



Mbugua alias George Boniface Nyanja v Iqbal (Personal representative of the Estate of the Late Ghulam Rasool Jammohamed) (Miscellaneous Application 7 (E011) of 2021) [2021] KESC 41 (KLR) (6 August 2021) (Ruling)

George Boniface Mbugua v Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed) [2021] eKLR

Neutral citation: [2021] KESC 41 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

MISCELLANEOUS APPLICATION 7 (E011) OF 2021

MK KOOME, CJ & P, PM MWILU, DCJ & V-P, SC WANJALA, NS NDUNGU & W OUKO, SCJJ

AUGUST 6, 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)

The Supreme Court has no jurisdiction to entertain an application filed without the existence of a pending petition of appeal or reference before the court.

Reported by Beryl Ikamari

***Civil Practice and Procedure** - stay of execution - application for a stay of execution at the Supreme Court - principles governing the grant of a stay of execution - whether the Supreme Court would grant a stay of execution of a Court of Appeal judgment.*

***Jurisdiction** - jurisdiction of the Supreme Court - jurisdiction to hear and determine an application - where the applicant had not filed a notice of motion and a pending petition of appeal was not in existence - whether the Supreme Court could exercise jurisdiction and entertain the application - Supreme Court Rules 2020, rule 31(2).*

Brief facts

The dispute related to a parcel of land along Ngong Road, Nairobi. In 1985, the parties entered into an agreement wherein the applicant was to purchase the land from the respondent (deceased) for a consideration



of Kshs. 2, 000, 000. After making partial payments, the applicant took possession of the land. The dispute was about whether the applicant paid the full purchase price. While the applicant claimed that he had paid the full price, the respondent claimed that there was a balance of Kshs. 500, 000 and that the failure by the applicant to complete the transaction amounted to a repudiation of the agreement.

The applicant filed a suit at the Environment and Land Court seeking orders for the transfer of the suit premises to him as the purchaser. The respondent counterclaimed Kshs. 25,020,000 being rent for the period 1986 to 2011 and Kshs. 200,000 per month until judgment was entered. The Environment and Land Court dismissed the counterclaim and ordered for the specific performance of the sale agreement.

The Environment and Land Court decision was overturned in an appeal by the respondent at the Court of Appeal. The Court of Appeal declared that the applicant had breached the agreement by failing to pay the full purchase price. The Court of Appeal also made the finding that time was of the essence in the parties' agreement and that the applicant's failure to pay the full purchase price despite being granted many opportunities to do so, dis-entitled him from the benefit of an order of specific performance.

The applicant filed a notice of motion indicating an intention to challenge the entire Court of Appeal judgment but he withdrew it and filed a notice of motion at the Court of Appeal for a review of the judgment. The review application was dismissed. Before the Court of Appeal, the applicant sought certification that the appeal raised matters of general public importance but before that application could be determined, he filed an application for a stay of execution of the Court of Appeal judgment.

Issues

1. What were the principles governing the grant of a stay of execution at the Supreme Court?
2. Whether the Supreme Court had jurisdiction to hear and determine an application that was filed without the filing of a notice of appeal and the existence of a pending petition of appeal or reference before the Supreme Court.

Held

1. There were no specific provisions relating to an application for a stay of execution at the Supreme Court. The Supreme Court Rules generally provided that an interlocutory application could be brought by way of notice of motion and it had to be filed together with written submission.
2. The principles governing the grant of a stay of execution were that the applicant had to demonstrate that the appeal was arguable and not frivolous, that if the stay was not granted the appeal would be rendered nugatory and that it was in public interest to grant the order of stay.
3. In determining whether the appeal was arguable, the court would not interrogate the merits of the appeal or make definitive findings of fact or law. The appeal did not have to be one that had to succeed but it had to be one that could be argued fully.
4. The concern on whether the failure to grant a stay would render the appeal nugatory, was whether if what was sought to be stayed was to happen, it would be reversible and if it was not reversible, whether it could be compensated by an award of damages.
5. Under rule 36 of the Supreme Court Rules, the Supreme Court's jurisdiction was invoked by filing a notice of appeal within fourteen days from the date of judgment or ruling which was the subject of appeal. The notice of appeal that would have allowed the Supreme Court to exercise jurisdiction was withdrawn.
6. Once a notice of appeal had been filed, an appeal could then be instituted by lodging, among others, a petition of appeal. No interlocutory application could be brought before a petition was lodged. An interlocutory application had to be based on an existing petition or reference.
7. An averment by the respondent to the effect that Civil Application No. 14 of 2020 for the very same reliefs as those sought in the application was also pending before the Court of Appeal, had not been controverted.



8. The court lacked jurisdiction to hear and determine the application as there was no notice of appeal or pending petition of appeal, which would allow the application to be filed. In addition, there was a parallel application before the Court of Appeal which sought similar reliefs.

Application dismissed.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

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 unpersuaded 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

22. 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.



.....

M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

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

