



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO. 17 OF 2019

WINNIE KASYOKA MUMOAPPELLANT/APPLICANT

VERSUS

HFC LIMITEDRESPONDENT

[APPEAL FROM THE RULING/DECISION AND ORDERS OF THE CHIEF MAGISTRATES COURT AT NAIROBI (THE HON. M. OBURA (MRS (SPM) DATED 13/5/2019)]

RULING

1. The appellant/applicant herein filed the application dated 16th May 2019 seeking the following orders:-

a) Spent

b) Pending hearing and determination of this application and the appeal, the Honourable court be pleased to issue a temporary injunction restraining the respondent, whether by themselves or their agents or otherwise howsoever, from selling, evicting, unlawfully acquiring, taking over possession, entering and/or remaining on all that property known as a three bedroom apartment at Sunning Hills Apartment in Lavington erected on L.R. No. 330/432 being unit No. L2; or interfering with the appellant's quiet and peaceful ownership and occupation of the suit property herein or dealing in the said property in a manner prejudicial to the appellant's interests thereof.

c) The Honorable court be pleased to call for the records/proceedings in Milimani CMCC No. 6207 of 2018: Winnie Kasyoka Mumo –versus- HFC Limited.

d) The Honourable Court in the exercise of its supervisory jurisdiction does set aside and or reverse the orders issued on 13th May 2019 by the Chief Magistrates' Court of Kenya at Nairobi Law Courts (The Honourable M. Obura (Mrs),(SPM) in Milimani CMCC No. 6207 of 2018: Winnie Kasyoka Mumo –versus- HFC Limited.

e) Costs.

2. The application is supported by the applicant's affidavit sworn on 16th May 2019 and is premised on the grounds that the applicant is the registered owner of an apartment erected on LR NO. 330/432 Unit No. L2 (hereinafter "**the suit property**"). The applicant states that her earlier application for injunction before the Chief Magistrate was dismissed against the weight of evidence thereby prompting her to make an oral application under Order 42 Rule 6(2) for stay for 30 days to enable her lodge an appeal in good time but that the trial court declined to grant the said orders despite the fact that the respondent did not object to the application.

3. The applicant contends that she faces imminent eviction from the suit property by the respondent bank who intends to sell the said property at all costs.

4. The applicant further states that she stands to suffer substantial loss unless the court grants the orders sought and that the appeal raises triable issues with high chances of success.

5. It is the applicants case that she is a single parent and that the suit property is her only family home. She adds that she will be rendered homeless and destitute should the said property be sold.

6. The respondent opposed the application through the replying affidavit of its Legal Officer litigation, one **Joseph Lule**, sworn on 21st May

2019. He avers that following the dismissal of the applicant's application for injunction by the lower court, the respondent contracted M/S Legacy Auctioneers to advertize and sell the suit property by public auction in exercise of its chargee's statutory power of sale after complying with all requisite procedure and notices attendant to such a sale.

7. He avers that on 15th November 2018, the suit property was sold to the highest bidder at Kshs 11 million after which the successful bidder executed the Memorandum of Sale, a copy of which was attached to the replying as annexure "JL6". He adds that the bid price was reflected in the applicant's statement of account.

8. He further states that following the said sale, the appellant's equity of redemption in respect to the suit property stands extinguished and that the reliefs sought in the application are therefore not available.

9. In the applicant's further affidavit dated 1st June 2019 she avers that she has already filed an appeal challenging the ruling of the subordinate court and that this court has powers, in the exercise of its appellate jurisdiction, to grant a temporary injunction on terms that are just.

10. She denies that the suit property has since been sold as she has consistently challenged the respondent's fraudulent and secret dealings on her property. She states that the respondent did not conduct any public auction but went to reassign her property to one of their staff members through proxies by conveniently alluding to "the highest" bidder without indicating to the court who the said highest bidder was.

11. She further states that the alleged purchaser one **Mr. Biego**, who is well known to her, has never contacted her or demanded vacant possession or rent from the suit property and that instead, one **Vincent Orina** has visited the suit property while claiming that he is the new owner.

12. She also states that the alleged Memorandum of sale is forged and that she has written to the Central Bank of Kenya Banking Fraud Investigations Department to conduct investigations so as to unearth the manifest fraud in the respondent's activities.

13. Parties filed written submissions to the application which I have carefully considered and I find that the main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

14. In summary, the applicant seeks orders for firstly, temporary injunction to restrain the respondent from selling, evicting, unlawfully acquiring, taking over possession, entering and/or remaining on the suit property pending the hearing of the appeal. Secondly; calling for the lower court records/proceedings and lastly; the exercise of the court's supervisory jurisdiction to set aside and or reverse the orders of the lower court's orders of 13th May 2019.

15. Starting with the last two prayers regarding the calling of the lower court's records and the setting aside or reversing the impugned orders. I find that it is common ground that lower court records ordinarily constitute part of the Record of Appeal that must be filed in court and served on all the parties before an appeal is admitted for hearing. In the instant case. I note that the Record of Appeal dated 16th May 2019 has already been filed. For the above reason, I find that it is not necessary for this court to make an order, at this stage, calling for the lower court's record.

16. Turning to the second issue of the exercise of the court's supervisory jurisdiction to set aside and/or reverse the impugned orders, I note that the first prayer sought in the appeal is that *"the decision of the Chief Magistrates' Court (Honorable M. Obura SPM) dated and delivered on 13th May 2019, be varied and/or set aside."* Clearly therefore and having regard to the said prayer in the appeal, I find that allowing a revision or setting aside of the lower courts decision, at this stage, will be tantamount to determining the entire appeal upfront and before it is canvassed substantively on its merits.

17. On the main prayer for temporary orders of injunction pending the hearing and determination of the appeal, the applicant argued that she had filed a proper appeal before the court and that Order 42 Rule 6 (6) of the Civil Procedure Rules gives this court the power to grant the orders sought.

18. On its part, the respondent conceded that in appropriate cases, the court, in exercise of its appellate jurisdiction, would have the power to grant orders of injunction pending appeal pursuant to the provisions of Order 42 Rule 6(6) Civil Procedure Rules. The said order stipulates as follows:-

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with. "

19. In the case of **Patricia Njeri & 3 Others –vs- National Museum of Kenya** [2004] eKLR, the court set out the principles governing the grant of orders of injunction pending appeal in the following terms:

"There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?"

In the Venture Capital case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be "exercised judicially and not in whimsical or arbitrary fashion." This discretion is guided by certain principles some of which are as follows:

a) *The discretion will be exercised against an applicant whose appeal is frivolous (see Madhupaper International Limited vs Kerr (1985) KLR 840 (cited in Venture Capital). The applicant must state that a reasonable argument can be put forward in support of his appeal (J.K. Industries vs KCB (1982-88) KLR 1088(also cited in Venture Capital).*

b) *The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra)*

c) *The applicant must show that to refuse the injunction would render his appeal nugatory (see Butt vs Rent Restriction Tribunal (1982) KLR 417(cited also in Venture Capital).*

d) *The court should also be guided by the principles in Giella vs Cassman Brown & Company Ltd (1973) EA 358 as set out in the case of Shitukha Mwamodo & Others (1986)KLR 445(also cited in Venture Capital).*

20. Similarly, in the case of *Madhupaper International Ltd -Vs- Kerr* [1985] KLR 840 the Court of Appeal held that :-

“where a judge dismisses an Application for interlocutory injunction, he has jurisdiction to grant an applicant an injunction pending appeal so as to prevent the appeal being rendered nugatory in the event the appeal is successful. A similar principal was held in the case of Erinford Properties Ltd vs (Cheshire County Council [1974] 2 ALL ER 448.

Having said so, an applicant must demonstrate the criteria set out in the case of Giella vs Cassman Brown Ltd(supra) . A careful perusal of the appellant’s affidavit evidence showed that he did not demonstrate that:

a. *He had established a prima facie case with high chances of success.*

b. *Damages would not be adequate compensation if the interlocutory injunction was not granted.*

c. *Balance of convenience should tilt in his favour.”*

21. In the instant case, it is not disputed that the lower court dismissed an earlier application for injunction thereby precipitating the filing of an appeal and the instant application for injunction pending appeal. While the applicant maintained that she had satisfied all the conditions for the grant of orders of injunction as were set out in the celebrated case of *Giella V Cassman Brown* (1973) EA 353, the respondent argued that the suit property had already been sold at a public auction conducted on 15th November 2018 in exercise of the respondent’s/chargee’s statutory power of sale following the lower court’s ruling of 17th October 2018 rejecting the earlier application for injunction. In support of this argument, the respondent attached a copy of the Memorandum of Sale (**annexure “JL6”**) to the replying affidavit. The respondent further argued that Section 99 of the Land Act is clear that where a property is sold in exercise of a chargee’s statutory power of sale, the remedy available to any person aggrieved by an auction is in damages.

22. In her part, the applicant contended that the alleged sale never took place as the purported purchaser has never asked her to vacate suit premises which she still occupies of to pay rent. The applicant further claimed that the Memorandum of sale is a forgery and that the purchaser is the respondent’s employee and proxy.

23. In determining whether or not the sale in question took place, I note that the applicant has raised pertinent questions regarding the veracity of the alleged purchase of the suit property at the public auction. The respondent’s position was that the purchaser was one **Paul Kibichy Biego**.

24. I have carefully perused the Memorandum of Sale (**annexure “JL6”**) and I note that apart from the mere mention of the purchaser as one **Paul K. Biego**, the respondent did not furnish any tangible proof that the said **Mr.Biego** indeed paid any money towards the purchase of the suit property so as to allay the applicant’s fears that the sale could have been a hoax or a smokescreen. The applicant’s claim that there have been no attempts by the said Mr. Biego to evict her or to ask her for the monthly rents is also a factor which the court cannot ignore in determining this application.

25. In effect, this court finds that the issue of whether or not the suit property was sold in an issue that the court cannot verify with certainty. The applicant’s contention that she still peacefully occupies the suit property undisturbed by any claims from ‘new owner’ lends credence to her position that the sale may not have taken place. This court is of the view that it is most unlikely that any purchaser of a property in the nature of the suit property herein would sit pretty and not lay any concrete claim to his property upon parting with a tidy sum of Kshs 11,000,000/-.

26. To my mind therefore, there is more than meets the eye in the challenged sale/auction. This is not to say that this court is making any conclusive finding on the issue of the sale, which is a matter to be canvassed at a different forum. This court is of the view that the ends of justice would be met if the fundamental questions regarding the rights and liabilities of the parties herein are canvassed at the hearing of the appeal. I am also of the considered view that allowing the prayer for the temporary injunction in this matter will have the effect of compromising the pending appeal as the issue of orders of injunction remains the main issue in the appeal.

27. In these circumstances, I consider it just and equitable to make the following orders:

a) *The status quo currently obtaining in the suit property shall be maintained pending the hearing and determination of the appeal.*

b) *That the applicant/appellant shall move expeditiously and in any event, within 30 days of the date hereof, to secure a date for*

the hearing of the appeal, which date, shall be given on priority basis failing of which the respondent shall be at liberty to make an appropriate application.

c) Costs in to abide the outcome of the appeal.

Dated, signed and delivered in open court at Nairobi this 3rd day of October 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Midenga for the appellant

Mr. Murimi for Mutua for the respondent

Court Assistant - Margaret