

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 961 OF 2002

NELLY RWAMBA MUGO & ANOTHER.....APPELLANT

VERSUS

ANITA KIRAGU & 5 OTHERS.....RESPONDENT

RULING

George and Anita Kiragu, the 1st and 2nd Respondents are the Directors of Cofitex Ltd, the 3rd Defendant. Cofitex Ltd is the registered proprietor of the Land known as L.R. No.209/11897 (I. R. No.85297). On 11.01.2001, the Company registered a charge in favour of Co-operative Merchant Bank Ltd the 5th Respondent, apparently to secure some financial accommodation. On or about 21st August, 2001, George and Anita, who were then the registered proprietors of L.R. No.209/11896 (I.R. No.86280), entered into a sale agreement with Nelly Rwamba Mugo and James Njogu Kiarie, the applicants, to sell the said property to the applicants. The sale was concluded and a transfer was registered in the names of the applicants on 19th October, 2001. The property sold to the applicants is subservient to the property registered in the name of Cofitex Ltd and which is charged to Co-operative Merchant Bank Ltd. There is a 3 metre driveway from the main road adjacent to Cofitex's property which provides a way in and out of the applicants' property. That driveway is part of the applicants' property.

The Bank is intent to exercise its statutory power of sale in respect of Cofitex's property. The applicants seek an interlocutory injunction to restrain the sale and/or transfer of the said property until the hearing and determination of the present suit or other orders of the court.

From the plaint filed herein and the affidavit in support of the application for interlocutory relief, the gist of the matter would appear to be this. When the Kiragus were selling their property to the applicants, they undertook in the agreement of sale to give the applicant a free ingress and egress into the said land from the main road through the property registered in the name of Cofitex Ltd, without any obstruction. They have now refused to provide such ingress or egress by way of a driveway and have even blocked the 3 metre driveway into the applicants' property. These actions by the Kiragus have had the effect of rendering the applicants' property inaccessible and, so it is claimed, useless. The applicants' contend that if the Bank sells the property in exercise of its power of sale, they will lose their right of way to their property. So in the substantive suit, the relief sought is (a) that the Kiragus, their company and the Bank be compelled by order of this court to do or take all necessary steps and/or sign all necessary documents to enable the Commissioner of Lands and the Director of Survey (who are impleaded as the 6th and 7th defendants) to provide for a 9 metres driveway to the applicants' land (i.e. L.R. No.209/ 11896 (I.R. 86280) on or through the Kiragu Company's land (i.e. L.R. No.209/11897 (I. R. No.85297)); (b) that the Kiragus and/or their company be compelled by order of the court to provide a 9 metre driveway on or through the Company's property; and (c) that the Kiragus, their company and the Bank be restrained by Court order from selling, disposing or interfering in any way with Plot No.209/11897 (I.R. 85297) or L.R. No.209/11896 (I.R. 86280) until the disposal of the suit or other order. And the interlocutory prayer sought is essentially in terms of prayer (c) in the substantive suit save that the prohibitory order is also being sought against Valley Auctioneers, a firm of auctioneers which has been instructed by the Bank to sell the company's property in exercise of the Bank's statutory power of sale.

The application was served on all the respondents but only the Bank, i.e. the 5th Respondent, has filed any grounds of opposition or replying affidavit. That is not difficult to understand for the real battle here

is actually between the applicants and the Bank. The Bank wants to realize its security and the applicants want to stop that until they have been provided with what they consider to be their contractual right of way into their property by means of a 9 metre driveway through the land now registered in the name of the Kiragus' Company, the chargor to the Bank.

In both the grounds, of opposition and the replying affidavit filed on behalf of the Bank, the Bank claims that no cause of action is disclosed against it; that the applicants do not dispute that the chargee's statutory power of sale has arisen or that the charge is valid; that the contract of sale which purported to confer on the applicants a right of way over the debtor's property was executed subsequent to the charge and without reference to the chargee; that if the applicants have such a right of way, the same is attached to the land and not to the chargor or any particular owner and the plaintiffs may still pursue their right even after the sale; that the applicants have not made out a *prima facie* case with a probability of success at the trial; that the Bank is a sound financial institution which is capable of compensating the applicants for any financial loss which they may suffer; and that the applicants are guilty of substantial delay in bringing the application.

I have considered the application and all the arguments advanced in support and in opposition to it. I think the point of departure here must be an appreciation of the essence of the remedy of an interlocutory injunction. An interlocutory injunction is a great equitable remedy which issues at the instance of a party to a suit to protect his legal rights in appropriate circumstances pending the hearing and determination of the suit where those rights have been, are being or are threatened with violation by unlawful acts of another party. At the interlocutory stage, the court is not called upon to determine with finality the rights and obligations of the parties. All the applicant needs to show is that there is a *prima facie* case with a probability of success at the trial. And due to the equitable nature and origin of the remedy, it is also important to show that the applicant would suffer an irreparable injury which could not adequately be compensated by way of damages. Where the court is in doubt as to the existence or otherwise of the *prima facie* case, the application is to be considered on a balance of convenience. All those principles are so well known that reference to authority is hardly necessary. How do those principles apply in the present case?

Do the applicants have a *prima facie* case with a probability of success that they have a contractual entitlement to a 9 metre wide right of way on or over L.R. 209/11897 (I.R. NO.85297) which is charged to the 5th defendant Bank by the 3rd defendant company and, if they do, would they be entitled to injunct the bank from realizing its security until the chargor and its directors have provided for such right of way? On the material before me and given the fact that the 1st, 2nd and 3rd Respondents against whom the contractual right of way is asserted have not controverted the claim, I think the applicants do have a *prima facie* case with a probability of success that the said respondents had contracted to provide them with a right of way. However, whether the applicants would be entitled to a restraining order against the Bank until such right of way is accorded would appear to be a different kettle of fish altogether. In the first instance, the sale agreement embodying the covenant for a right of way, was executed long after the property in question had been charged to the Bank. Surely the Bank could not possibly be bound by a covenant affecting its interest in the charge property and which covenant it had not approved. In law the contract of charge superceded any subsequent contracts affecting the charged land. And as the contract of charge gave the bank power to realize the security comprised in the charge and there is no suggestion from the chargor that the power of sale had not arisen or that it was not exercisable when the bank sought to exercise the same, it would appear to me that 5th defendant and its auctioneers cannot be restrained from selling the charged property only on the ground that such sale will injuriously affect the value of the applicant's adjacent property. In short, although there may be sufficient grounds shown for sympathy to the applicants, the applicants have not shown that the Bank's intended actions are unlawful. In the absence of any unlawful acts on the part of the Bank and/or its auctioneer violative of the applicants' legal rights, there is no juridical basis for the remedy of the interlocutory injunction sought against the 5th and 4th respondents. That being the view I have taken of the matter it follows that the application must be dismissed as against the 4th and 5th Respondents. What of relief against the 1st, 2nd and 3rd Respondents? One of the great equitable maxims is that equity does not act in vain. What triggered this litigation is the bank's move to realize its security.

The Kiragus and/or their company cannot sell or otherwise dispose or interfere with the charged property. To restrain them from doing so would indeed be to act in vain. This court will not do so. However, there is uncontroverted evidence that the said respondents have blocked the applicant's entrance into their own property by walling off the 3 metre driveway which is shown on the survey deed plans as part of the applicants' property known as L.R. NO.209/11896 (I.R. No.86280). They have no colour of right to do so. Unfortunately, the applicants have not applied for an order of mandatory injunction compelling the respondents to unblock the said driveway and as I understand the law, a mandatory injunction is not to be issued couched in negative terms. I cannot therefore regrettably order the respondents to unblock the 3 metre driveway by the device of an order restraining them from interference with the applicant's property or any part thereof. In those premises, the applicants may have to resort to the common law remedy of self-help against the respondents' act(s) of trespass in order to keep the 3 metre driveway open.

In the result, the application for interlocutory injunctive relief is refused with costs to the 5th respondent who is the only respondent who opposed the same.

Dated and delivered at Nairobi this 18th day of September 2002

A.G RINGERA

JUDGE