kshs.7,000,000 to the respondents as explained above,
- ii) give vacant possession of the suit premises, and
- iii) pay the costs of the counter-claim to the respondents.

The applicant has evinced, by filing a notice of appeal, her intention to challenge the whole of that decision in this Court. In the meantime she has moved this court under its **Rule 5(2) (b)** to stay the decree issued pursuant to the judgment. We turn to apply the principles we set out at the beginning of this ruling to the facts presented in this application.

From the grounds proffered in this application and from those enumerated in the draft memorandum of appeal, the intended appeal will be raising issues, such as, whether;

- i) the learned Judge misdirected himself by finding that the applicant was a trespasser on the suit premises when her occupation was with the consent of the respondents,
- ii) there was error in awarding general damages for trespass, whether they were excessive and whether they were based on no evidence,
- iii) the learned Judge erred in making an order of forfeiture of €75,000
- iv) the learned Judge erred by failing to find that fraud was committed by the respondents against the applicant,
- v) the finding that specific performance could not issue was made in error, and
- vi) the learned Judge considered extraneous matters in arriving at the decision sought to be challenged

We entertain no doubt whatsoever that these grounds are indeed arguable in the sense that they are not frivolous, and that they deserve court's consideration. But we do not have to decide them in this application; they will be conclusively determined in the intended appeal. **See Dennis Mogambi Mongare v Attorney General & 3 others** Civil Application No.265 of 2011. But since an application made under **Rule 5(2) (b)** can only succeed if the applicant satisfies both requirements, we now turn to consider the second limb, namely, whether the intended appeal will be rendered nugatory should we reject this application only for the intended appeal to succeed. We have already observed that the consideration of this ground calls for the balancing of the interests of the parties with the sole objective of not exposing any of them to substantial or irreparable loss. This Court explained this principle in relation to the distinction between the jurisdiction of the High Court and this Court in an application for stay of execution, in the case of **Mukuma v Abuoga** (1988) KLR 645 at 647 in the following passage;

".. but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo"

It has been deponed by the respondents in opposition to this application that on 3rd of June, 2015, nearly a month after the decision of the High Court, that court issued a warrant to the court bailiff against the applicant to give possession of the suit premises, a warrant of attachment of movable property and a warrant of sale of movable property; that on the same day the bailiff executed the warrant to give possession of the suit premises by evicting the applicant; and that the 1st respondent has taken possession of the suit premises. There is no affidavit to controvert these averments.

In normal circumstances that would have ended our consideration of the question of the nugatory aspect of the appeal because no order of stay can issue where the action sought to be arrested has been effected. But Mr.Sumba, learned counsel for the applicant, while appreciating that execution was complete, and nothing was left capable of being stayed, invited us to resort to our inherent power to order for the reinstatement of the applicant to the suit premises arguing that the execution process leading to her eviction and attachment of her movable assets were in breach of **Rule 12** of the **Auctioneers Rules**; that it would be unconscionable for the applicant to lose €75,000, so far paid to the 1st respondent, the suit premises and on top of that, pay Kshs.7,000,000 to the respondents as damages for trespass.

Counsel relied on the decisions of this court in **Ransa Company Limited v Manca Fransesco & 2 others**, Civil Application No.283 of 2008, **Mahideen Ali Ahmed v Ahmed Khalifa Omar**, Civil Application No.155 of 1999, **Nyals (Kenya) Limited v United Housing Estate Limited** Civil Application No.129 of 1995, **Elijah Kipngeno Arap Bii v Samuel Mweha Gitau & another**, Civil Application No.243 of 2004 and **Housing Finance Co. of Kenya Ltd v Richard Ndere Johnson Paul & 3 others**, Civil Application No.7 of 2005, to emphasise the jurisdiction of this court under **Rule 5(2) (b)** aforesaid. **Muhideen Ali Ahmed** (Supra) was cited for the proposition that this court can issue a mandatory order of reinstatement even where it has not been sought in the application. Likewise in **Ransa** case (Supra) the court in exercise of its inherent power ordered the maintenance of *status quo*, though not prayed for, in order to meet the ends of justice. It is not clear to us from the terse 1 ½ page-ruling in **Muhideem** what factor (s) the court considered in granting a mandatory order of injunction. The Court simply said it was “satisfied” that the appeal would be rendered nugatory if the applicant was not reinstated to the suit premises. We can only stress that each case must turn on its uniqueness. Mr.Kilonzo for the respondent does not think the appeal will be rendered nugatory. He contends that nothing is left to be stayed after the execution of the decree; that it is too late in the day to reinstate the applicant; and that should the appeal succeed the respondents will be able to avail to the applicant a villa, among the over 48 available villas, within the same property-Nyumba Baharini Village.

For our part we reiterate that indeed the court can, in special circumstances issue orders not prayed for in the interest of justice, to prevent abuse of its process but only when such an action is not prejudicial to the other party. We confirm, in the same vein, that under **Rule 5(2) (b)** the court can only issue orders of stay of execution, injunction or stay of further proceedings. It is now settled that the injunction envisaged under the rule can either be prohibitory or mandatory. See **New Ocean Transport Limited v Anwar Mohamed Bayusuf Limited**, Civil Application No.16 of 2014. It is equally trite that in considering an application under **Rule 5(2) (b)**, be it for injunction or stay, the consideration is the same, that is to say arguability of the appeal and nugatory aspect of the appeal. With regard to prohibitory and mandatory injunctions this court does not base its consideration on the principles enunciated in the leading case of **Giella v Cassman Brown & Co Ltd** (1973) EA 358 or in the latter case, **Locabail International Finance Ltd v Agroexport** (1986) 1 A 11 ER 901. In the contrast this court only considers arguability of the appeal and its nugatory aspect if stay or injunction is not granted.

In the circumstances of this matter we do not think, for the following reasons, that the success of the appeal will be rendered nugatory if this application were to fail..

The main relief sought in the applicant’s amended plaint is payment or refund of €301,145, confirming that she can be compensated in damages. She has not contended that the respondents are incapable of paying the sum claimed. Secondly the 1st respondent has averred that it has several unsold units on the same property where the suit premises is situate which will be available to be transferred to the applicant in the event the appeal succeeds. There is no evidence that the suit premises has been offered for sale to a third party.

For these reasons we find no justification to grant an order of mandatory injunction to reinstate the applicant to the suit premises. Accordingly the motion dated 24th May, 2015 is dismissed. Costs will be in the appeal.

Dated and delivered at Malindi this 31st day of July, 2015

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR