



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 461 OF 2007

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF/DECREE HOLDER

VERSUS

JOHN FAUSTIN KINYUA.....1ST DEFENDANT/JUDGMENT DEBTOR

JOHNSON J. GITHAKA.....2ND DEFENDANT/JUDGMENT DEBTOR

MBUYU FARMS LIMITED3RD DEFENDANT/JUDGMENT DEBTOR

SUMAC MICROFINANCE BANK LIMITEDOBJECTOR/RESPONDENT

SAMMY MICHUGU NJENGAINTERESTED PARTY/APPLICANT

RULING

1. On 6th May 2020, this Court dismissed the Notice of Motion of 7th October 2019 by Sammy Michugu Njenga (the Applicant herein). The result is that a consent order of 23rd July 2019 was left unscathed.

2. The Applicant is aggrieved by the Ruling of the Court and duly filed a Notice of Appeal to the Court of Appeal. Through an application of 31st August 2020, the Applicant has moved the Court of Appeal for the following orders:-

[2] THAT pending the hearing and determination of the Applicant's Appeal from the Ruling and orders of 6th May 2020, an injunction be and is hereby issued restraining the Respondents whether by themselves, their agents, employees, or otherwise howsoever from selling or advertising by way of private treaty or by public auction the property comprised in LR. No. 209/10611/30(IR 77263) or interfering in any way whatsoever with the Applicant's quite possession and enjoyment thereof.

[3] THAT Pending the hearing and determination of the Applicant's Appeal from the Ruling and Orders of 6th May 2020 this Court be pleased to stay further proceedings before the High Court in HCCC No. 461 of 2007 Kenya Anti-Corruption Commission v John Faustin & Others.

3. So as to get some respite as he pursues his Application before the Court of Appeal, the Applicant moved this Court through a Motion of 5th October 2020 for the following orders:-

[3] THAT the hearing and determination of the Applicant's Application dated 31st August 2020 filed in the Court of Appeal against the Ruling and Orders of 6th May 2020, an injunction be and is hereby issued restraining the Respondents whether by themselves, their agents, employees, or otherwise howsoever from selling or advertising by way of private treaty or by public auction the property comprised in LR. No. 209/10611/30(IR 77263) or interfering in any way whatsoever with the Applicant's quite possession and enjoyment thereof.

[4] THAT this Court be pleased to stay further proceedings before it pending the hearing and determination of the Applicant's Appeal from the Ruling and orders of 6th May 2020.

4. Although the Respondents oppose the application, this Court is inclined to grant it, partially, for the following reasons.

5. The consent which aggrieves the Applicant and which he unsuccessfully sought to set aside reads;

“By Consent of the parties, the sale by public auction conducted on 28th October 2016 is set aside for lack of compliance with section 97 of the Land Act.

The Objector shall within 30(thirty) days of today commence the exercise of its statutory power of sale by public auction in terms of the order of Court of 29th July 2016.

The valuation report prepared by the Objectors valuers shall be availed by the Objector to all parties at least 7 days before the sale. All parties to be at liberty to attend and observe the auction.”

6. The effect of the consent is that it reverses the Applicants purchase of the LR. No. 209/10611/30 and the Objector is now at liberty to dispose it. If that was to happen then the property may well be placed beyond the reach of the Court while his application to preserve it is still pending before the Court of Appeal. In fairness, I think the Court of Appeal should determine the Application when the property is still within the reach of Court. If that were not so then the Application before the Court of Appeal maybe rendered moot and academic.

7. While the Respondents may suffer some loss in the delay in selling the property, that loss has to be weighed against the possibility that the Court of Appeal could be minded to grant an injunction against the sale. Again, that loss can be ameliorated by this Court granting an order on terms.

8. However, as prayer 3 offers sufficient preservation of the property for now, the Court declines to grant prayer 4 which is for stay of these proceedings.

9. The upshot is prayer 3 of the Notice of Motion dated 5th October 2020 is allowed on the following terms:-

a) The Applicant shall within 14 days furnish to the Respondents an undertaking as to damages in the event that its application for injunction to the Court of Appeal is withdrawn or otherwise fails.

b) The Respondents are at liberty to apply for the discharge of this order.

c) Each party to bear its own costs on the application.

Dated, Signed and Delivered in Court at Nairobi this 12th Day of March 2021.

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 Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Nixon: Court assistant

Ngecha for 3rd Respondent

Marete for Applicant

Ocharo for Plaintiff/Decree holder