

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

*(Coram: Koome, CJ & P; Mwilu, DCJ & VP; Wanjala, Njoki & Ouko,
SCJJ.)*

MISC. APPLICATION NO. 7 (E011) OF 2021

- BETWEEN -

GEORGE BONIFACE MBUGUA *alias*

GEORGE BONIFACE NYANJA APPLICANT

AND

MOHAMMED JAWAYD IQBAL

(Personal representative of the Estate of the late

Ghulam Rasool Jammohamed)RESPONDENT

(Being an Application for stay of execution of the Judgment of the Court of Appeal sitting at Nairobi (Makhandia, Kiage & Ole Kantai, JJA) dated on 8th November, 2019 in Civil Appeal No. 242 of 2018).

RULING OF THE COURT

A. BACKGROUND

[1] At the heart of this dispute is a parcel of land known as L.R. NO. 1/387 located along Ngong Road, Nairobi, whose ownership is claimed by the parties in this application. It is common factor that the applicant and the original owner, Ghulam Rasool, (deceased), represented in the proceedings by the respondent, entered into an arrangement in 1985 in which the

applicant agreed to purchase the suit property from the deceased at a consideration of Kshs.2,000,000; it is also not in dispute that, having made the initial part payment, the applicant took possession of the property. However, the bone of contention is whether the purchase price was paid in full.

[2] While the applicant asserts that he fully paid the purchase price, the respondent denied the claim, arguing that a balance of Kshs.500,000 remained outstanding, in breach of the terms of the sale agreement. According to the respondent, failure by the applicant to complete the transaction amounted to a repudiation of the agreement.

[3] The applicant filed suit before the Environment and Land Court seeking an order of specific performance to compel the respondent to transfer to him the suit property. The respondent, for his part counter-claimed Kshs.25,020,000 being rent for the period 1986 to 2011 and Kshs.200,000 per month “*till judgment is entered.*” He also sought interest at court rate and costs, arguing that, apart from failing to pay the balance of the purchase price, the applicant had refused or neglected to sign the sale agreement.

[4] The single question before the Environment and Land Court and indeed before the Court of Appeal was, who, between the applicant and the respondent was in breach of the agreement. The learned trial Judge (Bor, J.) dismissed the respondent’s counter-claim and granted an order of specific performance of the sale agreement.

[5] Aggrieved by this, the Respondent moved to the Court of Appeal seeking to overturn the decision of the trial court. By its judgment of 8th November 2019, the Court of Appeal (*Makhandia, Kiage & Kantai, JJA.*) allowed the appeal, declaring that the applicant was indeed in breach of the agreement for failing to pay the balance on the purchase price amounting to Kshs.500,000. Relying on the evidence on record, the Evidence Act on the burden of proof and judicial authorities, the Court of Appeal faulted the casual treatment of this contentious question by the trial Judge.

“With great respect,” they said,

“...we are not convinced that the learned Judge did justice to this issue. She had before her Nyanja’s claim and the appellants diametrically opposed position. She did not give any reason why she accepted one version and not the other.....As we have pointed out, the onus to prove payment of Kshs.500,000 in cash to the deceased lay on Nyanja. We are un-persuaded that he discharged it.....Rather, we are persuaded from all the circumstances of the case that Nyanja never made the alleged payment of Kshs.500,000 in cash to the deceased.

Our holding on the decisive point of whether Nyanja paid the full purchase price is inevitably in the negative. The learned Judge fell into a reversible error in finding, without evidence that the contentious Kshs.500,000 was paid by Nyanja to the deceased and we are therefore entitled, indeed compelled, to set aside the same as we hereby do”.

[6] In addition the learned Judges also found that the sale agreement was not executed in contravention of the express provisions of **section 3(3)** of the Law of Contract Act; that time having been of essence, the trial Judge was in error for not finding that the applicant's failure to pay the full purchase price, despite many opportunities granted to him by the respondent, disentitled him to benefit from an order of specific performance. Ultimately and for these reasons, the Court of Appeal set aside the judgment, allowed the counter-claim and remitted the case to the trial Court to assess rent, mesne profits and damages.

[7] The applicant intends to challenge that outcome before this Court and in the meantime has taken out a Notice of Motion expressed to be brought pursuant to the provisions of **Articles 163(4)(a)** and **159** of the Constitution, **Sections 21(2)** and **24(1)** of the Supreme Court Act, **Rules 23** and **26(1)** of the Supreme Court Rules (2012) as well as **Rules 31** and **32** of the Supreme Court Rules (2020), praying, in the main, that the execution of the entire judgment of 8th November 2019, be stayed “**pending the hearing and determination of application dated 15th December 2020 in the Court of Appeal....and or appeal thereof**”.

[8] The following three events are relevant for the determination of this application. After the Court of Appeal delivered the judgment, the applicant lodged a notice of appeal, expressing the intention to challenge the whole of that judgment. That notice of appeal was promptly withdrawn. The applicant, instead took out a motion before the Court of Appeal seeking a review of the judgment. That application was rejected in a ruling dated 4th

December, 2020. The applicant then filed an application before the Court of Appeal dated 15th December 2020, for certification to appeal to this Court on the basis that the intended appeal will raise matters of general public importance, under **Article 163(4) (b)** of the Constitution.

Subsequent to these events and even before the last application for certification could be determined, the applicant brought the present Notice of Motion for stay of execution. On 30th April 2021, a single Judge of the Court certified the application urgent and directed that the file to be placed before the Ag. Chief Justice for further directions.

B. SUBMISSIONS

i. The applicant:

[9] In summary the application is premised on the grounds that, following the decision of the Court of Appeal, the Environment and Land Court, in execution of the judgment, has set the matter down for assessment of rent and or *mesne* profits on 4th June 2021 (now past); that the respondent has issued a notice to evict the applicant; that the applicant has an arguable appeal with high chances of success; that the learned appellate Judges viewed the application for review as an affront to their integrity and as a result refrained from addressing the real issues intended for review and that the questions in the intended appeal will settle the jurisprudence in the law regarding the powers of the Court of Appeal to review its decision. This is because there are numerous and similar suits awaiting the outcome of the intended appeal; and that, unless the orders of stay are granted, the application for certification before the Court of Appeal and the intended appeal before this Court will be rendered nugatory.

[10] The applicant cites, in support on those submissions, **Article 163(4)** of the Constitution, **Section 24** of the Supreme Court Act, and the cases of ***Deynes Muriithi & 4 others vs. Law Society of Kenya & another*** Civil Application 12 of 2015, [2016] eKLR, ***Board of Governors, Moi High School, Kabarak & another vs. Malcolm Bell***, Supreme Court Applications Nos. 12 & 13 of 2012 [2013] eKLR, and ***Republic vs. Ahmad Abolfathi Mohammed & another*** Criminal Application No 2 of 2018, [2018] eKLR, ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others*** SC Application No 5 of 2014, [2014] eKLR, (***Gatirau Munya Case***), in a long line of others.

ii. The Respondent

[11] In opposing the application, the respondent has filed both a replying affidavit and written submissions, whose combined effect is that the application has been overtaken by events as the orders sought to be stayed have already been executed; that the suit property is still registered in his name; that this application is frivolous and vexatious in view of the aforesaid; that there is no substantive appeal upon which an order of stay can be founded; that the applicant has made a similar application in the Court of Appeal in Civil Application No. 14 of 2020, making this application an abuse of the Court processes.

[12] To support those submissions, the respondent relies on Rule 31(2) of the Supreme Court Rules, 2020 and the cases of ***Teachers Service Commission vs. Kenya National Union of Teachers & 3 others*** Application No 16 of 2015, [2015] eKLR and ***Housing Finance Company***

Limited of Kenya vs. Scholastica Nyaguthi Muturi & another, Application No 10 of 2020, [2020] eKLR.

C. ANALYSIS AND DETERMINATION

[13] The invocation of the Court's general powers under **Article 159** of the Constitution, **Sections 21(2)** of the Supreme Court Act, and **Rules 31** and **32** of the Supreme Court Rules (2020) is itself a confirmation that there are no specific express provisions in the rules of the Court for the relief of stay of execution. The Rules however provide in general terms, *inter alia*, that an interlocutory application can be brought by way of a Notice of Motion; and that it must be filed together with written submissions and determined likewise by written submissions. See Rule 31.

[14] The three principles that guide this Court in deciding an application for stay are now old hat, but bear repeating nonetheless. Those principles require the applicant to demonstrate, first that the appeal is arguable and not frivolous; that if the order of stay is not granted the appeal will be rendered nugatory; and finally, that it is in the public interest to grant an order of stay. See ***Gatirau Munya Case*** (*supra*).

[15] It must be remembered that the question whether an appeal is arguable, does not call for the interrogation of the merit of the appeal, and the Court, at this stage must not make any definitive findings of either fact or law. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully by the Court.

[16] On the nugatory aspect, the concern is whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved. See the decision of the Court of Appeal in ***Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others*** Civil Application No 31 of 2012, [2013] eKLR.

[17] On the arguability of the appeal, and strictly in accordance with the above strictures, the jurisdiction of the Court is invoked and proceedings commenced, first under Rule 36 of the Court's Rules, by filing a notice of appeal within fourteen days from the date of judgment or ruling which is the subject of appeal. A notice of appeal is therefore a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave. This Court in ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others***, Application 16 of 2014, [2014] eKLR stressed that a notice of appeal is a jurisdictional pre-requisite.

[18] It has been argued, without rebuttal, that the notice of appeal lodged in respect of the judgment of 8th November 2019 was withdrawn, yet that is the very judgment the intended appeal seeks to challenge. That notice of appeal cannot possibly exist after the applicant elected the route of review of the judgment, as settled in a long line of authorities. See ***Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others***, Civil Appeal No. 368 of 2014, [2020] eKLR. The notice of appeal on record relates to the subsequent decision of 4th December, 2020, which is not the subject of the intended appeal.

[19] Secondly, once a notice of appeal has been filed, an appeal can then be instituted by lodging, among others, a petition of appeal. No interlocutory application can be brought before a petition is lodged. **Rules 31(2)** is categorical that;

“31. (2) An interlocutory application shall not be originated before a petition of appeal or a reference is filed with the Court”.

An interlocutory application must be based on an existing petition or reference.

In *the Director of Public Prosecutions V. Chrysanthus Barnabus Okemo & 4 others* [2018] eKLR, this point was clarified beyond debate thus;

[12] The upshot is that without a petition of appeal having been first filed in this Court, this application was predicated on nothing. It had no foundation upon which to stand and it was a nullity *ab initio*. The same should not have been accepted for filing..... As the application was a nullity, the proceedings therein were also a nullity and we so declare them”.

[20] Thirdly, an averment by the respondent to the effect that Civil Application No. 14 of 2020 for the very same reliefs as those sought herein is also pending before the Court of Appeal, has not been controverted.

[21] In view of all the foregoing, the application before us contests the exercise of discretion by the Appellate court when there is neither a notice of

appeal nor petition of appeal pending before this Court. As a corollary and without this basis, this application cannot succeed, in addition to the fact that there is a parallel application for the very relief pending before the Court of Appeal. Any remarks by this Court would amount to premature comments on issues yet to be adjudicated by the Court of Appeal. In the circumstances, we find that this Court lacks jurisdiction to entertain this application.

D. DISPOSITION

In the end, we find no merit in the instant application and make the following orders:

- a) The Notice of Motion dated 26th April, 2021 filed on 30th April, 2021 is dismissed.
- b) Costs will abide the outcome of the appeal.

DATED and DELIVERED at NAIROBI this 6th day of August, 2021.

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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

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

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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA