



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WARSAME, G.B.M. KARIUKI & M'INOTI JJ.A.)**

**CIVIL APPLICATION NO. NAI 142 OF 2014 (UR 115/2014) BETWEEN**

**CONSOLIDATED BANK OF KENYA LTD.....APPLICANT**

**AND**

**FLORENCE WAIRIMU MBUGUA & SYLVIA MUGUGU**

**(Administrators of the Estate of JOSEPH KIARIE MBUGUA)..RESPONDENTS**

*(Application for stay of execution pending the lodgement, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Ogola, J.) dated 19<sup>th</sup> May, 2014.*

in

H.C.C C NO. 652 OF 2006)

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**RULING OF THE COURT**

By its Notice of Motion taken out on 20<sup>th</sup> June 2014 under **rule 5(2)(b)** of the **Court of Appeal Rules**, the applicant, **Consolidated Bank of Kenya Limited**, seeks in the main, stay of execution of the ruling and order of the High Court (**Ogola J.**) dated 19<sup>th</sup> May 2014. By that ruling the learned judge partly varied a consent judgment entered into between the parties herein on 29<sup>th</sup> June 2011. The applicant avers that it has filed a Notice of Appeal evincing intention to appeal against the said ruling; that it has an arguable appeal and that unless this Court orders stay of execution of the High Court's order, its intended appeal shall be rendered nugatory.

The application is opposed by the respondents, **Florence Wairimu Mbugua** and **Sylvia Murugi Mbugua** who are two of the four administrators of the estate of the late **Joseph Kiarie Mbugua**. The other two administrators **Grace Wanjiku Mbugua** and **Peter Chege Kiarie** are ambivalent while **Timber Manufacturers & Dealers Ltd**, the Third Party in the proceedings before the High Court, strongly supports the application.

The background to this application is a bit convoluted and involves primarily the property known as **LR No Nairobi 4894/59 (the suit property)**. At all material times the suit property was registered in the name of **Joseph Kiarie Mbugua**, now deceased. In 1985, the applicant's predecessor in title, **Home Savings & Mortgages Ltd**, advanced a loan to the deceased which was secured by a charge over the suit property and

another property known as **LR No Nairobi 209/1605**.

On 6<sup>th</sup> August, 1990, the deceased purported to sell the suit property, which was charged to the applicant, to the third party for Kshs 4 million free of all encumbrances. The third party duly paid the agreed purchase price and on 31<sup>st</sup> August 1990 the deceased gave the third party vacant possession of the suit property. The third party has had that possession since. As it soon turned out, the deceased was unable to transfer the suit premises to the third party because it was charged in favour of the applicant. Undoubtedly, one thread that runs through this long and tedious litigation is the conduct of the deceased. While not in any way casting aspersions on a deceased person, we nevertheless think that the deceased perpetuated this dispute through deliberate and intentional conduct. We shall say no more in this respect.

Unhappy with the turn of events, the third party filed **HCCC No 1048 of 1994** against the deceased and the applicant, seeking primarily specific performance of the agreement for sale of the suit property and general damages. On its part, the applicant filed a defence and counter claim seeking return to it of the original documents of title of the suit property, which somehow the deceased had managed to give to the third party.

On 5<sup>th</sup> March 2005 the High Court declined to order specific performance of the agreement between the deceased and the third party on account of the prior charge over the suit property in favour of the applicant. However, the court ordered the deceased to refund the third party's Kshs 4 million and to pay it general damages of Kshs 1 million. The deceased was also ordered to refund Kshs 75,157.00, which the third party had paid as rates. As regards the counterclaim, the court allowed the same and directed that the documents of title to the suit property be returned to the applicant.

The third party was aggrieved by the decision of the High Court and sought a stay of execution in this Court. On 15<sup>th</sup> July 2005, this Court found that the third party's intended appeal was not frivolous and stayed execution of the decree of the High Court until the hearing and determination of the intended appeal. In that ruling this Court concluded:

***“On our consideration of the material before the Court, we are satisfied that the intended appeal is not frivolous... The applicant contends that the appeal will be rendered nugatory, if successful, unless stay is granted as the second respondent (Consolidated Bank of Kenya) will realize the security and the documents will be beyond its reach. It is not denied by the second respondent that it will sell the property upon receipt of the documents of title. The appeal is against the order dispossessing the applicant of the documents of title. We accept that, if the documents are released and the security is realized, the appeal if successful will be rendered nugatory as the documents of title will no longer be in the hands of the second respondent.”***

On 22<sup>nd</sup> December 2006 the deceased passed on and the respondents, together with **Grace Wanjiku Mbugua** and **Peter Chege Kiarie** were on 6<sup>th</sup> August 2007 appointed on as joint administrators of his estate. The disputes between the parties escalated as one new application after another was filed in the High Court. Ultimately in a bid to resolve the dispute between the applicant and the estate of the deceased once and for all, the parties initiated negotiations. The third party, whose appeal in this Court against the applicant and the estate of the deceased was still pending, was made a party to the negotiations. At those negotiations, **M/s Judy Thongori & Company Advocates** acted for the estate of the deceased though the respondents later disowned that firm of advocates.

On 29<sup>th</sup> June 2011 there was a breakthrough and the parties recorded and filed a consent judgment in one of the suits between them, namely **HCCC No 625 of 2006**, in the following terms:

1. ***The Plaintiffs do pay to the 1st Defendant a sum of Kshs.47,500,000/= only in full and final settlement of the Plaintiff's loan account with the 1<sup>st</sup> Defendant.***

***That the said amount be paid as follows:-***

a. *The sum of Kshs.13,652,675/= due from the Ministry of Lands and which amount the parties have agreed to be deposited in a joint account in the names of their advocates, be transferred to the 1<sup>st</sup> Defendant and if the said sum has not been received into this account as at 29.06.2011, the same be transferred to the 1<sup>st</sup> Defendant as soon as it is put into that account.*

b. *The balance being the sum of Kshs.33,847,325/= be paid on or before 31<sup>st</sup> January 2012.*

2. *Upon payment of the amount set out in Clause 1 above, the two properties used as security for loans that is to say LR No. 209/1605 Murang'a Road, Nairobi and LR No.5894/59 Garden Estate Nairobi be unconditionally discharged.*

3. *The Discharge of Charge and original title document over LR No. 209/1605 Murang'a Road Nairobi be released to the Plaintiffs upon payment of the amount above.*

4. *The Discharge of Charge in respect of LR No. 4895/59 Garden Estate Nairobi be released to the Purchaser that is Timber Manufacturers and Dealers Limited who have in their possession the original title document.*

5. *That in default of payment of the sums set out above, the 1<sup>st</sup> Defendant do sell LR No. 209/1605 Murang'a Road, Nairobi.*

6. *The intended appeal by Timber Manufacturers and Dealers Limited in HCCC No. 1048 of 1994 be marked as settled in terms of this consent.*

7. *That each party do bear its costs."*

Matters then took a rather dramatic twist when two of the administrators of the estate of the deceased, namely the respondents herein, applied to the High Court vide an application dated 26<sup>th</sup> April, 2012 to set aside, cancel, vary or review the entire consent judgment of 29<sup>th</sup> June, 2011. The basis upon which the setting aside was sought was primarily that the firm of Judy Thongori & Company Advocates had acted without instructions from the respondents and to that extent they were not bound by the consent judgment.

The other two administrators of the Estate, *Grace Wanjiku Mbugua* and *Peter Chege Kiarie*, as well as the applicant and the third party vigorously opposed the application. By a ruling dated 19<sup>th</sup> May 2014, Ogola J. found that although the respondents had expressed their opposition to the consent judgment to M/s Judy Thongori & Company Advocates and that those advocates did not have instructions from the respondents, that in itself did not invalidate the consent judgment. The learned judge also found that the said advocates had acted *bona fide* when they entered into the consent judgment. The learned judge expressed himself thus regarding the consent judgment:

***"The consent affected all the parties to these proceedings. It also affected the distribution of the assets under the confirmed Grant in the estate. The consent also brought to finality several issues in this matter. Again all other parties to this matter are satisfied with the consent. It is now the duty of this court to balance the rights of the parties, and to do what is just for all the parties, and more importantly, putting the effect of the said consent into perspective. The fact that a consent is entered into without full instructions of one or more of the parties does not of itself invalidate the consent. Other parties affected by the said consent are the 1<sup>st</sup> Defendant and the Third Party. The consent was recorded on 29<sup>th</sup> June 2011 and the House of Grace, the 1<sup>st</sup> Defendant and the Third Party have acted upon it. Their action have far reaching consequences, which this court must consider. Under the consent, the 1<sup>st</sup> Defendant has been paid its loan balance of Kshs.47,500,000/=. Pursuant to above payment the two properties used as security for loan that is, the Murang'a Road Nairobi Property, and the Garden Estate Nairobi Property, have since been discharged, and Discharge of Charge for the Murang'a Road, Nairobi, property issued to the House of Grace, and the Discharge of Charge for the***

***Garden Estate Nairobi, property issued to the third party who has also paid Kshs.1,000,000/= to the estate of the deceased. The intended appeal by the Third Party has also been settled by the said consent.” (Emphasis added).***

After quoting from the decision of this Court in ***DIAMOND TRUST BANK OF KENYA LTD V PLY & PANELS LTD & OTHERS CA No 243 of 2002*** that courts are less likely to set aside a consent judgment which has been executed, the learned judge further stated:

***“Clearly, to the extent that the consent judgment herein has been performed the strict position would favour the submission that the consent should not be interfered with. I agree.”***

Nevertheless, for the sake of what he called ***“harmony in the family”***, the learned judge varied the consent judgment in the following terms:

**Clause (4)**

- i. ***The Discharge of Charge in respect of LR No. 4894/59 Garden Estate Nairobi be released to the Estate of JOSEPH KIARIE MBUGUA (deceased) pending the resolution in the Court of Appeal or in any other forum, of any disputes thereon.***
- ii. ***Related to this Clause is an order that the Kshs.1,000,000/= alleged to have been paid by the Third Party to the estate of the deceased in order to secure above discharge, if correct, shall be refunded to the Third Party within 7 days from today.***

**Clause (6)**

- a. ***The intended appeal by the Third Party – Timber Manufacturers and Dealers Limited in HCCC No.1048 of 1994 shall proceed as intended.***
- b. ***That parties shall bear their own costs for this application except that the Third Party’s costs herein shall be paid by the House of Grace.”***

Aggrieved by the decision to review and vary part of the consent judgment, the applicant filed a notice of appeal and took out the Motion now before us for stay of execution pending the hearing and determination of its intended appeal. In urging the merits of the application, **Mr. Thuku**, learned counsel for the applicant submitted that the applicant’s intended Memorandum of Appeal raises 12 substantial grounds of appeal upon which the ruling of the learned judge is impugned. Key among those grounds, it was submitted, was that the learned judge had varied the consent judgment even after finding that it had been substantially performed.

The ruling will also be challenged, we were told, on the ground that the learned judge varied the consent judgment yet he had found that the reason advanced by the respondents to justify review, namely the lack of instructions on the part of M/s Judy Thongori & Company Advocates, did not constitute a sufficient reason for review. Counsel also submitted that if the consent judgment was tainted in any way by lack of instructions on the part of the advocates, it ought to have been reviewed in its entirety rather than in part. **Mr. Thuku** relied on the judgment of this Court in ***FLORA N WASIKE VS DESTIMO WAMBOKO (1982-88) 1 KAR 625*** regarding the grounds upon which a consent judgment may be set aside, which he submitted did not exist in this case.

On whether the intended appeal would be rendered nugatory if stay of execution was not granted, learned counsel submitted that indeed it would. The effect of the variation of the consent judgment was to re-open litigation between the parties which had been compromised and in particular the third party’s appeal before this Court. Should the appeal succeed, counsel submitted, the applicant will have been subjected to unnecessary legal proceedings, which the parties had agreed to resolve and conclude. Counsel relied on the ruling of this Court in ***RELIANCE BANK LTD VS NORLAKE INVESTMENTS LTD (2002) 1 EA 227*** and submitted that a refusal to grant stay in the circumstances of this case would expose the applicant

to more hardship than it would to the respondents.

**Mr. Njuguna** learned counsel for the third party supported the application on the basis of an affidavit sworn by a director of the third party, **Bruno Rosiello** on 2<sup>nd</sup> October, 2014. He submitted that the third party had also filed a notice of appeal against the ruling of Ogola, J. and had obtained in the High Court stay of execution until the hearing and determination of the current Motion. Counsel submitted that the High Court had erred in reviewing the consent judgment on grounds of harmony in the family of the deceased rather than on the established legal grounds such as fraud, mistake or misrepresentation.

It was **Mr. Njuguna's** submission that the variation of the consent judgment had far reaching implications and affected the legal rights of parties who were not members of the deceased's family and whose interest were not considered by the learned judge. It was therefore wrong, counsel submitted, for the court to compromise the rights of the third party on the convenience of harmony in the family of the deceased. It was counsel's argument too that the parties had not been afforded an opportunity to be heard on the issue of family harmony, which they did not expect to be the consideration upon which the ruling would turn.

Relying on the confirmed grant of letters of administration of the estate of the deceased, **Mr. Njuguna** submitted that the suit property was not among the properties distributed to the heirs and dependants of the deceased. Instead, it was left out of the list of assets of the deceased because all the administrators accepted that it had been sold by the deceased to the third party and was therefore not available for distribution as free property of the deceased.

On whether the appeal would be rendered nugatory if stay of execution was not granted, Counsel submitted that the third party stood to suffer serious prejudice because after the consent judgment, the third party had sold two acres of the suit property to purchasers who had each taken possession. If the documents of title to the suit property were released to the respondents as directed by the High Court rather than to the interested party, the third party would be unable to fulfill its contractual obligations to the two purchasers and would thereby be exposed to unnecessary claims. In addition, counsel submitted, the litigation between the applicant and the third party, including the appeal before this Court, which was compromised by the consent judgment would be re-opened to the prejudice of the third party, including the incurring of unnecessary legal costs.

**Grace Wanjiku Mbugua** and **Peter Chege Kiarie** did not file any replying affidavit or grounds in opposition of the application and their learned counsel. **Mr. Kalsi** left the determination of the application to the discretion of the Court.

**Mr. Mbabu**, learned counsel for the respondents opposed the application on the strength of an affidavit sworn by **Florence Wairimu Mbugua** on 1<sup>st</sup> October, 2014. Counsel submitted that the applicant had no cause to complain because the part of the consent judgment that affected it had not been varied by the ruling of the High Court and that in any event, the applicant had been paid in full as per the consent judgment. None of the administrators was seeking a refund of the monies already paid to the applicant. In these circumstances, counsel submitted, the applicant was not an aggrieved party. In the absence of a genuine grievance, we were urged to find that applicant could not sustain an arguable appeal.

Counsel supported the partial review and variation of the consent judgment by the High Court rather than of the entire consent judgment on the ground that the respondents, who had applied for review, were not aggrieved by the entire judgment, but only part of it. As for the third party, learned counsel submitted, he was a stranger who had literally gate crashed into the consent judgment and that therefore he should be left to pursue his own claims and litigation in this Court. Counsel was unequivocal that the respondents were now laying claim to the suit property because the house of the deceased represented by the other two administrators had been given LR No Nairobi 209/1605.

On whether the intended appeal stood to be rendered nugatory in the absence of an order of stay of execution, **Mr. Mbabu** submitted that it cannot since the respondents are not asking for any payment. On the contrary, counsel submitted, it is the respondents who stood to suffer prejudice because they have paid the agreed sum of Kshs 47,500,000.00 yet they have not received the discharged documents of title for

the suit property. In those circumstances, counsel submitted, it would be unconscionable to allow the applicant to keep the money paid to it without the applicant in turn discharging the suit property.

We have anxiously considered the application, the ruling of the High Court, the affidavits in support and in opposition, the illuminating submissions of learned counsel, the authorities cited and the law. An intended appellant who has duly filed a notice of appeal is entitled to move this Court under rule 5(2)(b) for stay of execution of a decision of the High Court pending the hearing and determination of his or her intended appeal. The filing of a notice of appeal is a condition precedent before this Court can assume jurisdiction under Rule 5(2)(b). In **SAFARICOM LTD V. OCEAN VIEW BEACH HOTEL LTD AND 2 OTHERS**, CA No. 327 of 2009 Omolo, J.A. stated the proposition thus:

***“At the stage of determining an application under Rule 5(2) (b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be intention to appeal, which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”***

The applicant duly filed a notice of appeal on 30<sup>th</sup> May 2014. On its part, the third party filed its notice of appeal on 21<sup>st</sup> May 2014 and obtained from the High Court an order for stay of execution pending the hearing and determination of this application.

To be entitled to an order of stay of execution, the applicant must satisfy the Court that his intended appeal is arguable and that unless an order for stay of execution is issued, the intended appeal will be rendered nugatory if successful. In **REPUBLIC V. KENYA ANTI-CORRUPTION COMMISSION & OTHERS** [2009] KLR 31 this Court explained the guiding principles for stay of execution as follows:

***“The law as regards the principles that guide the court in such an application brought pursuant to Rules 5(2) (b) of the Rules are now well settled... The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds; the results or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb”.***

Has the applicant placed before us an arguable appeal? An arguable appeal, this Court has stated time and again is not necessarily an appeal that must succeed at the full hearing. Far from it, an arguable appeal is one that raises an issue or issues of law that are deserving of consideration by this Court. (See **KENYA RAILWAYS CORPORATION V. EDERMANN PROPERTIES LTD** CA No. Nai. 176 of 2012). In the same vein, to make out an arguable appeal, the applicant does not have to establish a multitude or multiplicity of arguable issues. It will suffice if he or she can establish even one *bona fide* issue deserving consideration by this Court. (See **KENYA TEA GROWERS ASSOCIATION & ANOTHER V. KENYA PLANTERS & AGRICULTURAL WORKERS UNION** CA No. Nai. 72 of 2001).

The applicant intends to argue, among other issues that having found that the ground relied upon by the respondents for review or variation of the consent judgment did not justify review and having found that the advocates who had entered into the consent judgment had acted in good faith, the learned judge had erred by reviewing the consent judgment, nevertheless. The applicant will also argue that the learned judge had erred by ignoring established principles for review of consent judgments and orders and basing his ruling on considerations of harmony in the family of the deceased without due regard to the interests of other parties who had entered into *bona fide* commercial transactions with the deceased and whose legal rights ought not to have been compromised at the expense of harmony in the family of the deceased.

According to the applicant, the learned judge committed two fundamental errors in his ruling. The first was failure to review or set aside the entire consent judgment as prayed by the parties that were

purportedly aggrieved by it. The second was disposition of the application on the basis of an issue that was not pleaded, proved or left by the parties for determination of the learned judge. The applicant contends further that reliance on harmony in the family was a fundamental departure from the rules of engagement as parties are bound by their pleadings and a court ought not to determine a dispute on the basis of issue that was never addressed by the parties. We think the applicant's arguments have material and considerable merit deserving consideration by this Court.

We are satisfied that the applicant's intended appeal is not frivolous and is one that deserves to be heard by this Court. It is not necessary for us to say more in this regard lest we create the wrong impression in an application for stay of execution that the Court has a concluded mind on the merits of the intended appeal. (See **CENTRAL BANK OF KENYA DEPOSIT PROTECTION FUND BOARD V. UHURU HIGHWAY DEVELOPMENT LTD & OTHERS, CA No 95 of 1999**).

Does the intended appeal stand to be rendered nugatory if an order for stay of execution is not granted? The purpose of the inquiry into whether an intended appeal, if successful, will be rendered nugatory is, as stated by this Court in **AHMED MUSA ISMAEL V. KUMBA OLE NTAMORUA & 4 OTHERS (CA No. 256 of 2013)**:

***“to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”***

The effect of the judgment as reviewed is to direct the applicant to hand over the discharged documents of title of the suit property to the respondents. The respondents are unequivocal that they claim the suit property as their inheritance. The possibility of the respondents disposing of the suit property is very real. On the other hand the third party had paid to the deceased Kshs 4 million for the suit property and has been in possession of it since 1990. The third party also has in his possession the original documents of the suit property, though they are not discharged. Moreover, upon entry of the consent judgment, the third party, believing that the suit property was finally his has sold part of it to two innocent purchasers who have taken possession.

The other effect of the judgment as reviewed is to immediately revive suits and litigation, which the parties had compromised. Such suits including an appeal in this Court could be heard in the meantime. If the applicant's intended appeal is ultimately successful, the hearing and determination of such suits with the attendant costs would have been totally unnecessary and unjustified.

We are satisfied that unless an order of stay of execution of the ruling an order of the High Court dated 19<sup>th</sup> May, 2014 is granted, the applicant's intended appeal, if successful will be a mere pyrrhic victory. Accordingly we hereby order stay of execution of the said ruling until the applicant's intended appeal is heard and determined. Due to the long period that this litigation has taken, we direct the applicant to move with due dispatch and file its intended appeal without any further delay.

The applicant and the third party shall have costs of this application. It is so ordered.

***Dated and delivered at Nairobi this 21<sup>st</sup> day of November, 2014***

**M. WARSAME**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

*jkc*