



**Housing Finance Company of Kenya Limited v Muturi & another
(Application 10 of 2020) [2020] KESC 20 (KLR) (4 September 2020) (Ruling)**

Housing Finance Company of Kenya Limited v Scholastica Nyaguthii Muturi & another [2020] eKLR

Neutral citation: [2020] KESC 20 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

APPLICATION 10 OF 2020

**DK MARAGA, CJ & P, PM MWILU, DCJ & V-P, MK
IBRAHIM, SC WANJALA & NS NDUNGU, SCJJ**

SEPTEMBER 4, 2020

BETWEEN

HOUSING FINANCE COMPANY OF KENYA LIMITED APPLICANT

AND

SCHOLASTICA NYAGUTHII MUTURI 1ST RESPONDENT

EVANSON KAMAU WAITIKI 2ND RESPONDENT

*(Being an Application for stay of Execution of the Judgment and Orders of Court
of Appeal the at Nairobi (Makhandia, Kiage, Kantai JJA) in Civil Appeal No.
153 of 2017, pending hearing and determination of Petition No.7 of 2020)*

**A matter on the application of the in duplum rule did not warrant an appeal to the Supreme Court
as of right**

The applicant had received two adverse determinations from the High Court and at the Court of Appeal. The matter involved the application of the in duplum rule. The respondent objected the appeal and the application for stay on grounds that the instant matter did not involve the interpretation of the Constitution and as such did not warrant an appeal under article 163(4)(a) of the Constitution. The court held that a matter on the application of the in duplum rule did not warrant an appeal to the Supreme Court as of right.

Reported by Ribia John

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals as of right in a case involving interpretation of the Constitution - whether an appeal on the subject matter of the in duplum rule warranted an appeal to the Supreme Court as of right as a matter involving the interpretation of the Constitution – Constitution of Kenya, 2010 article 163(4)(a); Supreme Court Act, section 24; Supreme Court Rules, rule 31 and 32.



Brief facts

The applicant had received two adverse determinations from the High Court and at the Court of Appeal. The matter involved the application of the in duplum rule. Aggrieved by the determinations of the Court of Appeal and the High Court, the applicant filed the instant appeal to the Supreme Court under article 163(4)(a) of the Constitution of Kenya, 2010 (Constitution) as an appeal as of right in any case involving the interpretation of the Constitution. The applicant also filed a notice of motion seeking orders to stay the determination of the Court of Appeal. The respondent objected the appeal and the application for stay on grounds that the instant matter did not involve the interpretation of the Constitution and as such did not warrant an appeal under article 163(4)(a) of the Constitution.

Issues

- i. Whether an appeal on the subject matter of the in duplum rule warranted an appeal to the Supreme Court as of right as a matter involving the interpretation of the Constitution.

Held

1. Whereas the applicant sought to invoke article 163(4)(a) of the Constitution that the appeal was of right, the instant matter did not take a constitutional trajectory to warrant our jurisdiction. The record indicated that at the High Court, the central issues for determination were repayment of debt by the respondent, validity of a statutory notice before the sale, valuation of the suit property, collusion and conspiracy between the parties, whether the property in question was sold by private auction or private treaty and the applicability of the in duplum rule. The central issue for determination before the Court of Appeal was, whether the trial judge erred in applying the in duplum rule and whether the High Court was entitled to order that the applicant refund money with interest to the 1st respondent. At no point did any of the courts delve into matters of interpretation or application of the Constitution.
2. There was no practical purpose to be served if we were to grant stay of execution of the judgment and orders of the Court of Appeal. For the Supreme Court to do so there had to be some prospect that the intended appeal was sustainable on the jurisdiction invoked, which was lacking for the applicants.

Application and petition dismissed; the applicant was to bear the costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

- (1) Upon perusing the Notice of Motion dated and lodged on the 19th May 2020 by Housing Finance Company of Kenya Limited, pursuant to Article 163(3)(b)(i) of the Constitution of Kenya; Section 24 of the Supreme Court Act as read together with Rules 31 and 32 of the Supreme Court Rules 2020 and all other enabling provisions of law seeking stay of execution of the Judgment and Decree issued on the 17th of February 2017 in High Court Civil Case No 10 of 2010 and the Judgment and decree issued on the 3rd of April 2020 by the Court of Appeal in Civil Appeal no 153 of 2017; and
- (2) Upon reading the affidavit of Belinda Nganga, on behalf of the Applicant sworn on the 19th of May 2019; and
- (3) Upon perusing the grounds adduced by the Applicant in support of the orders sought; that the applicant has an arguable appeal with good prospects of success as the same raises issues of interpretation and application of Articles 25, 50 (1) and Article 27 (1) of the Constitution; that if the



Orders are not granted, the Appeal will be rendered nugatory and the Applicant will suffer irreparable loss as the decretal amount payable together with interest is almost Kshs. 50,000,000.00; that the 1st Respondent who was retrenched from her job in the year 2000 has no verifiable source of income and would not be able to refund the said sums if the Appeal was successful; that it is in the public interest that the orders sought are granted as the Applicant is a bank that trades with depositors' money, and as a subsidiary of a publicly listed company, its assets owned by members of the public are to be safeguarded against potential loss; and

- (4) Upon perusing the arguments made by the Applicant in its written submissions dated and filed on the 19th of May 2020, where they contend they have met the threshold for grant of stay of execution orders as set by this Court in *Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Application No 5 of 2014, [2014] eKLR; that the appeal herein is arguable, is not frivolous, and has been filed pursuant to Article 163(4)(a) of the Constitution where they have raised various issues touching on the interpretation and application of the Constitution; that in line with this Court's decision in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 Others* Petition 17 of 2015; [2019] eKLR, the right to fair hearing is a ground of Appeal constituting a matter requiring the interpretation or application of the Constitution; and
- (5) Upon further perusing the response contained in the written submission of the 1st Respondent dated 21st May 2020 filed on the 22nd of May 2020 where it is contended that this Court lacks the requisite Jurisdiction to entertain the Applicants Appeal under Article 163(4)(a) of the Constitution citing both *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & Another* Sup. Ct Petition No. 3 of 2012; [2012] eKLR and *Erad Supplies General Contractors* Sup. Ct Petition No. 5 of 2012, [2012] eKLR, which affirm that an issue coming on appeal to this Court must have first been the subject of litigation before the High Court and risen through the judicial hierarchy on appeal; that the Applicant has not established an arguable appeal, that the Appellate court dealt with all issues fairly; that the issues raised have no chance of success; and
- (6) Having considered the Application, all the submissions and the relevant laws applicable, including case law, we find that whereas the Applicant seeks to invoke Article 163(4)(a) of the Constitution that the Appeal is on right, upon our perusal of the record, it is not evident that the matter took a constitutional trajectory to warrant our jurisdiction. The record indicates that at the High Court, the central issues for determination were repayment of debt by the Respondent, validity of a statutory notice before the sale, valuation of the suit property, collusion and conspiracy between the parties, whether the property in question was sold by private auction or private treaty and the applicability of the In Duplum Rule.
- (7) We also find that the central issue for determination before the Court of Appeal was, whether the trial judge erred in applying the "in duplum" rule and whether the Judge was entitled to order that the Applicant refund money with interest to the 1st Respondent. At no point did any of the Courts below us delve into matters of interpretation or application of the Constitution.
- (8) For this reason, we see no practical purpose to be served if we were to grant stay of execution of the Judgment and Orders of the Court of Appeal (*Makhandia, Kiage, & Kantai JJA*). For us to do so, there must be some prospect that the intended appeal is sustainable on the jurisdiction invoked, which is lacking for the Applicants. Having found so, we do not find it necessary to consider the prayer for stay of execution.
- (9) It is apparent that this determination renders nugatory any consideration of the substantive appeal that is, Petition 7 of 2020. Consequently, we dismiss both the Application for stay of execution and Petition 7 of 2020 itself.

[10] For reasons aforesaid, we make the following orders;



Orders:

11. ...

- i. The Notice of Motion dated 19th May 2019 is disallowed.
- ii. That Petition No. 7 of 2020 is hereby dismissed.
- iii. The Applicant shall bear the costs of the Application.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF SEPTEMBER, 2020

.....
D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original
REGISTRAR,
SUPREME COURT OF KENYA

