



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 2 OF 1996

BETWEEN

JAMES OMBERE OCKOTCH.....APPLICANT

AND

1. EAST AFRICAN BUILDING SOCIETY

2. C.B. MISTRI

3. MR. M. YOUNG.....RESPONDENTS

(Application for leave to file Memorandum of Appeal out of time in an intended appeal from the order of the High Court of Kenya at Nairobi (Osiero, J.) dated 21st March, 1990

in

H.C.C.C. NO. 5049 OF 1989)

RULING

By his amended Notice of Motion dated 28th May, 1996 the applicant has sought extension of time within which to lodge his Notice of Appeal and Memorandum of Appeal against the order of the superior court dated 21st March, 1990 in that court's Civil Case Number 5049 of 1989. That case arose from the sale on 26th October, 1989 by public auction at K.Shs.2,700,000/- of the applicant's parcel of land known as L.R. NO. 12144/9 Langata Road, Nairobi comprising in area approximately 4.858 acres with a private dwelling house having a lounge with a fire-place, dinning room, children's play-room, 6 bedrooms with two bedrooms en-suite, guest bedroom with a dressing room, bathroom suite and lobby, passage, 2 additional bathroom suites, 2 kitchens each with food store and a servants quarters with 3 rooms, cooking space, shower and W.C. There was also a garage for two cars.

On 6th November, 1989 the applicant filed a suit in the superior court against the respondents and by a Chamber Summons taken out on the same day under Order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules he inter alia sought an order restraining the respondents, their agents and/or representatives from proceeding with the sale referred to above and/or from effecting any transfer or doing anything in pursuance of the sale of the applicant's aforesaid property. Besides seeking such an injunction in his plaint dated 6th November, 1989 the applicant had also sought a declaration that the sale

of his above mentioned property was null and void on account of fraud.

The application for injunction was heard inter partes on 31st January, 1990 and in his ruling dated 21st March, 1990 Osiemo, J. concluded that he saw no reason why the sale of the applicant's property by public auction should be declared a nullity. According to him, the sale was proper and the transfer of the property in question was to be effected in favour of the 3rd respondent. This conclusion effectively terminated the applicant's suit against the respondents at the interlocutory stage without the same being tried particularly on the issue of fraud.

Dissatisfied with the order of the superior court flowing from the conclusion of the superior court judge, on 18th May, 1990 the applicant in Civil Appeal Number 57 of 1990 appealed to this Court against that order. Unfortunately, the record of that appeal did not at all contain a certified copy of the order appealed against as is required by rule 85(1)(h) of the Rules of this Court. That omission was fatal to the applicant's appeal and on 31st October, 1995 the same was struck out as being incompetent. It was for that reason that on 8th January, 1996 the applicant made this present application.

The property the subject-matter of the applicant's suit in the superior court was a valuable one. The finality with which the superior court judge dealt with that suit in an interlocutory application for injunction may have occasioned injustice. Hence, although the applicant is to blame in failing to include a certified copy of the order appealed against in his Civil Appeal Number 57 of 1990, I am in the circumstances inclined to exercise my discretion under rule 4 of the Rules of this Court in his favour. In the result, his amended Notice of Motion dated 28th May, 1996 succeeds and the time for lodging his Notice of Appeal is extended so that the same shall be lodged in the superior court within 7 days from today's date and the time for lodging his record of appeal is extended so that the same shall be lodged in this Court within 14 days from the date of lodging the Notice of Appeal within the extended time. The costs occasioned by the applicant's amended Notice of Motion are awarded to the respondents.

Dated and delivered at Nairobi this 20th day of September, 1996.

J.E. GICHERU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR