



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: NAMBUYE, M'INOTI & J. MOHAMMED JJ.A.**

**CIVIL APPLICATION NO. NAI 103 OF 2013 (UR 69/2013)**

**BETWEEN**

**HAITHAR HAJI ABDI**

**ABDI HAITHAR HAJI ..... APPLICANTS**

**AND**

**SOUTH DOWNS DEVELOPERS LIMITED ..... RESPONDENT**

**(Application for stay of execution pending the lodgement, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mutungi, J) dated 29<sup>th</sup> April, 2013**

**in**

**HCCC NO. 1389 OF 2004)**

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**RULING OF THE COURT**

The applicants' Notice of Motion dated 14<sup>th</sup> May, 2013 is brought under **Rule 5 (2) (b) of the Court of Appeal Rules** and seeks an order for stay of execution of the judgment and decree of the High Court (Mutungi, J) dated 29<sup>th</sup> April, 2013, pending the filing, hearing and determination of an intended appeal. The applicants also pray for costs of the application.

The grounds upon which the motion is based are that the applicants have filed a notice of appeal against the said judgment and have applied for copies of the proceedings; the intended appeal raises arguable points with high chances of success and the same will be rendered nugatory if a stay of execution is not granted; it is in the interest of justice to grant the orders sought and that in any event such orders, if granted, will not occasion the respondent any prejudice.

The motion is supported by an affidavit sworn by the first applicant on 14<sup>th</sup> May, 2013, which seeks to demonstrate the arguable appeal presented in the application and how the intended appeal risks being rendered nugatory if the order of stay of execution is not issued. The motion is opposed in equal

measure by an affidavit sworn by Paul Omondi Mbago, the managing director of the respondent, which pours cold water on the grounds upon which the applicants' motion is founded.

As disclosed in the affidavits filed by the parties and the annexures thereto, the short background to this application is as follows. At all material times before July 2004, the applicants were the registered proprietors of **LR No. 13154** (original number part of 6861/4, hereafter [*the suit property*]) situate along Bogani Road, Langata in Nairobi. In or about 1987 and 1989, the applicants mortgaged the suit property to **Kenya National Capital Corporation Limited** to secure some loans. As a result of the applicants' default in repayment of the loan, the mortgagee advertised and sold the suit property by public auction to the respondent on 14<sup>th</sup> November, 1991 for KShs.3.4 million. The mortgagee then reneged on the sale, forcing the respondent to sue for specific performance in Nairobi HCCC No. 1181 of 1992. That suit was consolidated with an earlier one, to wit, Nairobi HCCC No. 6054 of 1991, filed by the applicants against the mortgagee to stop the sale of the suit property.

After full hearing, the High Court on 18<sup>th</sup> December, 2003, ruled in favour of the respondent and ordered specific performance. The suit property was ultimately registered in favour of the respondent under the **Registration of Titles Act, Cap 281, Laws of Kenya** (now repealed) on 20<sup>th</sup> July, 2004.

Attempts by the respondent to take possession of the suit premises were effectively resisted and thwarted by the applicants, culminating in the respondent filing Nairobi HCCC No. 1389 of 2004 for their eviction, an injunction to restrain their entry into and occupation of the suit property, general damages for trespass and costs. The applicants filed a defence to the claim, but the same was struck out on 28<sup>th</sup> September, 2011, paving the way for hearing of the suit by formal proof. The suit was heard by Mutungi, J, who on 29<sup>th</sup> April, 2013, ordered the eviction of the applicants and issued a permanent injunction to restrain their entry into and occupation of the suit property. He also awarded the respondent KShs.6,300,000/- as general damages for trespass, costs and interest.

On 6<sup>th</sup> May, 2013, the applicants lodged a notice of appeal against the said judgment and followed it up with this application for stay of execution pending the hearing and determination of the intended appeal.

In determining this application, we are required to satisfy ourselves that the applicants have an arguable appeal or an appeal that is not frivolous and whether refusal of an order of stay would render that appeal nugatory if it is eventually successful. See **AHMED V SAVINGS AND LOAN KENYA LTD & ANOTHER, (2000) LLR 4145** and **EAST AFRICAN POWER MANAGEMENT LTD V THE OWNERS OF THE VESSEL "VICTORIA EIGHT", NAIROBI CIVIL APPLICATION NO. NAI 245 OF 2009**. Mr Nyaosi, learned counsel for the applicants submitted that an arguable case is not necessarily one that must succeed and that one arguable point will suffice to entitle an applicant to an order of stay of execution. He relied on the applicant's draft memorandum of appeal listing six [6] grounds of the intended appeal as follows:

1. *The learned judge erred in law and in fact in arriving at a conclusion that the appellants were trespassers;*
2. *The learned judge erred in law and in fact in assessing mesne profits (general damages) for trespass in the sum of KShs.6,300,000/- yet there was no factual basis for such finding;*
3. *The learned judge erred in law and in fact in determining the matter yet the court had no jurisdiction to make any orders in the matter;*
4. *The learned judge erred in law and in fact in finding that the respondent was the registered owner of the land;*
5. *The learned judge erred in law and in fact in condemning the appellant to bear the costs of the suit;*

6. *The learned judge misdirected himself as to the law and facts thus arriving at the wrong determination.*

Regarding the manner in which the appeal would be rendered nugatory if the order of stay was not granted, Mr Nyaosi submitted that the applicants risked suffering irreparable loss and damage by being evicted from the suit property and that if the appeal was successful, the applicants might not be able to recover damages from the respondent.

Mr David Njogu, learned counsel for the respondent, submitted that the intended appeal did not raise any triable issue because the issue of ownership of the property had already been settled on 18<sup>th</sup> December, 2003, when the High Court ordered specific performance in favour of the respondent and that judgement had never been set aside or otherwise varied. In his view the applicant's were trespassers on the suit property once it was registered in the name of the respondent pursuant to the decree of the High Court. Regarding whether the intended appeal would be rendered nugatory, Mr Njogu submitted that the applicants were not physically in occupation of the suit property but had instead let it to a tenant. Consequently, the question of being evicted from their home did not arise and that in the unlikely event of the intended appeal succeeding, the respondent had deponed in paragraph 8 of its replying affidavit that it was in a position to repay any monies to the applicants.

We are conscious that at this stage we are not dealing with the merits of the intended appeal. However, it is not lost to us that the decree of the High Court pursuant to which the respondent was registered as the proprietor of the suit property has never been set aside or otherwise varied. The ownership of the suit property was conclusively settled by that decision of a competent court. In any event, it was not open to Mutungi, J to make a different determination on the ownership of the suit property because the applicants' defence in HCCC No 1389 of 2004 had been struck out and the hearing proceeded on formal proof. We do not see how the learned judge can therefore be faulted for holding that the respondent was the owner of the suit property or that the applicants were in occupation thereof as trespassers without any colour of right. As regards the jurisdictional issue intended to be raised, we note that the same was never raised before the High Court and that Mr Nyaosi did not shed any light on what that ground entails. Lastly, general damages for trespass were awarded on the basis that the respondent was kept out of its property from July 2004 when it was registered as owner. The figure of KShs.6,300,000/- was arrived at by multiplying KShs.60,000/- per month by 105 months. We were not shown the basis for the challenge directed to the award of general damages.

The respondent's deposition that the applicants are not in physical occupation of the suit property is not challenged or disputed. So is the respondent's averment that it will be ready, able and willing to repay any amount it is ordered to pay in the event of a successful appeal in favour of the applicants. The applicants have not made any effort to show that the respondent has no assets. As it is, we have nothing before us other than the applicant's bare assertion it will not be able to recover damages from the respondent. This Court has stated severally that refusal of a stay of execution will not ordinarily render an appeal nugatory where an issue is the payment of money. See *KENYA SHELL LTD V KIBIRU & ANOTHER, (1986) KLR 410*.

Taking all these matters into account, we are not satisfied that the applicants have presented an arguable appeal or an appeal that is not frivolous. We are also not satisfied that should the intended appeal succeed, the same shall be rendered nugatory. Accordingly the Notice of Motion dated **14<sup>th</sup> May, 2013**, is hereby dismissed with costs to the respondent. It is so ordered.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of July, 2013.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**