



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & GATEMBU, JJ.A)

CIVIL APPLICATION NO. NAI 329 OF 2013 (UR 243/2013)

BETWEEN

MAVJI RAMJI PATEL.....APPLICANT

AND

EUNICE WAIRIMU MUTURI.....1ST RESPONDENT

WASHINGTON MUCHIRI MUTURI.....2ND RESPONDENT

(Being an application for stay of execution of the Judgment of the High Court pending the hearing and determination of an appeal from the Judgment and Orders of the High Court of Kenya

at Nairobi (J. M. Mutungi, J) given on the 22nd day of July, 2013

in

ELC HIGH COURT CIVIL CASE NO. 586 OF 2005)

RULING OF THE COURT

1. The applicant, Mavji Ramji Patel, seeks an order, under Rule 5(2)(b) of the Rules of this Court, that pending the hearing and determination of an intended appeal, there be a stay of execution of the judgment of the High Court, Environmental and Land Division, delivered on 22nd July 2013 in Civil Suit No. 586 of 2005 by which the High Court granted the respondents an order of specific performance requiring the applicant to execute all necessary documents to transfer the property known as L. R. No. 209/1832 Nairobi (the property) to the respondents and in default the Deputy Registrar of the High Court to do so. The applicant contends that unless the order for stay of execution of the judgment is granted, his appeal, which he says has very good prospects of success, will be rendered nugatory.

Background

2. On 23rd September 2003 the applicant as vendor entered into an agreement for sale with Gerald Muturi Maina, the purchaser (who is since deceased) under which the applicant agreed to sell the property measuring approximately 0.07461 to the purchaser for the price of Kshs. 10,000,000.00. A deposit of

Kshs. 3,000,000.00 was paid on execution of the agreement for sale. The balance of Kshs. 7,000,000.00 was to be paid on completion.

3. According to the purchaser the sale was not concluded, by reason of breach on the part of the applicant. The purchaser therefore commenced suit in the High Court against the applicant on 17th May 2005 seeking an order for specific performance to compel the applicant to complete the agreement for sale dated 23rd September 2003.

4. Following an application made by the purchaser in that suit, the applicant's defence was struck out under the provisions of the then Order VI Rule 13 of the Civil Procedure Rules on grounds that it did not contain triable issues.

5. The purchaser died during the pendency of the suit in the High Court following which his name was substituted with the names of the respondents.

6. After the applicant's defence was struck out, the suit was set down for formal proof before J. M. Mutungi J, of the Land and Environment Division of the High Court. After hearing the parties, the learned judge gave judgment in favour of the respondents against the applicant for specific performance of the agreement for sale on condition that the respondents deposit into court the balance of the purchase price of Kshs. 7,000,000.00 within 30 days of the judgment. The same was to be released to the applicant upon the transfer of the property to the respondent.

7. Aggrieved by that judgment the applicant filed a notice of appeal on 5th August 2013 with the intention of challenging the whole of the judgment.

8. It is the execution of that judgment that the applicant wishes stayed pending the hearing and determination of his intended appeal.

The test

9. The grant or refusal of an order for stay of execution under rule 5(2)(b) of the Rules of this Court is a matter of exercise of judicial discretion based on the consideration whether the intended appeal is arguable and whether if the order for stay is refused the intended appeal will be rendered nugatory. In **Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006** this Court stated:

“The jurisdiction of the court under rule 5(2)(b) is discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

10. Does the application before us meet the required test?

Submissions by counsel

11. At the hearing of the application before us learned counsel Ms. J M Munyaka appeared for the applicant while learned counsel Mr. S. O. Oyugi appeared for the respondents.

12. Ms. Munyaka drew our attention to the grounds set out on the face of the application and the applicant's supporting affidavit and submitted that the application meets the requirements for the grant of an order of stay; that prior to the sale agreement, the applicant had submitted an application for subdivision of the property to the Commissioner of Lands; that the property was not in existence by the time the suit was heard and determined; that in the circumstances the order of specific performance should not have been granted and that it is impossible to comply with the order; that the applicant did not get a chance to ventilate his case and that important evidence which would have altered the course of the

suit in the High Court was left out.

13. It was also Ms. Munyaka's submission that if the respondents are allowed to execute the judgment before the appeal is heard and determined they will get the benefit which they are not entitled to as they are trying to transfer the subdivisions of the property yet the applicant intended to transfer a smaller parcel of land. Counsel also submitted that there is a real threat of execution as the respondents have already taxed costs in the High Court and threatened to carry out the judgment.

14. Regarding the issue of representation taken up by the respondent in the replying affidavit, Ms. Munyaka submitted that Article 159 of the Constitution 2010 allows the court to overlook technicalities and that the firm of Gikera Vadgama is properly on record. With that, counsel for the applicant urged us to allow the application.

15. Opposing the application, Mr. Oyugi relied on the 2nd respondent's replying affidavit and submitted that the contention by the applicant that the property does not exist has no foundation; that the applicant has in previous proceedings consistently deposed that he is the registered owner of the property and his latter contention that the property does not exist is dishonest; that the applicant had no defence in the High Court as it was struck out; that there is no mistake as to the property and there was no variation of the agreement for sale; that the process of sub division of the property was in any event not completed and the property is still in existence.

16. Counsel for the respondents concluded by stating that this is not a proper case for the grant of an order of stay of execution and urged us to dismiss the application.

17. In her brief reply Ms Munyaka reiterated that the applicant is seeking an order for the status quo to be maintained pending determination of the appeal and that the agreement for sale with respect to which specific performance was ordered is defective.

Determination

18. We have considered the application, the affidavits and the submissions by counsel. The main thrust of the applicant's grievance with the judgment of the High Court is that the judgment cannot be given effect because the property no longer exists having been subdivided and one resultant subdivision merged or amalgamated with another parcel of land. That however was not a matter that was before the trial judge as the defence filed by the applicant in answer to the purchaser's claim was struck out by order of the High Court on 20th April 2010 as raising no triable issues. The applicant did not appeal against the decision striking out his defence and it is doubtful that the learned trial judge can be faulted for granting the relief of specific performance.

19. There is also material before us to show that on 23rd September 2003 when the applicant entered into the sale agreement with the purchaser, the applicant also wrote to the Commissioner of Lands requesting for cancellation of subdivision of the property. In a response to the applicant's letter dated 23rd September 2003, the Commissioner of Lands in his letter dated 19th November 2003 lamented that the letter from the applicant "*cancelling the...subdivisions and amalgamation of this (sic) stage of implementation is disturbing; when the whole process is nearing completion.*" The Commissioner of Lands then sought the applicant's confirmation that he was no longer interested in the process.

20. Based on the letter from the Commissioner of Lands to the applicant therefore, it would seem that that the subdivision process was not completed. In the totality of those circumstances and to the extent that the intended appeal is premised on the non existence of the property, we have doubts that the intended appeal is arguable but leave the matter for the Court that will ultimately hear the appeal.

21. In any event, the applicant has not demonstrated, as he was under a duty to do, that the intended appeal will be rendered nugatory unless we grant the orders sought. No effort was made to show how the appeal will be rendered nugatory if we refuse to grant the orders sought.

22. We do not therefore consider that the application has merit. It is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 28th day of March, 2014.

W. KARANJA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

/ewm

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

REGISTRAR