REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI
(CORAM: KWACH, TUNOI & SHAH, JJ.A.)
CIVIL APPLICATION NO. NAI. 14 OF 1995 (8/95 UR)
BETWEEN

J. L. LAVUNA AND OTHERS .....APPLICANTS

AND

1. CIVIL SERVANTS HOUSING CO. LTD.

2. SAVINGS AND LOAN KENYA LTD. .....RESPONDENTS

(Being an application for an injunction pending the

hearing and determination of Civil Appeal No. 4 of

1995 filed on 20-1-1995 from the judgment and decree

of the High Court of Kenya at Nairobi (Dugdale, J.) delivered at Nairobi on 19th December, 1994

in

H.C.C.C. NO. 3381 OF 1985)

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RULING OF TUNOI, J.A.

In or about 1980 the first respondent advertized and made offers for sale of residential houses known as Langata Civil Servants Scheme comprising of 132 units of houses. It was further a term of the offer that the estates would be on a 99 years lease and the second respondent, a financial institution, was to provide successful applicants with 80% mortgage loans which had to be repaid over a period of 15 years. According to the applicants' own plaint, they met all the requirements of offer laid down by the first respondent and proceeded to assume possession and occupation of the houses as detailed. Upon inspection of the said houses, the Nairobi City Commission, being the local authority charged with the responsibility for effecting and enforcing the building bye-laws refused to grant occupational certificates due to a variety of defects of which despite due notice the first respondent refused and neglected to complete and rectify. The second respondent on the other hand, hiked the amount of mortgage money granted to the applicants without cause or reasons and had purported to demand payments for the houses on that basis. It was the applicant's averments in the plaint that the houses as they stand are of inferior quality, unsuitable for human occupation and habitation and they do not meet the minimal requirements laid down by the Building Code and the prices asked for and demanded by the second respondent as

mortgage monies due and owing are unrealistic and way outside the scope of the contracted price.

It is on the basis of the circumstances as set out briefly as herein above that the applicants instituted the suit against the respondents and sought, inter alia, damages for breach of contract, orders restraining the second respondent from demanding or enforcing repayments of mortgage money and an order directing the first respondent to complete and effect full repairs for the said houses.

The first respondent did not defend the suit. The second respondent in its defence denied the substance of the allegations contained in the plaint and went on to aver that it has a right to demand repayment of mortgage monies in accordance with the terms of the contracts between the respective applicants and itself and that it was not a term of the contracts or any of them between the parties that the houses be completed properly or at all, or that occupation certificates be issued before the second respondent acquired the right to demand repayment of mortgage monies.

The learned judge (Dugdale, J) did not believe the testimony of the witnesses called by the applicants and he found the case not proved and dismissed it. The upshot of that dismissal was that the applicants were in immediate danger of being evicted from their houses because the auctioneers had advertised for sale and disposal of the said houses. Hence this application to stay execution under the well-known rule 5(2)(b). As to the principle on which we should exercise this jurisdiction, I refer to two well-known cases namely, firstly, Githunguri v Jimba Credit Corporation Ltd, Civil Application No. 161 of 1988 decided on the 8th November, 1988 and J. K. Industries Ltd. v Kenya Commercial Bank decided in September, 1987 reported in 1982 -1988 1 KAR p 1088. Both laid down almost identical principles as the basis under which stay of execution pending appeal should be granted, namely, first, the applicant must present an arguable case for the consideration of the Court of Appeal and second, the application must show that if the stay is withheld, it would render the intended appeal nugatory. Both cases were decided on the basis of these principles. In Githunguri case, the application of that principle led to the grant of the stay sought, in the J. K. Industries case, it led to the opposite result, that is, that the application failed and was refused.

The divergent conclusions reached in these two cases on the application of the same principles show that, by and large, it is the facts of each particular case that determine the result.

As far as this case is concerned out of 129 original plaintiffs 39 of them are left to pursue this application and the intended appeal. It is not quite clear whether the rest have surrendered or not.

A casual perusal of the evidence of the main witnesses shows that the applicants did not even attempt to prove their case before the superior court. No tribunal will believe that the Kenyan elite, the majority of whom the applicants belonged, could be forced into signing a mortgage document without reading it or without knowing the nature of the concerned document or be compelled to go into a newly constructed house full of gaping defects and not know what to do in the circumstances. Despite these, the applicants did not produce any documentary evidence, for example, to show what monies they expended to rectify the so-called rampant defects in their houses. Further, they admitted having freely occupied the said houses, and some made handsome rents out of them during the last decade or so. All in all, it is doubtful whether the applicants have arguable issues in their intended appeal.

An application for injunction under Rule 5(2)(b) of the Rules of this Court is an invocation of the equitable jurisdiction of the Court. So it follows that its grant should always be made on principles established by equity one of which is that equitable remedies are said to be mutual. If that is so, I pose: what is the mutuality of the matter herein? The second respondent has lent money for the benefit of the applicants. Isn't it inequitable for it to be made to incur loss without recompense none of which is forthcoming from the applicants? Again, it is trite law that the very first principle of injunction law is that prima facie, you do not obtain injunctions to restrain actionable wrongs for which damages are adequate remedy. I need not deal with the second limb of the principle.

I have had the advantage of reading in draft the ruling of my brother Kwach, J.A. and I entirely agree with it.

That being the position as I see it, the applicants have failed to show that they have an arguable case on the intended appeal. I would refuse this application with costs to the second respondent.

Dated and delivered at Nairobi this 9th day of June, 1995.

P. K. TUNOI

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JUDGE OF APPEAL