



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 208 OF 2014

MAISHA INVESTMENTS LIMITED.....PLAINTIFF

=VERSUS=

MOHAMED HASSANALI

ALIMOHAMED JANMOHAMED.....1ST DEFENDANT

FARHANA MOHAMED HASSANALI.....2ND DEFENDANT

RULING

The plaintiff brought this suit against the defendants on 24th February, 2014 seeking the following reliefs;

1. Specific performance of the agreement of sale dated 13th November, 2012 in respect of L.R No. 1338/29 (hereinafter referred to only as “the suit property”).
2. Damages for breach of contract.
3. Costs of the suit.
4. Any other or further relief the court may deem just and fit to grant.

The defendants filed a joint statement of defence on 10th March, 2014 in which they denied the plaintiff’s claim. The defendants averred that the offer to sell the suit property to the plaintiff was rescinded when the plaintiff failed to honour the terms of the offer. The defendants averred further that in any event, the offer to sell the suit property to the plaintiff did not constitute an agreement of sale capable of enforcement. The suit was heard by Mutungi J. In a judgment delivered on 30th October, 2019, Mutungi J. dismissed the plaintiff’s suit and ordered each party to bear its own costs. He made a further order that the defendants do refund to the plaintiff the sum of Kshs. 5,250,000/= that was paid to the defendants by the plaintiff as a deposit within 21 days from the date of the judgment. The plaintiff was dissatisfied with the said judgment and filed a notice of intention to appeal against the same to the Court of Appeal on 7th November, 2019.

On 15th November 2019, the plaintiff brought an application by way of Notice of Motion dated 14th November, 2019 under Section 3A of the Civil Procedure Act, Order 40 Rules 1(a), 2 and 3, and Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders;

1. Leave to appeal against the judgment of the court delivered on 30th October, 2019.
2. Injunction restraining the defendants from selling, advertising, transferring, constructing on or continuing to construct on the suit property pending the hearing and determination of the intended appeal to the Court of Appeal.

The application was brought on the grounds that pending the hearing and determination of the suit, the court had granted a temporary injunction in favour of the plaintiff on 31st July, 2015 restraining the defendants from selling, advertising, putting up for sale, occupying or continuing to remain in occupation, erecting or continuing to erect and from preventing the plaintiff from accessing or remaining on the suit property. The plaintiff averred that in the judgment delivered on 30th October, 2019 its suit was dismissed. The plaintiff averred that it was aggrieved by the said judgment and had filed a Notice of Appeal. The plaintiff averred that it was apprehensive that the defendants who had attempted to transfer the suit property to a third party before the injunction aforesaid was issued would now proceed with the said transfer to the prejudice of the plaintiff. The plaintiff averred that if the suit property was sold by the defendants, the substratum of the intended appeal would be lost with the result that the appeal if successful would be rendered nugatory. The plaintiff averred that it was willing to deposit the balance of the purchase price in court as security and that it was in the interest of justice and fairness that the application be allowed.

The application was opposed by the defendants through a replying affidavit sworn by the 2nd defendant on 13th January, 2020. The defendants contended that leave to appeal sought by the plaintiff was superfluous because the plaintiff had automatic right of appeal to the Court of Appeal against this court's judgment delivered on 30th November, 2019. The defendants averred further that the plaintiff's application was incompetent as concerns the order of injunction in that the injunction was sought under Order 40 Rule 1 of the Civil Procedure Rules on the basis of a nonexistent agreement of sale. The defendants averred that there was no valid agreement of sale between the parties and that the court had in its judgment made a finding to that effect. The defendants averred that the plaintiff's application lacked merit and urged the court to dismiss the same with costs.

When the application came up for hearing on 23rd June, 2020, the advocates for the parties relied entirely on the affidavits in support of and in opposition to the application and left the matter to court for determination. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendants in opposition to the application. I am in agreement with the contention by the defendants that the plaintiff's application has no merit. First, the court has no power under the provisions of the Civil Procedure Rules through which it has been moved to grant the orders sought by the plaintiff. An order of injunction under Order 40 Rules 1, 2 and 3 is issued by the court pending the hearing of a suit. In this case, the suit has been heard and determined and as such the court's power to grant an interlocutory injunction under Order 40 Rule 1 of the Civil Procedure Rules is spent. The court has no power under Order 40 Rule 1 of the Civil Procedure Rules to grant an injunction pending appeal to the Court of Appeal in a suit that has been conclusively determined. The plaintiff has not cited any authority to persuade me that I have such power. I am aware of the decision of the Court of Appeal in Madhupaper International Limited v Kerr [1985] KLR 840 where the court held that the High Court has jurisdiction where it has dismissed an application for interlocutory injunction to grant to the applicant an injunction pending an appeal against that decision to prevent an appeal from being rendered nugatory. That is however not the case here. What I have been called upon to do is to grant an injunction pending an appeal to the Court of Appeal against a final judgment of the court. The decision in the above case is in the circumstances distinguishable. I am of the view that such order can only be granted by the Court of Appeal after considering and satisfying itself that the plaintiff has an arguable appeal. This court having made a conclusive finding that the plaintiff's claim against the defendants has no merit and has proceeded to dismiss the same cannot be called upon to consider whether the plaintiff's intended appeal to the Court of Appeal is arguable.

The plaintiff had also moved the court under Order 42 Rule 6 (6) of the Civil Procedure Rules. This provision of the Civil Procedure Rules gives the court power when sitting as an appellate court to grant an order of injunction pending the hearing of an appeal before it. This is not the situation before me. This court is not seized of the plaintiff's intended appeal. It cannot therefore grant an injunction to the plaintiff pending the hearing of its intended appeal. The orders sought by the plaintiff cannot also be granted under Section 3A of the Civil Procedure Rules. This is because the plaintiff has a remedy in the Court of Appeal for the reliefs it is seeking. The Court of Appeal Rules has express provisions for injunction pending appeal to that court. It is not necessary in the circumstances for the plaintiff to seek the aid of Section 3A of the Civil Procedure Rules for the orders sought.

With regard to the prayer for leave to appeal, I am in agreement with the defendant that the plaintiff has an automatic right of appeal against the judgment of this court. The leave sought is therefore unnecessary. The upshot of the foregoing is that the plaintiff's Notice of Motion application dated 14th November, 2019 fails wholly. The same is dismissed with costs to the defendants.

Dated and Delivered this 15th day of October 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kathangu h/b for Ms. Koki for the Plaintiff

Mr. Gichuki h/b for Mr. Kyalo for the Defendants

Ms. C. Nyokabi-Court Assistant