



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, SICHALE & KANTAI, J.J.A.)

CIVIL APPLICATION NO. NAI. 295 OF 2017

BETWEEN

TINA HOLDINGS LIMITED.....APPLICANT

AND

HOUSING FINANCE COMPANY OF KENYA.....1ST RESPONDENT

HOTEL CONNECTIONS LIMITED.....2ND RESPONDENT

(Being an application for stay of execution of the orders and directions of the

Environment and Land Court at Machakos (Angote, J.)

delivered on 23rd November, 2017

in

ELC No. 206 of 2016)

RULING OF THE COURT

The property known as **L.R. No. Athi River/Athi River Block 1/87** was registered in the name of the applicant, **Tina Holdings Limited**. It was offered as a security for a loan advanced to the applicant by 1st respondent, **Housing Finance Company of Kenya**. It would appear that the loan was not serviced or serviced on time and the property was sold at a public auction on 12th October, 2016 as is seen in the agreement for sale of that date at page 52 of the record of the Motion. The highest bidder was the 2nd respondent, **Hotel Connections Limited**, to which the property was transferred on 27th February, 2017 as is evidenced by the Title Deed issued to the 2nd respondent by the District Land Registrar, Machakos.

The applicant approached the Environment and Land Court (“**ELC**”), Machakos, praying for various orders including a prayer for injunction and although that court originally issued favourable orders the injunction was eventually discharged after the court found that the property had been sold and transferred to the 2nd respondent.

In the Motion before us brought under **rule 5(2) (b)** of the **Court of Appeal Rules** it is prayed in the main that we stay the orders of the ELC given on 23rd November, 2017 pending the hearing of the Motion and of an intended appeal. We are asked in the alternative to order an injunction restraining the respondents from occupying the suit property pending the hearing and determination of an intended appeal. In grounds in support of the Motion and in a supporting affidavit of **Titus Kitonga**, a director of the applicant the history of the dispute is given. It is stated that an injunction was granted but was eventually discharged, the trial court holding that damage, if any, suffered by the applicant could be compensated in damages. Further, that the ELC had ordered that the applicant should not be granted any orders that would frustrate the 2nd respondent’s enjoyment of rights over the suit property; that the applicant was aggrieved by those orders and intends to appeal; that the 2nd respondent could very well dispose of the parcel of land and that would render the intended appeal nugatory; that the applicant was suffering loss as it was supposed to develop a petrol station on the land and that, the property being prime, the applicant could not be compensated in damages.

We note that the Hearing Notice served on 25th February, 2021 at 10.01 a.m. upon “onindoc@gmail.com; ondooindoadvocates@gmail.com; info@mohammedmuigai.com; fmwangangi1@gmail.com” informed the parties, amongst other things,

that the application would be heard on Tuesday 9th March, 2021 by way of written submissions. Parties were directed to file written submissions within 7 days of the date of the Hearing Notice.

The applicant filed written submissions dated 5th March, 2021 which we have considered.

In a replying affidavit by **Patrick M. Makau**, the **Managing Director** of the 2nd respondent, it is stated amongst other things that the Motion has no merit; that the 2nd respondent is in occupation of the suit land as the lawfully registered owner of the same after purchasing it at a public auction; that the applicant is raising new issues in this Motion that were not before the ELC; that there is no arguable appeal.

There was no replying affidavit by the 1st respondent.

The principles that apply in an application of this nature are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, is arguable which is to say that the same is not frivolous. Such an applicant, to succeed, must, in addition, show that the appeal would be rendered nugatory absent stay – See **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR**.

The applicant is aggrieved by the orders of ELC where an injunction earlier granted ex parte was discharged it being ordered that the 2nd respondent was entitled to enjoy proprietary rights over the disputed land. The applicant fears that the 2nd respondent, which, it has not challenged, is in possession, could very well dispose of the property.

As we have seen the suit land was offered by the applicant to the 1st respondent as security for a loan. The loan was not serviced and the land was sold at a public auction where the 2nd respondent was the successful bidder; it paid the full bid/purchase price and was eventually registered as the proprietor of the same.

The orders of the ELC were given in an interlocutory application; the suit has not been heard so the less we say here the better so as not to embarrass the trial court when the suit comes up for hearing. We agree with the ELC in the circumstances enumerated that the applicant on the material available would be compensated in damages if that eventuality came to be. We cannot, at this stage, see any arguable point in the intended appeal where the suit land was sold and transferred to the 2nd respondent way back in February 2017. Being of that view we need not consider the nugatory aspect. Suffice to say that the 2nd respondent is duly registered as proprietor of the land and it has full rights to deal with the same.

The Motion has no merit and we dismiss it with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR