IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAI 74 OF 2014 (UR 60/2014)

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

VIOLET NDANU MUTINDA…………………..1ST APPLICANT

JOEL KIEMA MUTINDA……………….…….2ND APPLICANT

AND

EDWARD NJUGUNA KANGETHE………..... RESPONDENT

(Being an application for stay of execution of Orders and sentence meted on the 1st applicant in the High Court of Kenya at Milimani Commercial and Tax Division (J.B. Havelock, J) dated 1st April 2014

in

CIVIL CASE NO. 911 OF 2009*)*

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RULING OF THE COURT

1. On 1st April 2014 the High Court (the Honourable Mr. Justice J. B. Havelock) found Violet Ndanu Mutinda, the 1st applicant, guilty of contempt of an order of that court given on 18th October 2012 requiring her and her husband the 2nd applicant to make monthly payments of Kshs. 80,000.00. As punishment, the court sentenced the 1st applicant to thirty days imprisonment. Aggrieved, the applicants lodged a notice of appeal on 2nd April 2014. On 11th April 2014, the applicants filed the present application under Rule 5 of the Rules of this Court to stay execution of those orders pending the hearing and determination of the intended appeal.

Background

2. Edward Njuguna Kangethe, the respondent, filed suit in the High Court against the applicants and against the Board of Trustees National Social Security Fund seeking an order for specific performance to compel them to transfer the property known as Land Reference Number

12948/266, House Number 81 situated at Mountain View Estate Nairobi (the property) to the respondent, among other reliefs. The respondent claimed that he entered into an agreement for sale dated 25th September 2009 with the applicants under which he agreed to purchase the property for Kshs. 16,000,000.00; that despite having paid the required deposit of Kshs. 1,600,000.00 to the applicants and Kshs. 8,307,416.00 to the Board of Trustees National Social Security Fund on account of monies due from the applicants under a tenant purchase agreement with respect to the property, the applicants had failed to complete the sale.

3. In their defence and counterclaim, the applicants denied the respondent's claim and contended that the respondent and the Board of Trustees National Social Security Fund conspired to defraud the applicants by unilaterally determining and inflating the amount owing under the tenant purchase agreement and transacting directly between themselves to the exclusion of the applicants and that it was the respondent who was in breach of the agreement for sale.

4. Pending the hearing and determination of the suit, the respondent applied and obtained a temporary injunction to restrain the applicants from selling, alienating, disposing or otherwise dealing in the property. The court granted the temporary injunction on condition that the respondent should deposit the balance of the purchase price in a joint interest earning account in the names of the advocates for the parties.

5. The respondent complied with that condition and deposited Kshs. 6,089,484.00 in a joint interest earning account in the names of the advocates for the parties. The result, it would seem, was that the respondent paid or secured the full purchase price for the property in the amount of Kshs. 16,000,000.00. Meanwhile the applicants continued to reside in the property. Irked by that state of affairs the respondent applied to the court under section 1A, 3A and 63(e) of the Civil Procedure Act for orders against the applicants "*to deposit Kshs. 80,000.00 in court and/or in a joint account to be opened by the parties herein, being monthly rent of the suit premises*" on grounds that it is unjust for the applicants to continue to occupy the property "*not only loan free but also rent free to the detriment of the respondent*" considering that the respondent had paid the purchase price for the property in full.

6. In a ruling delivered on 18th October 2012, the High Court allowed the respondent's application holding that:

"In the circumstances, the plaintiff has *de facto* ***ownership of the suit property and is merited in seeking orders for payment of rent. It would only be fair and just for the defendants to pay the requisite rent to ensure that the parties are on equal footing pending the full hearing and determination of this matter. I do not foresee any prejudice being occasioned to the defendants if the said sum of Kshs. 80,000/= is deposited in the joint bank account as monthly rent. In the event that this suit goes in their favour, the amounts will be easily refunded to them.***

In the upshot, the plaintiff's Notice of Motion dated 18th June, 2012 is hereby allowed with costs to the plaintiff. The 1st and 2nd defendants are hereby ordered to deposit the sum of Kshs. 80,000/= every month in a joint interest earning account opened in the names of the advocates for the plaintiff and those of the 1 st and 2nd defendants court effective from 31st October, 2012 until the hearing and determination of the suit."

7. It appears that the applicants did not make payments in compliance with the terms of that order. On 20th March 2013, (and having obtained leave of the court to do so) the respondent presented an application to the High Court under section 5(1) of the Judicature Act, Order 50 rule 1 of the Civil Procedure Rules, Order 52 rule 1(2) of the Rules of the Supreme Court of England and sections 3A, 63(e) of the Civil Procedure Act seeking orders for the applicants to be punished by detention in prison for a term not exceeding six months for disobeying the order made on 18th October 2012 requiring them to pay Kshs.80, 000.00 every month into a joint account as already mentioned. Alternatively the court was asked to order the applicants to vacate the property and for the same to

be let out to a third party to earn rent. On their part, the applicants presented an application to the court on 10th June 2013 seeking an order to stay execution of the orders given on18th October 2012 pending the hearing and determination of their appeal from those orders to this Court being civil appeal number 98 of 2013.

8. The two applications referred to in paragraph 7 above were heard together and determined in a consolidated ruling given on 1st April 2014 by the Hon. Mr. Justice Havelock. In relation to the respondent's application to punish the applicants for contempt of court order given on 18th October 2012, the learned judge held:

"Taking all circumstances in consideration, the upshot is that the Court hereby finds that the 2nd Defendant, knowingly and willfully, disobeyed this Court's Order issued on 18th October, 2012. The Court hereby finds the 2nd Defendant in contempt of that Order and she is hereby sentenced to thirty (30) days in civil jail commencing immediately. As far as the 1st Defendant is concerned, he can count himself lucky to not suffer the same fate as his wife only escaping therefrom as a result of his not being served personally with Mutava J's said Order. *Order 2* ***of the application is disallowed. Orders as issued by the Court on 18th October, 2012 are preserved."***

9. In the same ruling, the learned judge found the applicants application to stay the orders given on 18th October 2012 as undeserving and lacking merit and dismissed it.

10. Aggrieved by the ruling given on 1st April 2014, the applicants promptly lodged a notice of appeal on 2nd April 2014 giving notice of their intention to appeal to this Court against the orders for detention of the 1st applicant as punishment for contempt. According to the applicants, the learned judge of the High Court erred in making the order to punish the 1st applicant as inability to pay is not tantamount to wilful disobedience of a court order; that the order complained of was never served personally on the 1st applicant; that the judge failed to consider that an appeal against the order given on 18th October 2012 was pending before this Court.

11. It is against that background that the applicants have brought the present application under rule 5(2)(b) of the rules of this Court to stay the order given on 1st April 2014 for the detention of the 1st applicant in prison as punishment for contempt.

Submissions by counsel

12. At the hearing of the application before us, the parties were represented by learned counsel. Mr. B. M. Musyoki counsel for the applicants began his address by taking issue with the contention made in the respondent's replying affidavit that the applicants require leave of the High Court to appeal the decision of 1st April 2014 absent which the notice of appeal on the basis of which the present application is hinged is a nullity. He submitted that the application on the basis of which the impugned decision was made was presented to the High Court under sections 3A and 63(e) of the Civil Procedure Act and also under the Constitution and that leave to appeal is therefore not required. In that regard counsel also referred us to sections 66 and 75(1)(g) of the Civil Procedure Act and Section 3 of the Appellate Jurisdiction Act.

13. Regarding the merits of the application, counsel submitted that the intended appeal is arguable; that the learned judge of the High Court failed to consider that for one to be guilty of contempt there has to be blatant disobedience; that inability to comply with an order is in itself not tantamount to disobedience; that the applicants filed an appeal from the decision ordering the payment of Kshs. 80,000.00 per month which was made before a hearing was conducted; that there was no clear evidence of the applicants having been personally served with the order, complete with a penal notice, the applicants are said to have violated; that the judge wrongly drew inferences that service was indeed effected; that the order for detention is in effect being used to

enforce a civil debt through criminal proceedings for a debt that is not proved; that the intended appeal will be rendered nugatory if the 1st applicant is detained before that appeal is heard and determined; and that the intended appeal will be an academic exercise if the sentence is served before the appeal is disposed. counsel relied on several decisions of this Court including **Rev. Jackson Kipkemboi and others vs. Rev. Samuel Muriithi Njogu and others [2007] eKLR**; **Kenya Airports Authority vs. Mitu-Bell Welfare Society and Anor [2014] eKLR**.

14. Mr. J. P. Machira learned counsel for the respondent strenuously opposed the application arguing that in the absence of a valid notice of appeal there is no basis for the Court to entertain the applicants' application under Rule 5(2)

b. of the rules of this Court; that upon a consideration of the application leading to the impugned decision of 1st April 2014 and Section 75 of the Civil Procedure Act and Order 43(1)(1) of the Civil Procedure Rules, the applicants ought to have applied and obtained leave of the High Court to appeal; and that since leave was not obtained, this court has no jurisdiction to entertain the application.

15. Mr. Machira went on to say that court orders must be obeyed; that the applicants have disobeyed a court order made way back in October 2012; that the applicants have not made any attempt to purge the contempt and that it is not enough to say the order is harsh without demonstrating efforts made to comply with it; that since the order for payment was given by the court on 18th October 2012 the applicants have not made any effort to make payment even in part; that it is patently unjust that the respondent having deposited the entire purchase price of Kshs.16,000,000.00 is not deriving any benefit from the property whilst the applicants continue to reside on the property; that in the circumstances the intended appeal is frivolous and the applicants intention is to perpetuate litigation and they are undeserving of a discretionary remedy and the allegation that the applicants were not served with the order they violated is incorrect as the learned judge of the High Court correctly found "that personal service was effected" on the 1st applicant.

16. According to Mr. Machira, the appeal will not be rendered nugatory if we decline to grant the orders sought as the applicants have a choice to either comply with the order by making the required payments or serve the sentence meted out by the High Court. In support of his arguments Mr. Machira referred us to several authorities including the case of the **Director of Pensions vs. Abdul Majid Cockar [1999] eKLR**; **Vintage Road Transporters Ltd and another vs. Mistry Valji Naran Mulji and 5 others [2008] eKLR** and **RFS vs. JDS [2013] eKLR**.

Determination

17. We have considered the application and submissions by learned counsel. The issues that require consideration are; whether the applicants required leave of the court to file a notice of appeal; whether applicants have demonstrated that the intended appeal is arguable; and whether, if we decline to grant the orders sought, the intended appeal, if successful, will be rendered nugatory.

18. The answer to the question whether the applicants require leave to appeal the decision of the High Court made on 1st April 2014 to punish the 1st applicant is to be found in section 5(2) of the Judicature Act Chapter 8 of the Laws of Kenya. Section 5 provides that:

"(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

2. ***An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court."***

19. The application leading up to the decision of the High Court to punish the 1st applicant for contempt was made under Section 5(1) of the Judicature Act among other provisions. Under section 5(2) of the Judicature Act that decision is appealable as of right. Leave is not required. The applicants' notice of appeal on the basis of which the present application is presented cannot therefore be faulted for want of leave to appeal.

20. As to whether the intended appeal is arguable, counsel for the applicants submitted that willful disobedience of a court order is a necessary ingredient before a finding of contempt of a court order can be made; that in the present case that ingredient was absent as the applicants merely lacked the means to pay the amount they were ordered to pay and that they did not willfully disobey the order. We do not think that argument is frivolous. We are mindful that an arguable appeal is not one that will necessarily succeed.

21. On whether the appeal will be rendered nugatory, if it succeeds, unless we grant the orders sought, we think it will. The circumstances here are not different from those in **Rev. Jackson Kipkemboi and others vs. Rev. Samuel Muriithi Njogu and others** (supra) where this Court stated that:

"Elisha Zebedee Ongoya was sent to jail for 21 days. It is obvious that by the time his intended appeal will be heard, he will have served the sentence, hence the appeal even if it were to succeed the results will be rendered nugatory if we do not grant stay at this juncture."

22. We are persuaded, in the circumstances of this case, that it will be futile to pursue the appeal after the 1st applicant serves the sentence imposed by the lower court. For those reasons we allow the application in terms of prayer 3 of the application and grant a stay of execution of the orders of the Honourable Mr. Justice Havelock made on 1st April 2014 pending the hearing and determination of the intended appeal.

23. Costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 7th day of November, 2014.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

/ewm

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

DEPUTY REGISTRAR