



IN THE COURT OF APPEAL

NAIROBI

(CORAM: KARANJA, MWILU & KIAGE, JJA)

CIVIL APPLICATION NAI.272 OF 2010 (UR 191/2010)

**NELSON MUTAI T/A KANDIE MUTAI MUDEIZI & CO. ADVOCATES
APPLICANT**

V E R S U S

BENSON MBUVI KATHENGE.....RESPONDENT

(An application for stay of execution pending the hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Milimani Commercial Court, Nairobi (Koome, J.) dated 22nd October, 2010

in

HCCC NO. 189 OF 2010

RULING OF THE COURT

The motion before us dated 25th November 2010 is brought under **Rule 5(2)(b)** of the Court of Appeal Rules and seeks an order of stay of execution of the ruling and/or orders of the High Court made on 22nd October 2010 pending the hearing and determination of an intended appeal from the same.

The grounds on which the application is premised appear on the face of the motion and can be summarized as follows:-

- a. The applicant was required by the ruling to deposit some KShs.2,900,000 within fourteen days yet he, as an advocate, had previously forwarded the same to his client.
- b. The applicant ‘sincerely fears’ irreparable loss yet he derived no benefit from the said sums, hence it is grossly unjust.

The motion is supported by the affidavit of NELSON MUTAI the applicant, expressed as sworn on 25th November 2013. It is to the effect that the applicant was engaged by the vendor in a transaction for the sale of **L.R. 209/8275/20** that collapsed. The purchaser made payment of some KShs.3,250,000 to the applicant and the agreement did provide that the vendor was at liberty to utilize that sum towards rates

and rents and to obtain relevant transfer documents.

The transaction fell through when, the applicant avers, “**the Lands Office cancelled the registration of the transfer for in favour of the Vendor**” meaning in essence he had no title to pass to the purchaser. This led to a suit by way of originating summons against the applicant by which the purchaser sought a refund of the deposit paid. The same was heard by Koome J (as she then was) who, by the ruling dated 22nd October 2010, ordered the applicant to deposit the sum of KShs. 2.9 million in default of which judgment was to be entered against him.

The applicant has already filed a notice of appeal and he urges us to find, in line with the notorious first limb he must satisfy us on before he can obtain a stay of execution, that he has an arguable appeal based, in the main, on the fact that part of the deposit has been utilized per agreement and further that the applicant had rendered professional services and that the money was no longer in his hands.

As to the second limb he must satisfy to succeed, namely that the appeal would be rendered nugatory if the stay is not granted, the applicant avers at paragraph 13 of the affidavit thus;

“THAT unless the orders sought herein are granted, the intended appeal will be rendered nugatory as it may be difficult for me to recoup the amount at stake from the respondent in the event that the appeal is successful.”

The respondent is opposed to the application. He swore an affidavit in reply on 13th October 2013 in which he averred that the applicant failed to deposit the sum ordered by Koome J in consequence of which Judgment was entered against him. The respondent sees this application as an attempt by the applicant to deny him the enjoyment of the fruits of that Judgment.

The respondent’s advocate also swore a replying affidavit in opposition to the application. He repeated the substance of the respondent’s objection and added that the applicant had already obtained orders of stay of execution ‘**by proxy**’ at the High Court in that objector proceedings had been filed and orders granted in respect of the goods that had been proclaimed upon in execution.

At the hearing of the application, Mr. Kabue, the applicant’s learned counsel was present and he informed us from the Bar that the applicant has already filed **Civil Appeal No. 68 of 2012**. He reiterated the basis of the applicant’s plea as stated in his affidavit and asked us to grant the application for stay.

Even though there was no appearance at the hearing by the respondent or his advocates on record who were duly served, we have upon perusal of the material before us and consideration of learned counsel’s submissions come to the inevitable conclusion that this application is for dismissal.

We do not wish to make a definite finding on whether or not the appellants’ appeal is arguable. Suffice it to say that the applicant did receive from the respondent the sum of KShs.3,250,000 in his capacity as the vendors’ advocate and therefore a stakeholder. He released the bulk of the money to the vendor without as much as seeking the consent of or even informing the respondent’s advocates. Without saying more, we are not satisfied, as we should be before exercising our **Rule 5(2) (6)** discretion, that the appeal is arguable. It seems to us doubtful. And we cannot be satisfied if in doubt.

On the second limb as well, and an applicant must satisfy us on **both** as established in a long line of authorities (See GITHUNGURI –VS- JIMBA CREDIT CORP.LTD [1988] KLR 83-8; MAGNATE VENTURES LTD –VS- ENG KENYA LTD [2009] KLR 538.), we stand unsatisfied. Beyond the bare assertion by the applicant that “**it may be difficult to recoup the amount**” if paid over to the respondent, we have not been given material or reason to doubt the respondent’s ability to pay back the same amount of money he had himself first paid to the applicant. If anything, the record seems to show that it is the respondent who has had, and continues to have, difficulty recouping the money from the applicant.

For those reasons we find and hold that the Motion dated 25th November 2010 is devoid of merit. It is

accordingly dismissed but with no orders to costs given the respondent's unexplained non-attendance at the hearing.

Dated and delivered at Nairobi this 9th day of May 2014

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

P. O.KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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