



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 104 of 2012

SAMUEL MUREITHI MURIOKI..... 1ST APPLICANT

UNCLE SAM'S GITHURAI LTD..... 2ND APPLICANT

VERSUS

KAMAHUHA LTDRESPONDENT

(An application for stay of execution of the order made by the High Court pending the hearing and determination of the appeal lodged against the ruling of the High Court of Kenya at Nairobi (Koome J.) dated 10th January 2011

in

HCCC No. 286 of 2001)

RULING OF THE COURT

By their Notice of Motion dated and filed 12th April 2012 and brought under **Rules 5(2) (b)** and **42** of the **Court of Appeal Rules 2010**, **SAMUEL MUREITHI MURIOKI** and **UNCLE SAM'S GITHURAI LTD** (the Applicants) seek from this Court the following orders;

“2. THAT there be a stay of any further proceedings and/or execution of the Ruling and Order of the Hon. Lady Justice Koome made on 10th January 2001 pending the hearing and determination of the Appeal lodged by the Applicant.”

The Motion is based on various grounds appearing on its face and intended to show that the application satisfies the double rubrics under which this court exercises its jurisdiction pursuant to **Rule 5 (2) (b)** of this court Rules, namely:

- (i) *That the Applicants have an arguable appeal.*
- (ii) *That if stay is not granted, the said appeal will be rendered nugatory.*

(see GITHUNGURI VS. JIMBA CREDIT CORPORATION LTD (No 2 [1988] KLR 838, and J.K. INDUSTRIES VS. KENYA COMMERCIAL BANK LTD [1982-88] 1KAR 1088)

The Application is also supported by two affidavits sworn by SAMUEL MUREITHI MURIOKI and

KAREN WANJIKU THUMBI and was argued before us by Mr. Okindo, Learned Counsel who held brief for Rumba Kinuthia for the Applicants.

The Applicants have already lodged an appeal from the Ruling and Order of the Superior Court (Koome J, as she then was) being **Civil Appeal No. 49 of 2012**. The said Ruling was delivered on 10th January 2011, and at its conclusion the learned judge made the following findings which are the cause of the Applicants' grievance in their said appeal;

‘Accordingly, I have no hesitation to grant (sic) the orders sought by the Plaintiff’s application dated 18th September 2009 in the following manner;

1. *The 2nd and 3rd Defendants amended statements (sic) of defence dated 31st July 2009 is hereby struck out.*
2. *The 2nd Defendant to execute the transfer of the title No. Ruiru/Kiu Block 6/228 in favour of the Plaintiff within 30 days failure to do so the Deputy Registrar of this court to sign, seal execute the transfer in favour of the Plaintiff.*
3. *The Plaintiff shall also have the costs of this application as against the 2nd and 3rd Defendants.’*

The Applicants assail the said orders for a myriad reasons including,

- *“Alleged failure to find that the transaction to be effected by the Judge’s orders had been entered into without a valid resolution of the Board of Directors of the 3rd Defendant.*
- *Alleged failure to find and hold that the transfer of the suit premises by the 2nd Defendant was done in his own capacity and not as a director of the 3rd Defendant.*
- *Alleged error in law and fact in failing to find and hold that the 2nd and 3rd Defendant’s Defence raised serious triable issues that will (sic) only be canvassed in a full hearing.”*

The Application was resisted by the Respondent through its learned counsel Mr. Kamaara. Its director JOHN KIEREINI KIRIKA swore a Replying Affidavit on 23rd May 2012. The Respondent was dismissive of the application before us terming it as ‘completely unmerited given the true facts of the case’. These facts, according to the Respondent, include the following:

- *“THAT in 1995, the First Applicant offered to sell on behalf of the Second Applicant the parcel of land known as TITLE NO. RUIRU/KIU BLOCK 6/22 to the Respondent at a price of Kshs. 4 million which was paid in full and duly acknowledged by their letter dated 19th July 1998.*
- *THAT following that sale the Respondent was issued with a certificate of title and, moreover, took possession forthwith and has remained in possession to date.*
- *THAT the Respondent did major improvements on the said property upon purchase completing it and adding another floor at the cost of Kshs. 2,640,000.*
- *THAT the Respondent subsequently learnt that the suit property was, in fact, registered in the name of the 1st Respondent from March 1994 (before the foresaid transaction) and that the 1st Respondent had borrowed a loan from Standard Chartered Bank Ltd to secure which, it had created and registered two charges in favour of the Bank.*
- *THAT the 1st Respondent defaulted on its repayment with the result that the Bank commenced realization of the suit property which the Respondent, as purchaser in possession, attempted to resist at*

the High Court in vain and was ordered (Ochieng J.) to pay the loan balance owed to the bank plus costs of the suit if it was to retain possession of the property.

- *THAT the Respondent duly negotiated with the bank and paid Ksh. 5.5m plus costs of Kshs. 241,860 whereafter the title documents were discharged and released to the Respondent thereby effectively purchasing the suit property twice.*
- *THAT the Respondent subsequently amended its plaint on 23rd July 2009 to include an order that the First Respondent do forthwith execute the Transfer of Lease in favour of the Respondent failing which the Deputy Registrar to do so and the Applicants in response filed an Amended Defence on 31st July 2009.*
- *THAT on 10th January 2011, the High Court (Koome J.) granted an application by the Respondent to strike out the Amended Defence and ordered the 1st Applicant to execute the transfer of title to the suit property to the Respondent and to pay costs.*
- *THAT the Applicants filed a Notice of Motion application on 25th January 2011 seeking a Stay of Execution of Koome J's orders but the same was dismissed by Kimondo J. on 9th December 2011."*

It is the Ruling and order of Koome J. that the Applicants, in exercise of their undoubted right of appeal, have challenged by way of **Civil Appeal NO. 49 of 2012** and pending which they seek our intervention by way of stay of execution as we have already said.

The starting point in deciding whether or not to grant a stay of execution is to interrogate whether or not there is an arguable appeal. The burden of raising at least one bona fide point that merits consideration on appeal falls on the Applicant.

In the matter before us, we have considered the rather lengthy grounds contained in paragraph 9 of the Supporting Affidavit which the Applicant believes to constitute an arguable appeal. On our part, what renders an appeal arguable is not the multiplicity of the grounds that an Applicant conjures. Nor is it the ingenuity with which an attack on the Superior Court's decision may be couched. Rather, it comes down to the simple question of whether there is a genuine point of grievance upon which opposing parties can, without sophistry or show, properly address the appeal court for decision.

In determining that first issue, we bear in mind that we are a Court bound to do justice between the parties. In this regard, we turn our attention to Koome J's basis for her decision to strike out the Amended Defence which was this;

"The agreement entered into between the Plaintiff and the 3rd Defendant dated 6th November, 1995 is not denied. That agreement was executed by the 2nd Defendant on behalf of the 3rd Defendant ... However, it turns out that the 2nd Defendant had fraudulently issued to the Plaintiff a fake title because the genuine title had been charged by (sic) the Standard Bank to secure a loan. The Plaintiff was made to pay the outstanding loan in order to salvage the title from being sold by the bank ... Upon evaluation of the defence contained in the 2nd and 3rd amended statement of defence (sic) it is not denied that the agreement was entered into and a transfer and charge were executed in favour of the Plaintiff. Consideration was paid and the defence does not give an explanation of the origins of the title documents which were given to the Plaintiff."

Given Koome J's reasoning aforesaid, and given further the earlier Ruling, of Ochieng J in which he had categorically found that the Applicants herein had deliberately misled the Respondent by using fake documents of title to purport to sell to him land they knew they had already mortgaged to the bank, the Applicants' protestation before us that they have an arguable appeal may on full appeal not carry the day. Equally, we are at this stage not convinced by the argument on behalf of the Applicants that the sale agreement made on behalf of the 2nd Applicant with the Respondent was null and void by reason of

absence of a prior resolution of its Board of Directors. We respectfully think this may be an attempt to exploit a technicality and it may turn out to be a product of one's own default, to avoid clear obligations, to be inimical to the real purpose for which the law and the courts exist namely; to do substantive justice.

For the foregoing reasons, we are far from persuaded that the Applicants have an arguable appeal. Having so found, we need not go into any consideration of the second limb of the principles for stay under **Rule 5(2) (b)** namely that if the stay of execution is not granted, the appeal, if successful, will be rendered nugatory, but it, too, would fail in the circumstances of this case.

It is clear to us that the justice of this case requires that the Respondent, which it would appear has been the victim of a scam involving forgery and the issuance of dummy documents of title to its detriment, should not be further exposed to loss and injury. As for the Applicants, we do not see that they will stand to suffer any loss by a denial of stay the effect of which would be to cause the transfer of title of property they freely sold to the Respondent and were paid for, effectively twice.

We consider the sentiments of Kimondo J in dismissing a similar application filed by the Applicants in the High Court to be exactly on point;

“I find the Applicants have not laid out the ground of substantial loss. I say so because, it is the Plaintiff who has paid the purchase price to the Defendants for Kshs.4,000,000 as well as paid the charge debt and costs incurred by the Defendants to Standard Bank for Kshs.5,500,000 and Kshs.241,860 respectively. Although the Plaintiff removed the title from the bank, it is largely meaningless because it is still in the name of the 2nd Defendant, the original chargor, who has refused to execute a transfer to the Plaintiff.

In those circumstances, I am left wondering what substantial loss the 2nd Defendant would suffer yet he was in the thick of things that led to the original sale by the 3rd Defendant to the Plaintiff for a property that the 2nd Defendant held a hidden second title. Those to me are plain facts that have not been seriously contested and which informed the court in making the orders of 10th January 2011.’’

We respectfully concur and decline the invitation to make orders such as were sought here.

The application fails and is dismissed with costs.

Dated and delivered at Nairobi the 22nd day of February, 2013.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

G. B. M. KARIUKI

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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