REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GICHERU, AKIWUMI & PALL, JJ.A.)
CIVIL APPLICATION NO. NAI. 266 OF 1997 (112/97 UR)

BETWEEN

MAVOLONI COMPANY LIMITED.....APPLICANT

AND

STANDARD CHARTERED ESTATE MANAGEMENT LTD.....RESPONDENT

(An application for interlocutory injunction pending an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Justice Hayanga) dated 8th October, 1997 in H.C.C.C. NO. 2362 OF 1997 (O.S.))
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RULING OF THE COURT

The background to the present application for the equitable remedy of an injunction pending the determination of the applicant's intended appeal to this court, can be summarized thus. The applicant, which is a registered corporation, charged its farms NDALANI/MAVOLONI/BLOCK I/1131 and KAKUZI/ITHANGA/BLOCK I/876 to the respondent which the latter, in exercise of its alleged statutory power of sale under the charge, advertised on 11th September, 1997, for sale by public auction on 15th October, 1997. Not surprisingly, the applicant within ten days of the advertisement, rushed to the High Court seeking an interlocutory injunction to stop the sale of the farms on the main ground that the charge was invalid as it did not comply with certain mandatory provisions of the Registered Land Act which will hereinafter, be referred to as "the Act".

Hayanga, J. heard the applicant's application inter partes where the following rival arguments which were also argued before us, were presented to him. On behalf of the applicant, it was argued that the charge was ineffectual since it had not complied with the mandatory provisions of sections 109 and 110 of the Act because of the lack of attestation of the common seal of the applicant on the charge and the lack of verification of the execution of the charge, respectively. In contra, the respondent's case was that the affixing of the common seal of the applicant on the charge was sufficient and did not require any attestation or verification of the execution of the charge. But what is more, it was further urged on behalf of the respondent that the applicant's application was not only, vexatious and an abuse of the process of court but also, res judicata. In an earlier civil suit, H.C.C.C. NO. 3610 of 1995, which the applicant had brought against the respondent on the face of it, for breach of contract, the applicant had sought, inter alia, an interlocutory injunction to stop the respondent from selling the farms on the ground that the respondent was exercising its statutory power of sale in bad faith and dishonestly. But the interesting thing is that the

applicant and the respondent in that former suit, filed a consent letter dated 10th August, 1996, which formed the basis of a Decree of the same date wherein, the applicant now admitted that it rather, was indebted to the respondent in the not insubstantial sum of Kshs.55,000,000 and that if that sum was not paid by the applicant by 17th August, 1996, then the respondent would be at liberty to exercise its statutory power of sale in respect of the farms under the charge, the validity of which was not obviously being challenged. Subsequently, when a dispute arose as to the contents of the Decree, Juma, J. who had recorded the related consent order, ruled in support of the Decree as summarized above. It now, should not come altogether as a surprise, that the applicant did not pay the sum it had agreed to pay the respondent by the agreed deadline, and only rushed to court for leave to appeal against the ruling of Juma, J. and for a stay of execution, when the respondent tried to exercise its now conceded statutory power of sale. Juma, J. on 31st July, 1997, granted leave to appeal; he also granted the applicant stay of execution on condition that it deposits in court a banker's bond for Kshs.30,000,000 within thirty days from that date. The applicant, as one has come to expect, did not deposit the banker's bond and when the respondent now advertised the sale of the farms on 11th September, 1997, the applicant as we have seen, then rushed to court to stop the sale as already described. Hayanga, J. who heard that application, considered the facts and the law as summarized above, and had no hesitation in dismissing the application on the grounds that the applicant having consented to the Decree should no longer rely on breaches of the provisions of sections 109 and 110 of the Act, and that the consent judgment in the civil suit H.C.C.C. NO. 3610 of 1995, made the application not only res judicata but also estopped the applicant from pursuing the application it had now brought.

In the present application before us, it has been argued forcefully, by Mr. Kilukumi, counsel for the applicant, that even if the applicant had admitted its indebtedness to the respondent, the consent judgment did not amount to an admission that the charge was valid, moreover, if the charge were invalid under the Act, a consent judgment could not change that position; that the matters for determination in the former suit, H.C.C.C. NO. 3610 of 1995, were quite different, and founded on issues that were also different, from those involved in the application before Hayanga, J; that the application involved matters of law which can not be subject to the principles of res judicata; and that sections 109 and 110 of the Act had been irremediably breached. Mr. Kilukumi cited various authorities in support of his arguments and we can now say, having considered these and his arguments, that the intended appeal is not a frivolous one. We think it raises arguable points. But in order to satisfy us that the present application should be granted, it must also be shown that the intended appeal if successful, would be rendered nugatory.

Unfortunately, for the applicant, having failed to comply with the condition set for the granting of the stay of execution by Juma, J., the respondent, as it was entitled to, had the farms sold by public auction to a third person on 15th October, 1997, some two days after the filing of the present application. In our view, therefore, there is nothing which can be the subject of the injunction that the applicant seeks. Moreover, if the applicant succeeds in its intended appeal, it can be adequately compensated in damages since there is nothing really particularly unique about the farms. We do not therefore, think that the applicant's intended appeal would be nugatory were it to succeed.

But we must also make one more observation. The sale of the farms by public auction is not yet completed so the applicant on whose behalf it has been alleged that the sale by public auction was tainted with fraud, can still challenge the validity of the sale by public auction in the High Court.Instead of doing this, the applicant has chosen up to now, not to follow this course, and has, inspite of its rather reprehensible conduct in not complying with the orders of Juma, J. thought it fit to come to this court for an equitable remedy. The applicant has not come to court with clean hands.

In the result the applicant's present application is dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 19th day of November, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.