



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 60 OF 2020

BETWEEN

AMAZING TOURS & TRAVEL LIMITED.....APPLICANT

AND

HOUSING FINANCE COMPANY LIMITED 1ST RESPONDENT

GARAM INVESTMENTS2ND RESPONDENT

ELGONA HOLDINGS LIMITED3RD RESPONDENT

(An application for stay of execution of the Ruling of the High Court of Kenya at Nairobi (Okwany, J.) dated 31st *January*, 2020 **in H.C.C.C. No. 463 of 2017**)

RULING OF THE COURT

In a plaint filed at the Commercial & Tax Division at the High Court of Kenya, Nairobi, the applicant, **Amazing Tours & Travel Limited** made various prayers including a claim for money, injunctions, declarations, general damages and that an order be made for taking of accounts between itself and the 1st respondent, **Housing Finance Company Limited**. It was stated in the Plaint that the applicant was the registered owner of parcels of land **L.R. No. 12251/35** and **L.R. No. 12251/13** which were charged to the 1st respondent as security for a loan the applicant had taken with the 1st respondent. The applicant was unable to service the loan and the 1st respondent, acting through the 2nd respondent **Garam Investments**, advertised the sale of **L.R. No. 12251/13 (the suit property)** by public auction. The sale was scheduled for 10th July, 2018 but the applicant successfully applied to court and was granted a conditional injunction, being ordered to pay a certain sum of money to the 1st respondent by 3.00 p.m. on the day of the auction failure to which the injunction would lapse and the 1st respondent be at liberty to sell the suit property.

The 1st respondent contended to the High Court that the suit property was sold after 3 p.m. by the 2nd respondent to the 3rd respondent, **Elicona Holdings Limited** after the applicant was unable to meet the conditional stay issued by the High Court.

The 3rd respondent moved the High Court in an application in the said suit to declare actions of the applicant in harassing or evicting the 3rd respondent from the suit property as illegal and unlawful. The 3rd respondent also applied for orders of injunction.

In a ruling delivered by Okwany, J on 31st January, 2020 the learned Judge found in favour of the 3rd respondent ordering that:

“a. A declaration is hereby issued that the actions of the plaintiff/respondent of harassing and evicting the 3rd defendant/applicant and subsequently taking possession and *occupation all that property known L.R. No. 12231/13 I.R. 58071 is irregular, illegal, unlawful, fraudulent and thus null and void.*

b. A temporary injunction is hereby issued to restrain and or prohibit the plaintiff/respondents by itself, its agents and servants and/or whomsoever acting on its behalf or upon its instruction from harassing, evicting, alienating, claiming or interfering with the 3rd defendant/applicant’s quiet and peaceful enjoyment/occupation of all that parcel of land known as

?c. The costs of the application shall abide the outcome of the main suit.”

It is those orders that have precipitated this Motion brought under **rules 5(2) (b) and 42** of the **rules of this Court** where it is prayed in the main that we issue an order for stay of execution of the said ruling. In grounds in support of the Motion and in a supporting affidavit of **Rhoda Wambui Kariuki**, a director of the applicant, it is stated amongst other things that the essence of the ruling is to order the applicant not to evict the 3rd respondent when it (the 3rd respondent) is not in possession; that the applicant will suffer loss and damage; that the sale of the suit property was irregular; that the 1st respondent exercised statutory power of sale irregularly; that public auction was conducted at 11 a.m. when there was an order staying sale until 3 p.m.; that there was no proof that the sale price had been paid; that the applicant had leased the suit property; that the Judge misapplied the law, and, that the Judge erred in adopting a rigid and formalistic application of provisions of the Land Act and the Land Registration Act.

In opposing the application the 3rd respondent, in a replying affidavit of its director, **Andrew Chelobe Korir** depones, *inter alia*, that the Judge was right in the said ruling as it nullified actions of the applicant which were prejudicial to the 3rd respondent. Further, that he attended a public auction on behalf of the 3rd respondent conducted by the 2nd respondent on 10th July, 2018 and was the successful bidder of the property in the auction conducted after 3 p.m. His bid of Ksh.80,000,000 was the highest; he paid Ksh.20,000,000 as deposit on that day and paid the balance to the 1st respondent’s advocates within 30 days as required. He was issued with a Certificate of Sale on 11th July, 2018 by the 2nd respondent. Transfer was executed by the 1st respondent in favour of the 3rd respondent dated 26th September, 2018. Mr. Korir attached various annexures to the affidavit including a Memorandum of Sale made on 10th July, 2018 signed by him and the 2nd respondent (auctioneer); Certificate of Sale dated 11th July, 2018 by the 2nd respondent; Transfer Pursuant to Purchase by Chargee in a Public Auction; a charge by Credit Bank PLC in respect of the suit property shown as entry No. 8 presented as No. 1170 made on 12th November, 2018; Certificate of Title where entry No. 7 presented as No. 1169 shows that the 3rd respondent was registered as owner of the suit property. It is further stated in the affidavit that the 3rd respondent paid stamp duty of Ksh.3,200,000 to the Government.

The principles that apply in this Court in applications for stay of execution pending appeal are well settled by a long line of judicial pronouncements in cases such as **Stanley Kangethe Kinyanjui v Tony Keter & Others [2013] eKLR**. For an applicant to succeed in such an application he must, firstly, show that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. If the applicant satisfies that limb of arguability he must, secondly, prove that the appeal would be rendered nugatory absent stay.

We have considered all the material presented before us including the written submissions.

It is not in dispute that the suit property was offered by the applicant to the 1st respondent as security for a loan advanced to the applicant by the 1st respondent. That loan was not serviced and the suit property was advertised for sale. The suit property was sold at a public auction; sale price of Ksh.80,000,000 was paid by the 3rd respondent and a transfer was registered in favour of the 3rd respondent meaning, that the suit property passed to the 3rd respondent in 2018. The Judge was asked to make declarations in favour of the 3rd respondent who had successfully bid for and purchased the suit property. The 3rd respondent purchased the suit property and charged it to Credit Bank PLC where it must be servicing the loan. In those circumstances, whereas the intended appeal may perhaps be arguable, bearing in mind that an arguable appeal need not necessarily succeed, we are not satisfied that the applicant has established that the intended appeal would be rendered nugatory.

The Motion fails and is dismissed with costs to the 3rd respondent.

Dated and delivered at Nairobi this 7th day of August, 2020.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

J. MOHAMMED

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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