



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: TUNOI, GITHINJI & WAKI, J.J.A.)

CIVIL APPLI NAI 159 OF 2005 (UR.96/2005)

BETWEEN

TIMBER MANUFACTURERS LTD APPLICANT

AND

JOSEPH KIARIE MBUGUA

CONSOLIDATED BANK OF KENYA RESPONDENTS

determination of an intended appeal from the judgment and decree of

**the High Court of Kenya at Milimani Commercial Court Nairobi
(Azangalala J) dated 15**

th

March, 2005

in

H.C.C.C. NO. 1048 OF 1994)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Rules of this Court essentially seeking a stay of execution of the judgment of the superior court on the counter – claim wherein the superior court gave judgment against the applicant for the surrender of title documents for L.R. No. 4894/59 to Consolidated Bank of Kenya, second respondent herein.

By an agreement of sale dated 6th October, 1996, Joseph Kiarie Mbugua (first respondent) agreed to sell L.R. No. 4894/59 comprising of 5.04 acres situated at Garden Estate, Nairobi to Timber Manufacturers & Dealers Ltd. (applicant) for a consideration of Shs.4,000,000/= . The applicant had paid Shs.1,000,000/= by the date of the agreement. The balance of the purchase price was to be paid by two further instalments, viz a payment of the second instalment of Shs.1,000,000/= on or before 31st August, 1990 and the balance of Shs.2,000,000/= to be paid on the registration of documents of title but to be deposited with the first respondent’s advocates before the completion date which was 31st October, 1990. The agreement further provided that the applicant could take possession of the property, utilize, develop it immediately upon payment of the second instalment of Shs.1,000,000/= on 31st August, 1990. The applicant duly paid the second instalment and was given possession of the land. In addition, the applicant paid the balance of

Shs.2 million directly to the first respondent when the respondent executed a conveyance and released the title documents to the applicant. The conveyance could not however be registered because in the course of the valuation of the property it was discovered that there was a charge registered on 26th September, 1985 in favour of M/s. Home Savings and Mortgages Ltd (chargee) to secure a loan of Shs.500,000/= which had not been discharged. Although the chargee still existed as a company it was however under statutory management by the second respondent. The applicant approached the second respondent to have the charge discharged and even offered to pay the balance of the loan of Shs.1,700,000/= then outstanding in September, 1993 by monthly instalments of Shs.100,000/=. That offer was not accepted. The second respondent ultimately threatened to realize the security thereby precipitating the litigation which gave rise to this appeal.

The applicant filed a suit in the superior court on 17th March, 1994 against the two respondents herein. The reliefs sought included an order for specific performance of the agreement by the first respondent, an order directing the second respondent to execute and deliver to the applicant a conveyance of the suit property and general damages against the first respondent for breach of contract. The first respondent filed a defence but did not attend the hearing of the suit. The second respondent filed a defence and counter – claim. It averred among other things, that the first respondent obtained the title documents now in the hands of the applicant by deceit and fraud. By the counter – claim the second respondent sought judgment against the applicant for the return of the title documents in respect of L.R. No. 4894/59.

The superior court after trial declined to order specific performance of the contract because the suit property was still lawfully charged to M/s. Home Savings and Mortgages Ltd. Instead, the superior court awarded to the applicant against the first respondent Shs.4,000,000/= being the refund of the purchase price; Shs.1,000,000/= being damages for breach of contract and Shs.75,157/50 for rates paid – total Shs.5,075,157/50. The superior court further allowed the second respondent’s counter – claim and ordered the applicant to return the title documents of the suit property to the second respondent.

The applicant being aggrieved, particularly by the judgment on the counter – claim has filed a Notice of Appeal. The applicant seeks a discretionary relief pending the determination of the appeal. For the court to exercise its discretion in the applicant’s favour, the applicant has to show, among other things, that the intended appeal is not frivolous, that it is arguable, and that, unless the order of stay of execution is granted, the intended appeal would be rendered nugatory.

The applicant intends to appeal against the decree given in the counter – claim enjoining it to return the title documents for L.R. No. 4894/59 to the second respondent. The evidence at the trial showed that, on the request of the first respondent, the second respondent intimated to Home Savings and Mortgages Ltd that it had no objection to the release of the title documents for L.R. No. 4894/59 on condition that there was enhanced charge in respect of two other properties charged by the first respondent to Home Savings and Mortgages Ltd. However, it transpired that the title documents were released without observing that condition and without discharging the charge.

The learned Judge found that there was no privity of contract between the applicant and Home Savings and Mortgages Ltd. over the mortgage of the suit property but nevertheless ordered the return of the title documents “*in the interest of justice*”. It seems that the applicant will be contending in the appeal that the court had no jurisdiction to order the release of the title documents to the second respondent because, among other grounds, Home Savings and Mortgages Loan Ltd, the chargee, was not a party to the suit and had not asked for the release of the title documents.

The second respondent contends, among other things, that the intended appeal is frivolous and will not serve any purpose as the applicant has a money decree and is not appealing against the refusal to order specific performance of the agreement of sale. On our consideration of the material before the Court, we are satisfied that the intended appeal is not frivolous. The efficacy of the appeal, if successful is another matter. We refrain from speculating on how the applicant will use the documents of title if the appeal is ultimately successful.

The applicant contends that the appeal will be rendered nugatory, if successful, unless stay is granted as

the second respondent 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. For those reasons, we allow the application and grant a stay of execution of the decree in terms of prayer 2 (ii) of the application with costs in the appeal.

Dated and delivered at Nairobi this 15th day of July, 2005.

P. K. TUNOI

JUDGE OF APPEAL

E. M. GITHINJI

JUDGE OF APPEAL

P. N. WAKI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR