



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 257 OF 2019

PETER NJOROGE.....1ST APPELLANT

ANDREW KAMAU NJOROGE.....2ND APPELLANT

ANTONY WAWERU NJOROGE3RD APPELLANT

-VERSUS-

PETER MUCHIRI NDUNGU.....RESPONDENT

RULING

1. Peter Njoroge, Andrew Kamau Njoroge and Antony Waweru Njoroge, the 1st, 2nd and 3rd appellants/respondents respectively took out the motion dated 17th July 2019 in which they sought for the following orders:

i. THAT this matter be certified urgent and service thereof be dispensed within the first instance.

ii. THAT this honourable court be pleased to issue injunctive orders restraining the respondent, his agents and or representatives from taking away, further advertising for sale, selling and or auctioning the applicant's property L.R. KAJIADO/KISAJU 515 in execution of the decree in Milimani CMCC no. 7665 of 2018 pending hearing and determination of this application and the hearing and/or compromise of the appeal herein.

iii. THAT this honourable court be pleased to direct the respondent to lift the prohibitory order they placed on land parcel L.R. KAJIADO/KISAJU 515.

iv. THAT the costs for this application be provided for.

2. The motion is supported by the affidavit and further affidavit of Andrew Kamau Njoroge. When the motion was served upon Peter Muchiri Ndungu, the respondent herein, he filed a replying affidavit to oppose the application.

3. The respondent further filed the motion dated 29th July 2019 in which he applied for the exparte orders issued on 17.7.2019 by Hon. Mr. Justice Mboghohi to be discharged and or set aside. The respondent filed an affidavit he swore in support of the motion. In response thereto, the appellants filed the replying affidavit of Andrew Kamau Njoroge to oppose the motion.

4. When the matter came up for hearing, this court directed the two applications to be heard together. Learned counsels appearing in the matter made oral submissions. I have considered the grounds set out on the face of each application plus the facts deponed in the affidavits filed in support and against the motions. I have further considered the rival oral submissions made by learned counsels appearing in this matter. It is the submission of Miss Mwirichia, learned advocate for the appellants/applicants that the applicants successfully sought for leave to appeal against the judgment of the trial court delivered vide Nairobi C.M.C.C no. 7665 of 2018.

5. The learned advocate further submitted that the appellants failed to obtain an order for stay of execution at the time of seeking for leave to appeal.

6. The appellants aver that they took steps to have the decree satisfied by selling three (3) acres to be exercised from LR. No. Kajiado/Kisaju 515. It is stated that so far a sum of ksh.2,100,000/= has been paid to the respondent's advocate and that the balance would be fully settle the

decretal sum when the purchaser releases the balance of the purchase price of ksh.18,900,000/= upon obtaining the completion documents from the appellants' advocate.

7. The appellants pointed out that while in the process of completing the sale transaction, the respondent registered a prohibitory order against L.R no. Kajiado/Kisaju 515 and further proceeded to advertise the property for sale in execution of the decree. The appellants have argued that they are now unable to complete the transaction to sell the 3 acres unless the prohibitory order is lifted.

8. The learned advocate stated that the appellants are ready, willing and able to pay the decretal sum. It is further the submission of the appellants that they will suffer irreparable loss if the respondent is not restrained from auctioning the aforesaid parcel of land valued at ksh.100,000,000/= to recover a decretal sum of kshs.16,769,580/=. They also averred that the issue which remains to be determined on appeal relates to the applicable interest and costs of the decree.

9. The appellants further stated that they identified a buyer for the 3 acres after having had a communication with the respondent's advocate. They stated that they even shared the sale agreement with the respondent's advocate who in turn provided them with the bank details on the draft agreement.

10. Mr. Makambo, learned advocate for the respondent opposed the motion arguing that the same is resjudicata. It was pointed out that the appellants had filed an application in which they sought for both an order for stay of execution and for leave to appeal vide Nairobi H.C. Misc. Appl. No. 204 of 2019. The learned advocate argued that the appellants have sought to circumvent the ground of resjudicata by clothing the instant motion as an application for injunction yet in essence the same is equivalent to an application for stay of execution.

11. The respondent further argued that the appellants are guilty of material non-disclosure in that at the exparte stage they failed to disclose that they had filed a similar application dated 27.2.2019 which was heard and dismissed on its merits vide this court's ruling delivered on 30.4.2019.

12. The learned advocate urged this court to dismiss the appellants' motion dated 17.7.2019 and allow that of the respondent dated 29.7.2019.

13. Miss Mwirichia stated in response that the appellants' motion is not resjudicata because the two applications are distinct since the same are determined by applying different principles.

14. It was also argued that the application for stay dated 27/2/2019 was filed before this appeal was filed while the instant motion for injunction was filed after the appeal was filed upon obtaining leave.

15. The appellants further argued that they are no guilty of material non-disclosure in that they annexed to the instant application a copy of the Memorandum of Appeal together with the order granting leave and denying them the order for stay.

16. The respondent aver the appellants have no serious buyer to purchase the three acres since the purported purchaser has no resources of its own but is an estate agent appointed by the appellants to sub-divide the property and offer the sub-divisions for sale to the members of public hence there is no assurance that the decretal sum would be settled by the proceeds of the sale transaction.

17. The appellants are of the contrary view that they have a serious buyer ready to purchase the three acres for ksh.21,000,000/= and as an indication of its seriousness and commitment, the purchaser paid a sum of ksh.2,100,000/= being 10% of the purchase price.

18. The history of this dispute can easily be discerned from the material placed before this court. The respondent filed an action before the Chief Magistrate's Court vide Nairobi C.M.C.C no. 7665 of 2018 seeking to recover a sum of kshs.14,625,000/= plus interest and costs from the appellants in respect of money advanced to them in the year 2014.

19. The respondent successfully applied for entry of judgment on admission on 14th December 2018. The respondent also obtained an order of attachment of L. R. no. Kajiado/Kisaju 515 and a prohibitory order registered against the aforesaid title.

20. It would appear the appellants begun to take steps to have part of the aforesaid land excised for sale in order to satisfy the decretal sum. A sum of ksh.2,100,000/= being 10% of the purchase price of the sale of 3 acres has so far been paid to the respondent's advocate. The sale transaction appears to have stalled because of the existing prohibitory registered against the attached property.

21. The respondent now has taken steps to have the attached property advertised for sale on 6/8/2019 in execution of the decree. The appellants were granted leave to appeal against the decision of the trial court vide Nairobi H.C. Misc. Appl. No. 204 of 2019. Pursuant to the aforesaid, the appellants filed this appeal.

22. Having set out in brief the background of this matter, I now turn my attention to the applications before this court. I have already stated that the appellants have taken out the motion dated 17th July 2019 in which they seek for two main orders. First, is an order of injunction to restrain the respondent from inter alia selling or auctioning L.R. no. Kajiado/Kisaju 515 pending appeal, second, an order lifting the prohibitory order placed against the aforesaid parcel of land.

23. The respondents have raised two preliminary points of law against the motion which I think should be disposed of first before considering the merits of the motion. The first preliminary issue is that the motion is resjudicata. I have already taken into account the arguments put forward by both sides over this issue. After a careful consideration of the rival arguments, I have come to the conclusion that the motion dated 17.7.2019 is not resjudicata.

24. The motion dated 27.2.2019 vide Misc. App. No. 204 of 2019 ostensibly sought for an order for stay of execution and for leave to appeal. The court declined to grant the order for stay but granted leave to appeal.

25. The principles applicable in determining an application for stay are totally different from those considered in determining an application for injunction.

26. It is also apparent that the application for stay was sought before the filing of this appeal. It is evident that by then the process of execution had not been commenced whereas the current application was filed after the respondent had begun the execution process.

27. The second preliminary issue is to the effect that the appellants are guilty of material non-disclosure. It is said that the appellants did not disclose at the ex parte stage that they had previously sought for similar orders vide Nairobi H.C. Misc, Appl. No. 204 of 2019. The appellants were of the submission that they disclosed the aforesaid fact.

28. With respect, I am persuaded by the submissions of the appellants. I am satisfied that the appellants sufficiently disclosed at the ex parte stage that the appeal was filed pursuant to the order of leave attached to the memorandum of appeal. The order clearly shows that the order for stay of execution was declined.

29. Having determined the twin preliminary issues, I now turn my attention to the merits or otherwise of the two motions. The appellants have beseeched this court to grant them the orders prayed in their motion dated 17.7.2019. The principles to be considered in an application for injunction were stated in the celebrated case of **Giella -vs- Cassman Brown & Co. Ltd (1973) E.A 358**.

First, the plaintiff must establish that he has a prima facie with high chances of success.

Secondly, that the plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

30. The appellants have argued that their application captures the aforesaid principles. The respondent is of the view that the same does not meet the threshold applied in such applications and is meant to delay his enjoyment of the fruits of judgment.

31. Having considered the arguments of both sides, I am convinced that the appellants have shown they have a prima facie case with a high degree of success. One of the grounds of appeal put forward is that the rate of interest given is higher than the court rate and the prevailing commercial rates. This is an arguable point which has to be determined on appeal.

32. The second principle is that a party must show the irreparable loss he would suffer should the order for injunction be refused. The applicants have stated that they would suffer irreparable loss in that their property worth ksh.100million will be sold to recover a sum of ksh.16,769,580/=.

33. The respondent is of the submission that the appellants have admitted that they intend to sell the attached property to settle the decretal sum hence they will suffer no loss if the sale proceeded under the court process in that valuation can be undertaken.

34. A critical consideration of the rival arguments will reveal that if the order for injunction is denied, the respondent will proceed to sell the property in execution of the decree to recover a sum of ksh.16,769,580/=. It would appear that going as per the purchase price given to the purchaser of the three (3) acres, that, the sale value of the whole land may be about kshs. 70 million.

35. The interest of the respondent is for payment of the decretal sum which is less than ksh. 20 million. If the property is sold in a public auction, it will obviously attract a price less than the market value since it will be sold at forced sale value. It is obvious that in the circumstances the remedy available to the appellants if the property is sold to only recover the decretal sum is limited. I am satisfied that the appellants have shown that they would suffer substantial loss.

36. This court will not belabour to consider the third principle because I am not in doubt.

37. The respondent has expressly stated that the 1st appellant who is the registered owner of L.R. no. Kajiado/Kisaju 515 resides in the U.S.A and has no known assets capable of attachment hence it will be prejudicial to the respondent if the prohibitory order is lifted.

38. The main reason which prompted the appellants to take up the current proceedings is the fact that they are unable to complete the sale transaction for the 3 acres due to the prohibitory order registered against the property. In the circumstances, this court must balance the interests of the parties. This court prefers a partial discharge of the inhibition placed on the property so that the prohibitory order will subsist

against 7 acres but is lifted over the three acres.

39. In the end, I find the motion dated 29/7/2019 to be without merit. Consequently, the same is dismissed. However, the **motion dated 17.7.2019** is allowed giving rise to issuance of the following orders.

i. An order of injunction is issued to restrain the respondent, his agents and or representatives from further advertising for sale, selling, and or auctioning L.R. no. Kajado/Kisaju 515 in execution of the decree in Milimani C.M.C.C no. 7665 of 2018 pending the hearing and determination and or compromise of this appeal.

ii. The prohibitory order registered against L.R. no. Kajiado/Kisaju 515 is lifted as against only three (3) acres to be excised from the aforesaid land to be sold by private treaty to satisfy the decree in Milimani C.M.C.C no. 7665 of 2018.

iii. The prohibitory order should subsist as against 7 acres in L.R. no. Kajiado/Kisaju 515 but to be lifted upon the appellants settling the decretal sum.

iv. The sale due for 6/8/2019 is cancelled and or put off.

v. Costs of the two motions to await the outcome of the appeal.

Dated, signed and delivered at Nairobi this 5th day of August, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant