



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCA NO. 43 OF 2019 (CONSOLIDATED WITH HCCA NO. 30 OF 2019)

GUARDIAN BANK LIMITED.....1ST APPELLANT

EXECUTIVE SUPER RIDES LIMITED.....2ND APPELLANT

PETER NDEGWA MUREITHI..... 3RD APPELLANT

VERSUS

MICHAEL MUTAHI GITHAIGA

T/A NYAGUNGA TRADERS.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon P. N. Gesora Chief Magistrate delivered on 5th

December 2019 in CMCC No. 3532 of 2019)

MICHAEL MUTAHI GITHAIGA

T/A NYAGUNGA TRADERS..... PLAINTIFF

VERSUS

GUARDIAN BANK LIMITED.....1ST DEFENDANT

EXECUTIVE SUPER RIDES LIMITED.....2ND DEFENDANT

PETER NDEGWA MUREITHI.....3RD DEFENDANT

JUDGMENT

1. This decision is in respect to two consolidated appeals which seek to impeach the decision of Hon. P. N. Gesora Chief Magistrate delivered on 5th December 2019 in CMCC No. 3532 of 2019 Michael Mutahi Githaiga t/a Nyalgunga Traders v Peter Ndegwa Mureithi, Guardian Bank Limited and Executive Super Rides Limited (The Suit).For convenience only I refer to the parties as they appear in the Suit.
2. The facts leading to the Appeals are easy to follow. In the Suit, Michael Mutahi Githaiga (T/a Nyalgunga Traders Auctioneers) alleges that Peter Ndegwa Mureithi (The 1st Defendant) engaged him to procure a purchaser for land reference number 2/15 Ngong Road, Nairobi at a commission of 5% of the purchase price.
3. Githaiga's case is that he successfully procured a purchaser being Executive Super Rides Limited (the 3rd Defendant) and a commission of Kshs.18,000,000/= was due to him. He however complains that the 1st Defendant has failed to pay the commission.
4. Guardian Bank Limited (Guardian) are joined to the suit as the 2nd Defendant as they are financiers of the purchase by the 3rd Defendant.

5. At trial Githaiga seeks the following orders:-

a) An order of permanent injunction, restraining the release of Kshs.18,000,000 being 5% of the sale price of L. R. No. 2/15, Nairobi to the 1st Defendant/Respondent;

i. By the 2nd Defendant/Respondent and its agents and Advocates including Messrs. Kiruti & Co, Advocates or;

ii. By the Advocates of the 1st Respondent Messrs. Nderi & Kiingiti Advocates.

b) An order, directing the either of the 2nd Defendant or the Advocates of the 1st Defendant Messrs. Nderi & Kiingiti Advocates, being the holder of the sum of Kes.18,000,000 constituting 5% of the Purchase price in respect of the sale and purchase of Land Reference Number 2/15, Ngong Road, Nairobi, to release the said funds to the Plaintiff through its Advocates, Messrs. Walker Kontos, together with interest Court rates.

c) Costs of this suit together with interest thereon Court rates until payment in full.

6. Mureithi denies that Githaiga brokered the sale to Executive Super Rides. He further alleges that the Plaintiff held himself out to be a licensed estate agent when he was not. Part of his defence is that Githaiga cannot therefore seek payment of a commission as an estate agent.

7. Together with presentation of Complaint, Githaiga filed a Notice of Motion dated 20th May 2019. The lower Court record shows that interim injunctive orders were granted on 20th May 2019 and the same were in force when Githaiga filed another Notice of Motion dated 13th November 2019.

8. This latter motion was for an order that the sum of Kshs.18,000,000/= be deposited in Court within ten (10) days of the order by the Defendant/Respondent pending full hearing and/or final determination of the suit. Those orders were granted by Court through a short ruling delivered on 5th December 2019 and which is the subject of the appeals herein.

9. The consolidated Memorandum of Appeal dated 18th December 2019 raises 16 grounds which are reproduced below:-

1. The Learned Magistrate erred in law and fact in finding the Respondent had established a prima facie case and further misdirected himself as to the basic principles for the grant of orders of attachment before judgment under Order 39, Rule 5 on the furnishing of security and thus improperly exercised his discretion allowing the Plaintiff's Notice of Motion dated 13th November 2019 ordering the deposit of the sum of Kshs.18,000,000/- in Court pending the hearing and full determination of the suit.

2. The Learned Trial Magistrate erred in law in acting in total disregard of the provision of Order 39 Rule 5 of the Procedure Rules which clearly lays down that before an order of attachment before judgment can be made, it was incumbent on the Court to direct the Appellants to furnish security or to show cause, why they should not furnish security and thereby deprived them the right to freely utilize their properties, as guaranteed by the constitution, leading to a miscarriage of justice.

3. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the Respondent/Plaintiff was abusively using the process of the Court to coerce the 3rd Appellant to come to terms or settle the claim on the Plaintiff's terms.

4. The Learned Trial Magistrate erred in law in failing to exercise utmost caution and circumspection or conduct thorough investigations against the allegations thrown against the Appellants to satisfy itself a case for attachment before judgment had been made and thereby arrived at a wrong decision.

5. The Learned Trial Magistrate erred in law and fact in failing to evaluate and appreciate that the Respondent/Plaintiff's Supporting Affidavit was vague, the ground for belief were not stated, did not disclose any apprehension or evidence of value that the Appellant was about to dispose of his properties with a view to defeat and or delay the Plaintiff's claims and also in disregarding the Appellant averment that he was not disposing of his property and was capable of meeting the decree and thereby arrived at a wrong decision.

6. The Learned Magistrate erred in law and in fact as the subordinate Court has no jurisdiction to entertain proceedings relating to the enforcement of Professional Undertakings under Order 52, Rule 7.

7. The Learned Trial Magistrate erred in law and in fact in failing to comprehend that the transaction involved was for the sale of property in which the 2nd Appellant had secured financing from the 1st Appellant for the balance of the purchase price of Kshs.330,000,000/- upon which for the completion of the transaction a Professional Undertaking was pegged.

8. The Learned Trial Magistrate erred in law and in fact in ignoring that there was a binding and enforceable Professional Undertaking dated 25th February 2019 prior to the order of 20th May 2019 between the firm of Advocates of Kiruti & Company Advocates and Nderi & Kiingiti Advocates and that the parties to the Professional Undertaking were not enjoined in the proceedings before issuing the orders as it did not 20th May 2019 and thereby arrived at a wrong decision.

9. The Learned Trial Magistrate erred in law and in fact by failing to consider that the Respondent has no privity of contract as of the Professional Undertaking dated 25th February 2019.

10. The Learned Trial Magistrate erred in law and in fact by ignoring that the 2nd Appellant did not have money and thus secured a charge with the 1st Appellant in order to purchase the suit property when he gave the order of 5th December 2019.

11. The Learned Trial Magistrate erred in law and fact in ordering for attachment of a sum of Kshs.18,000,000/- from the Appellant without specifically disclosing where the money is held and or the account to draw from, notwithstanding that there was no garnishee proceedings on record.

12. The Learned Trial Magistrate erred in law and in fact when ordering for the deposit of the said monies when actually the 1st Appellant will not accrue any interest as the money is deposited in the joint account.

13. The Learned Trial Magistrate erred in law and fact in holding that the orders must be obeyed, insinuating the Appellants had disobeyed the said order, yet the order issued on 20th May 2019 was directed towards third parties, who are not parties to the suit, much so to the prejudice of the Appellants case.

14. The Learned Trial Magistrate erred in law and in fact when he disregarded that the 1st Respondent's Agreement dated 11th April 2018 falls foul of Section 7 and 18(i) of the Estate Agents Act, Chapter 533, Laws of Kenya and was therefore in breach of the express provisions of statute and is illegal and enforceable.

15. The Learned Trial Magistrate did not exercise his discretion judiciously and the ruling is biased, unreasoned and fixated.

16. The Learned Trial Magistrate erred in law and fact in falling to take cognizance of the fact the Appellants had endorsed an expeditious trial in the submissions of the Appellants.

10. This Court has read and considered all the material before it and the arguments made by the parties. It is clear to me that a host of the grounds of Appeal do not address the real matter at hand regarding the impugned Ruling and this short decision attempts to demonstrate that.

11. On 20th May 2019, the lower Court granted prayer (b) of the application of 20th May 2019 on an interim basis. Prayer (b) was to the following effect:-

“Pending the interparties hearing and determination of this Application, this Honorable Court be pleased to issue an order of temporary injunction, restraining the release of Kshs.18,000,000/= being 5% of the sale price of L. R. No. 2/15, Nairobi to the 1st Defendant/Respondent;

i. By the 2nd Defendant/Respondent and its agents and Advocates including Messrs. Kiruti & Co, Advocates or;

ii. By the Advocates of the 1st Respondent Messrs. Nderi & Kiingiti Advocates.”

12. The advocates for 1st and 3rd Defendants were in Court on 4/6/2019 when the orders were extended. This was also the position on 12/6/2019. Indeed on this day, there was a consent order of the advocates of the Plaintiff, 1st Defendant and 3rd Defendant to maintain status quo. The presence of counsel was also apparent on 4/11/2019 when a ruling in respect to a preliminary objection was raised by the 1st and 3rd Defendants.

13. When the Plaintiff presented his motion of 13th November 2019 his complaint was that there was an attempt to defeat the existing orders of Court. In response to that application Mr. Mureithi sworn an affidavit on 2nd October 2019, he partly depones:-

“That contrary to the Plaintiff's allegation there was no Court order in force preventing me from concluding a contract of sale and/or receiving sale proceeds from the purchaser, 3rd Defendant herein arising from my property LR. No. 2/15.”

14. For the 2nd and 3rd Defendants, one Eric Kimathi Kirimia swore a replying affidavit on 2nd December 2019. In respect to the Court order, the deponent states:-

11. THAT further the prayers sought in the earlier Motion are in law not capable of being granted as Kiruti & Co. Advocates and Nderi Kingati & Co. Advocates are not parties to the current proceedings as they have not been enjoined in this suit. My counsel has further advised me that it is trite law that Court orders be granted and or directed against a Third Party who is not enjoined in the suit.

12. THAT further my counsel has advised me advise I verily believe to be true that the subordinate court has no jurisdiction to entertain proceedings relating to enforcement of professional undertakings.

13. THAT in response to Paragraph 2, I reiterate that the court has no jurisdiction to issue the orders it did on the 20th May 2019 as the sale was governed by amongst other things a professional undertaking.

14. THAT in respect to Paragraph 3 and 4 there was no order prohibiting the transfer of the property to the proposed buyers.

15. THAT in any event the Court did not at any time order for monies to be paid to Messrs. Walker Kontos Advocates and their client whose financial status is even unknown and the issue of whether the Kshs.18,000,000/- was owing had not been determined.

16. THAT in the circumstances there could be no basis for the opening of a joint account for the payment of sum of Kshs.18,000,000/= to which has not even been found to be due.

15. The 1st and 3rd Defendants do not deny the existence of the order nor do they allege lack of knowledge about it. Indeed, the orders of 20th May 2019 were either extended in presence of their counsel. The effect of the order of 20th May 2019 was that, pending the interparties hearing and determination of the application of the same date, an order of temporary injunction restrained the release of Kshs.18,000,000/- being 5% of the sale price of LR No. 2/15 Nairobi to the 1st Defendant by the 2nd Defendant and its agents and advocates including Messrs. Kiruti & Co, Advocates or by the advocates of the 1st Defendant Messrs. Nderi & Kiingiti Advocates.

16. An attempt to pay the restrained portion to the 1st Defendant would be to disregard or disobey a clear court order. If there were difficulties in implementing the said Court order then the Defendants should have sought its discharge and not to go round them. Although it was deponed by Mr. Kirimia of the 3rd Defendant that the orders could not be implemented as there was a professional undertaking between Messrs. Kiruti & Co. Advocate and Nderi Kingiiti & Co. Advocates which was a separate and distinct contract, neither of the advocates swore an affidavit stating that their obligations under the professional undertaking prevented them from obeying an order of Court which was well known to their principals.

17. This Court is unable to fault the finding of the Trial Court that:-

“It is clear that on 20th May 2019 this Court made an order restraining the 2nd and 3rd Defendants from releasing a sum of Kshs.18,000,000/- to the 1st Defendant. That order is still in force.

There is evidence that the property has been charged to the 2nd Defendant and the natural effect of the same is that the purchase price has been paid to the 1st Defendant. This is a glaring disregard to the order of this Court. The issue of undertaking between counsel on the opening of account is not in issue herein. Compliance of the order is key in this matter.”

18. The Trial Court, just as any other Court, has inherent power to protect the dignity of orders it issues. One way is to punish a person who is in contempt of a court order and another is to make such further orders as may be necessary to give effect to the disobeyed order.

19. The Appellants have argued that the impugned ruling and order may not have been available under Order 39 Rule 5 of the Civil Procedure Rules. And I do not seek to trivialize those arguments. Yet, even if I were to find that the orders could not be granted within the strictures of Order 39 Rule 5, still they were available for grant under Section 3A of the Civil Procedure Act which was expressly invoked on the face of the application. If it needs to be reproduced, section 3A reads;

“3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

20. The upshot is that the Consolidated Appeals are dismissed with Costs to the Respondent.

Dated, Signed and Delivered in Court at Nairobi this 21st Day of December 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE