



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: OKWENGU, SICHALE & J. MOHAMMED, JJ.A]**

**CIVIL APPLICATION NO. E 373 OF 2020**

**BETWEEN**

**AQUINAS F. M. WASIKE.....APPLICANT**

**VERSUS**

**ABSA BANK PLC (FORMERLY BARCLAYS BANK OF KENYA LIMITED).....1<sup>ST</sup> RESPONDENT**

**REGENT AUCTIONEERS..... 2<sup>ND</sup> RESPONDENT**

**TITUS O. KOCEYO..... 3<sup>RD</sup> RESPONDENT**

(An application for an injunction pending the lodging, hearing and determination of an intended

Appeal from the Ruling of the High Court of Kenya at Nairobi (Majanja,J.)

dated 15<sup>th</sup> September 2020 in HCCC No. E 310 of 2020)

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**RULING OF THE COURT**

By a Notice of Motion dated 26<sup>th</sup> November 2020, Aquinas F. M. Wasike (the Applicant herein), has brought under **Rule 5 (2) (b)** of the **Court of Appeal rules** and **Section 3A** and **3B** of the **Appellate Jurisdiction Act, CAP 9** of the Laws of Kenya, an application for an injunction pending the lodging, hearing and determination of an intended Appeal from the Ruling and Order of the High Court at Nairobi (Majanja, J.) delivered on the 15<sup>th</sup> September 2020. The applicant sought the following orders:

“Spent.

**a. THAT pending the hearing and determination of this application interpartes, the Respondents either by themselves, their officers, servants, agents or otherwise howsoever be restrained from completing the sale and/or effecting the transfer and /or interfering with the Applicant’s quiet enjoyment of all that property commonly described as LR. NO 2/696 (PART) IR 119440 Apartment No. L. 5. of Block A on 1<sup>st</sup> Floor of Kirichwa Heights, Kilimani Estate situate in Nairobi City County.**

**b. THAT pending the lodging, hearing and determination of Applicant’s Intended Appeal, the Respondent either by themselves, their officers, servants, agents or otherwise howsoever be restrained from completing the sale and/or effecting the transfer and or interfering with the Applicant’s quiet enjoyment of all that property commonly described as LR. NO 2/696 (PART) IR 119440 Apartment No. L. 5. of Block A on 1<sup>st</sup> Floor of Kirichwa Heights, Kilimani Estate situate in Nairobi City County.**

**c. THAT the costs of this application be provided for”.**

In support of the motion, the Applicant swore an affidavit dated 26<sup>th</sup> November, 2020. He deposed that the application filed simultaneously with the plaint that was considered by the learned Judge was seeking an injunction as he contested the illegal exercise of the statutory power

of sale by the applicant herein as the statutory power of sale was not exercised on *stricti sensu*; and that substantial loss will result to him. In a ruling delivered on **15<sup>th</sup> September, 2020**, the learned Judge dismissed this application thus, precipitating the motion before us.

In support of the motion before us, the Applicant filed his submissions on **15<sup>th</sup> December, 2020**, therein it was submitted on his behalf that, he had satisfied the principles to be entitled to orders sought for because; the Appeal was arguable as the learned Judge erred in failing to find that, the exercise of statutory power of sale by the Respondents had not arisen and/ or crystallised; in failing to find that the Applicant had not been validly served with the mandatory statutory notice as required by **Section 90 (2) of the Land Act No. 6 of 2012** and that the power to sell had NOT arisen as no valid notification of sale or no valid statutory notice was ever served on the Applicant; in failing to find that, there was glaring collusion on the face of the record between the Respondents, hence invalidating any alleged auction and that the learned Judge misdirected himself in misinterpreting the meaning, effect and purport of the new agreement and the variation of terms of payment in the email dated **28<sup>th</sup> April 2020** which gave the Applicant 3 months to sell **LR. NO 2/696 (Part) IR 119440 Apartment No. L. 5 of Block A on 1<sup>st</sup> Floor of Kirichwa Heights, Kilimani Estate situate in Nairobi City County** (the suit property) by private treaty. The second limb was that the Appeal will be rendered nugatory if an injunction is not granted as prayed for; the Applicant was apprehensive that if the sale of the suit property is perfected before the hearing of the appeal, then the Applicant would suffer irreparable damage as the 3<sup>rd</sup> Respondent proceeded to bid for the suit property which had not been advertised and the power of sale had not crystallised and therefore the 3<sup>rd</sup> Respondent could not attract the protection or the empathy of the Honourable Court.

The 3<sup>rd</sup> Respondent, **Titus Koceyo**, in his replying affidavit sworn on the **14<sup>th</sup> of December 2020** deponed that the sale process and transfer had been completed and change effected in the name of the 3<sup>rd</sup> Respondent; that the applicant had handed over the suit property to the 3<sup>rd</sup> Respondent who found the suit property run down and has spent Kshs 1,158,160/= towards repairs having taken possession on **16<sup>th</sup> September 2020**.

The 3<sup>rd</sup> Respondent further swore that the advertisement for the sale of the property appeared in the Standard Newspaper on the **20<sup>th</sup> July, 2020** and **14<sup>th</sup> April 2020**. Being interested, he approached his bank for a loan to purchase the suit property which loan was approved on the **15<sup>th</sup> May, 2020**, an amount of Kshs 10,125,000/=. He attended the auction on the **5<sup>th</sup> August, 2020** and was the highest bidder at Kshs 13,500,000/=. He deposited Kshs 1,000,000/= on the **17<sup>th</sup> July, 2020** and paid Kshs 3,375,000/=. 25% deposit to the Applicant's account. On the **7<sup>th</sup> of August, 2020**, he paid the Kshs 10,125,000/= the balance of the sale price to the 1<sup>st</sup> respondent's account. He urged the Court to consider that he was already paying Kshs 341,392/= per month to Family Bank for the loan granted to him.

The 1<sup>st</sup> Respondent through its Legal Counsel **Mr. Samuel Njuguna** filed his submissions dated **23<sup>rd</sup> December, 2020** submitting that the Applicant had no arguable appeal since the suit property had already been sold and transferred.

The 3<sup>rd</sup> Respondent filed his submissions dated **6<sup>th</sup> January 2021** reiterating that the process of sale, transfer and giving vacant possession have been completed and the Court would be acting in vain and that the dispute as to the valuation on the suit property as between the Applicant and the 1<sup>st</sup> Respondent is a matter which can be remedied by way of damages and not an injunction.

In an application such as the one before us, an applicant must demonstrate to the court two principles. The first is that the appeal is arguable, and the second is that if the orders sought are not granted, then the appeal would be rendered nugatory. It falls upon the applicant to satisfy the twin principles. See **Republic v Kenya Anti-Corruption Commission & 2 others (supra)** where the Court rendered itself thus:

**“The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb.”**

In **Hashmukhlal Virchand Shah & 2 others v Investment & Mortgages Bank Limited [2014] eKLR**, the Court while seated in Nairobi held:

**“As for the second requirement, we have to ensure that the word “nugatory” has been given its full meaning, namely that the appeal will not be rendered worthless, futile; invalid or even trifling (Reliance Bank Ltd versus Nor-Lake Investment Ltd [2002] IEA 227. Secondly we have to consider whether what has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”**

In **George Otieno Gache & another v Judith Akinyi Bonyo & 5 others [2017] eKLR** the Court of Appeal while sitting in Kisumu stated that;

**“Thus in determining whether an appeal will be rendered nugatory or not the Court must consider what is sought to be stayed and whether if allowed to happen the situation is reversible; or if it is not reversible whether damages will reasonably compensate the aggrieved party”.**

#### **Analysis and determination**

Having considered the Applicant's Notice of Motion, the Respondents' replying affidavit and the parties' submissions, we find that the suit property was sold at an auction by the 1<sup>st</sup> respondent and transferred to the 2<sup>nd</sup> respondent.

An order of injunction (if any) cannot remedy what has already taken place. The motion is overtaken by events as there is nothing to stay.

The upshot of the above is that, the motion of **26<sup>th</sup> November, 2020** is bereft of merit. It is hereby dismissed with costs to the Respondents.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY, 2021**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

signed

**DEPUTY REGISTRAR**