



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, GATEMBU & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. 31 OF 2019 (UR 37/2019)

BETWEEN

EQUIP AGENCIES LIMITED.....1ST APPLICANT

GILGIL TREATMENT INDUSTRIES.....2ND APPLICANT

AND

I & M INVESTMENT BANK.....1ST RESPONDENT

JOHN GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS....2ND RESPONDENT

**LUCAS KIIRU NGIGI, PAUL MBUGUA MARY WANGARI GTHUME sued on the
capacity as Office Bearers of GILGIL TOTAL INVESTMENTS**

SELF HELP GROUP.....3RD RESPONDENT

(Being an application for injunction pending hearing and determination of appeal against the Ruling and Order of the High Court of Kenya at Nairobi (F. Tuiyott, J.) dated and delivered on 24th January 2019

in

Nairobi HCCC No. 417 of 2018

Formerly

Naivasha HCCC No. 9 of 2016)

RULING OF THE COURT

1. Intending to challenge, on appeal to this Court, a ruling of the High Court (**F. Tuiyott, J.**) delivered on 24th January 2019 dismissing their prayer for “interlocutory relief under the provisions of Order 11 Rule 3(2)(g) of the Civil Procedure Rules” to restrain the 1st respondent “from selling, auctioning, disposing, transferring on in any way dealing” the property known as Gilgil Township Block 2/210 (the suit property), the applicants filed a notice of appeal before the High Court on 28th January 2019.

2. Thereafter, on 1st February 2019, the applicants filed the present application in which they seek an order of injunction to restrain the 1st respondent from advertising for sale, selling, transferring or otherwise dealing with the suit property pending the hearing and determination of the appeal. An amended notice of motion was filed on 16th April 2019 in which the 2nd respondent, an auctioneer, and the 3rd respondent, the purchaser of the suit property at the auction, are joined in the application. The application is brought under Rule 5(2)(b) of the Court of Appeal Rules.

3. In a nutshell, the applicants’ case is that the 1st applicant charged the suit property to the 1st respondent to secure a maximum principal

amount of Kshs.324,000,000.00; that on 24th January 2019, despite the loan having been repaid, the 1st respondent, in purported exercise of its statutory power of sale, fraudulently sold the suit property to the 3rd respondent at a fake public auction conducted by the 2nd respondent; that the sale was at a gross under value and the suit property was thereafter transferred to the 3rd respondent.

4. Prior to the auction held on 24th January 2019, the applicants presented an application dated 10th January 2019 before the High Court seeking to restrain the 1st respondent from selling or auctioning the suit property. In its ruling of 24th January 2019 (the subject of the intended appeal) dismissing that application the learned Judge found that there had been numerous other suits and attempts by the applicants to restrain the 1st respondent from exercising its power of sale. The learned Judge found that the application dated 10th January 2019 was a disguised attempt to re-litigate a matter that had already been litigated. The learned Judge stated:

“It is therefore the finding of this court that although disguised as a quest for a different type of interlocutory relief, the true character of the application before this court is that of an interlocutory or temporary injunction which has been sought and rejected previously.”

5. Urging the present application before us on 15th January 2020, **Mr. Peter King’ara**, learned counsel for the 1st applicant referred to the application and the supporting affidavit and further supporting affidavit sworn by Divyesh Indubhai Patel, the Managing Director of the 1st applicant as well as the 1st applicant’s written and further written submissions. He urged that the intended appeal is arguable; that the applicant will at the hearing of the appeal demonstrate that the learned Judge erred in refusing to grant interlocutory relief under Order 11 rule 3(2)(g) of the Civil Procedure Rules pending resolution of the issues framed for the court; that the suit property was wrongly sold when the original debt had already been paid; that the purported auction was a sham; and that the purported sale of the suit property to the 3rd respondent is null and void.

6. It was submitted that unless we grant the orders sought and the suit property is transferred, there will be immense loss to the 1st applicant as the property will have been lost for good.

7. Supporting the application, learned counsel for the 2nd respondent **Ms. C. Kimere** submitted that the 2nd applicant is in possession of a factory that stands on the suit property; that the valuable equipment therein belongs to the 2nd applicant and was wrongly made part of the sale as it did not form part of the 1st respondent’s security; that in any event no proper valuation was done prior to the sale; and that the 2nd applicant, a tenant on the suit property, should be at liberty to remove its equipment therefrom.

8. Opposing the application learned counsel for the 1st and 2nd respondents **Mr. P. Wawire** submitted that the intended appeal is not arguable; that the learned Judge of the High Court addressed the issues raised; that in any event the intended appeal will not be rendered nugatory as the value of the suit property is known; that a similar application filed by the 1st applicant over the same matter, being Civil Appeal (Application) No. 421 of 2019, was dismissed on the grounds that the intended appeal would not be rendered nugatory.

9. **Ms. Ngugi**, learned counsel for the 3rd respondent, also opposed the application. In a replying affidavit sworn on 27th March 2019, Lucas Kiiru Ngigi, the Chairman of the 3rd respondent, deposed that the 3rd respondent was the highest bidder at an auction conducted on 24th January 2019 and that the 3rd respondent stands to suffer prejudice if the orders sought are granted. Counsel submitted that the 3rd respondent is a bona fide purchaser of the property at a regular and properly conducted public auction; that the 3rd respondent is protected under Section 99(3) of the Land Act; and that the applicants’ application has no merit.

10. We have considered the application, the affidavits, and the submissions and authorities cited by counsel. In an application of this nature, the applicant needs to demonstrate that the intended appeal is arguable and that if we decline to grant the orders sought, the intended appeal will be rendered nugatory. As this Court stated in **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Limited Civil Application [2007]eKLR:**

“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] These principles are now well settled. For an application to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

11. On arguability, counsel for the applicants state, among other complaints set out in the draft memorandum of appeal, that the learned Judge erred in: ignoring the provisions of Order 11 Rule 3(2)(g) of the Civil Procedure Rules dealing generally with case conference by refusing to grant interlocutory relief in accordance with those provisions; and holding that the application was a disguised attempt to obtain orders that had previously been denied.

12. Considering, as we do, that that an arguable appeal is not one that must necessarily succeed but simply one that is deserving of the Court’s consideration as held by the Court in **Dennis Mogambi Mong’are vs. Attorney General & others [2012] eKLR**, we are satisfied that the intended appeal is arguable.

13. On the second limb, whether the intended appeal will be rendered nugatory unless we grant the orders sought, our attention was drawn to the ruling of this Court delivered on 6th December 2019 in Civil Appeal (Application) No. 412 of 2019 between the same parties, except for the 2nd applicant who is introduced in the present application.

14. The Court in that ruling dismissed a similar application dated 29th August 2019 by which the 1st applicant had sought an order of injunction, pending appeal, to restrain dealings with the suit property following an unsuccessful bid in the High Court to do so subsequent to the auction conducted on 24th January 2019. In concluding that the 1st applicant had failed to demonstrate that the intended appeal would be rendered nugatory unless the orders it had sought were granted, this Court stated:

“Regarding whether the appeal will be rendered nugatory if it succeeds in the absence of the orders sought in this application, we have absolutely no doubt that it will not. The value of the suit property is known in precise monetary terms. The 1st respondent (which is also the 1st respondent in the present matter) has already given an undertaking to compensate the applicant should the appeal end up in its favour. The applicant has not even remotely suggested that the 1st respondent has no means or ability to satisfy the undertaking. The applicant has also not demonstrated that the 3rd respondent intends to sell and transfer the property once it is registered in its name. The position taken by the applicant on this limb of the application is purely speculative and conjectural. The evidence on record, which includes the 3rd respondent having borrowed money to purchase the suit property, which money it is repaying, points to the contrary.”

15. We share the same view in the present matter. Furthermore, Section 99(4) of the Land Act provides that a person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power. We are therefore not satisfied that the applicants have demonstrated that the appeal will be rendered nugatory if we decline to grant the orders sought in the application and they ultimately succeed in the appeal.

16. The application fails and is hereby dismissed with costs to the respondents.

Orders accordingly

Dated and delivered at Nairobi this 8th day of May, 2020.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR