



Campus Hostels Limited v Housing Finance Company Limited & another (Civil Application 32 of 2020) [2022] KECA 1324 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KECA 1324 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 32 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 2, 2022**

BETWEEN

CAMPUS HOSTELS LIMITED APPLICANT

AND

HOUSING FINANCE COMPANY LIMITED 1ST RESPONDENT

TAIFA AUCTIONEERS 2ND RESPONDENT

(An application for conservatory orders of the Ruling of the High Court of Kenya at Mombasa (P.J.O. Otieno J.) delivered by Ogola J. on 23rd April 2020 pending the hearing and determination of the intended Appeal from the aforesaid ruling in High Court Civil Suit No. 4 of 2016)

RULING

1. The application that is the subject of this ruling is a Notice of Motion dated 3rd June 2020, brought under rule 5 (2) (b) of the Court of Appeal Rules, Section 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, in which the Applicant, Campus Hostel Limited, is seeking a conservatory order for status quo to restrain the 1st Respondent from registering a transfer over the parcel of the land known as Mombasa/ Block XVII/1585 (“the suit property”) in the name of the successful bidder at the public auction held on 18th July 2019, and to restrain the successful bidder from evicting or in any manner physically removing the Applicant from occupation and possession of the suit property.
2. The application is supported by a supporting affidavit and further affidavit sworn on 27th May 2020 and on 30th June 2022 respectively by Moses Waweru Ndung’u, a director of the Applicant. The Applicant’s case is that the 1st Respondent was in the process of completing the conveyances arising from the public auction held on 18th July 2019 which was held against the express orders of Hon. Lady Justice Chepkwony issued on 17th July 2019. The Applicant swore that they had written to the High



Court on 19th May 2020 seeking typed and certified copies of the proceedings and ruling: they had lodged a Notice of Appeal dated 27th April 2020 and they had annexed their memorandum of Appeal to the supporting affidavit.

3. The application is opposed vide the sworn affidavit of Christine Wahome, the 1st respondent's legal manager. It was revealed that the instant application was served 2 years after it was filed and this is inequitable conduct. It was revealed that the suit land was sold on 8th July 2019 and transferred on 20th May 2020 therefore there is nothing to conserve. It was revealed that the 1st respondent attempted to take possession of the suit property and the occupant obtained injunctive orders in Mombasa CMCC 1549 of 2021. Counsel posited that the intended appeal is not arguable in view of the multiple suits filed by the applicant; that the court properly found in the ruling dated 23rd April 2020 that the applicant's application was *res judicata*.
4. A brief background to the application is as follows. The suit property was used as security for a loan facility advanced by the 1st Respondent to the Applicant, which remained unpaid culminating in the said property being advertised for sale at a public auction. The Applicant then filed a suit in the High Court together with an application dated 13th January September 2016 seeking an injunction against the respondents restraining them from selling the suit property by public auction, and the application was subsequently dismissed in a ruling rendered on 5th September 2016. The Applicant filed another application dated 21st October 2016 seeking the same orders which was also dismissed in a ruling rendered on 26th October 2016. On 16th July 2019 a third application was filed by the Applicant seeking the same prayers, and the High Court in the impugned ruling delivered on 23rd April 2020 found that it was *functus officio* and that the application was *res judicata* in dismissing the application. The Applicant, being aggrieved with the decision filed a notice of appeal on 29th April 2020 and thereafter, this application.
5. Learned counsel Mr. Waweru for the Applicant and learned counsel Mr. Opole holding brief for Mr. Kongere for the 1st Respondent urged their respective positions during a virtual hearing of the application held on 19th July 2022. Mr. Waweru and Mr. Opole relied on their respective written submissions dated 7th July 2022 and 13th July 2022. Mr. Opole informed us that the 2nd Respondent is an agent of the 1st Respondent and did not participate in the trial.
6. It is in this regard notable that the Applicant's application is brought pursuant to Rule 5(2)(b) of the Court of Appeal Rules of 2010, under which this court assumes jurisdiction to grant orders of stay of execution, injunction or a stay of any further proceedings in any civil proceedings, where a notice of appeal has been lodged in accordance Rule 75 of the Court of Appeal Rules of 2010, which requires a Notice of Appeal to be lodged within 14 days of the decision intended to be appealed against. This position was also confirmed by this Court in *Halai & Another vs Thornton & Turpin* (1963) Ltd. (1990) KLR 365. The ruling intended to be appealed against was delivered on 23rd April 2020, while the Notice of Appeal was lodged on 29th April 2020. This Court can therefore assume jurisdiction under Rule (2)(b).
7. Mr. Opole raised a preliminary issue that the application is fatally defective because it is expressed to be under rule 5 (2) (b) of the Court of Appeal Rules, 2010, yet the Applicant seeks conservatory orders, and cited the case of *Darmour Florian Emmeric vs Director of Immigration Services* [2017] eKLR for the proposition that conservatory orders bear a public law connotation and are not unlike interlocutory injunctions, linked to such private-party issues. Therefore, that as the present dispute is between two private citizens and there is no remedy in public law that is being sought, the Applicant is seeking a remedy unavailable in law, and in any event, that a Court has no jurisdiction to grant reliefs



- that has not been sought. Mr. Waweru in reply submitted that the guiding principles that apply to conservatory orders are the same as those that apply to injunctions.
8. While it is the practice that the nomenclature of a conservatory order is normally used in relation to public law litigation, it is evident from the wording of the prayer sought by the Applicant that what is essentially sought is an injunction to restrain the 1st Respondent and successful bidders at the public auction in relation to the suit property. In addition, under Rule (2)(b) of the Court of Appeal Rules, the discretion granted to the Court is wide and it can order a stay of execution, injunction or a stay of any further proceedings on “such terms as it Court may think just”. The instant application is therefore properly before this Court.
 9. In this regard, the principles applicable in the exercise of the Court’s discretion under Rule 5 (2) (b) to grant an order of stay are well settled. Firstly, an Applicant has to satisfy that he or she has arguable appeal. Secondly, an Applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kang’ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR.
 10. Mr. Waweru submitted that the appeal is arguable on account of the registration of the suit property being impeachable on the ground that the public auction was held notwithstanding the status quo orders being in place; that, the transfer of the suit property was effected not to the successful bidder, but illegally and unlawfully effected to the 1st Respondent as a chargee without obtaining leave of the Court to purchase the property as required by section 100 (1) of the *Land Act*; and that the Applicant were still in occupation of the suit property and had a tenant thereon.
 11. Mr. Opole in response submitted on the limb of arguability, that the trial Court held in its ruling of 23rd April 2020 that it had considered two separate applications for injunction which it dismissed on 5th September 2017 and 26th October 2016, and to ask the trial Court to grant an injunction for the third time was res judicata. Reliance is placed on *Juja Coffee Exporters Ltd & 2 others vs Bank of Africa & 2 others* [2019] eKLR in which it was held that an appeal was not arguable in similar circumstances. On the nugatory aspect, counsel urged that it was common ground that the suit property was offered to the 1st Respondent as security for a loan, which was never repaid, and the statutory power of sale accrued and was exercised on 18th July 2019. Therefore, that the Appeal would not be rendered nugatory on those circumstances as held in *Julius Musili Kyunga vs Kenya Commercial Bank Ltd & 2 others* [2016] eKLR.
 12. For an appeal to be arguable, it should raise issues that are deserving of consideration by the Court, irrespective of whether or not they will succeed on merit. In this regard the Applicant has faulted the finding by the trial Court that its application was res judicata, and raised various grounds to demonstrate this error in their Memorandum of Appeal. To this extent we find the appeal arguable. We however are not convinced that the appeal will be rendered nugatory if the injunctions sought are not granted, for three reasons. Firstly, it is not in dispute that the suit property has since been transferred to the 1st Respondent as a result of the public auction, secondly, the Applicant’s tenant is in occupation of the said property pursuant to a court order issued in Mombasa CMCC 1549 of 2021, and additional injunction orders would not only be superfluous, but also in abuse of the court process in the circumstances. Lastly, any prejudice suffered by the Applicant arising from the auction of the suit property can adequately be compensated by damages.
 13. The required threshold has therefore not been met by the Applicant with regard to the nugatory limb, and the Notice of Motion application dated 3rd June 2020 is accordingly dismissed with costs to the 1st Respondent.



14. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER 2022

S. GATEMBU KAIRU (FCI Arb)

JUDGE OF APPEAL

P. NYAMWEYA

JUDGE OF APPEAL

J. LESIIT

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

