



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. 32 OF 2020

BETWEEN

CATHERINE WAMBUI KURIA

(Suing as the Personal Representative of

the estate of PETER KURIA MUNYUIRA.....APPLICANT

AND

HOUSING FINANCE COMPANY OF

KENYA LIMITED.....1ST RESPONDENT

BEATRICE MUTHONI MAKUMI

(Sued as the Personal Representative

of the estate of DANIS MUNA.....2ND RESPONDENT

(An application for an injunction pending the hearing and

determination of an intended appeal from the Judgment of the

High Court (D.S. Majanja, J.) dated 30th January, 2020 in HCCC No.457 of 2006)

RULING OF THE COURT

The dispute between the applicant and the respondents is over the ownership and occupation of land L.R No. Dagoretti/Riruta/ S.296 located in Nairobi County.

From the parties, it should be apparent that both the original applicant and 2nd respondent are deceased. Those now engaged in this litigation are their personal representatives.

It was the applicant's case that Peter Munyuiira (now deceased) was the legal owner of the suit property and that by a legal mortgage dated 5th March, 1998 he charged the suit property to the 1st respondent to secure a loan of Kshs. 1,520,000.00; that on 4th August, 2006, without any notice, the 1st respondent in collusion with the auctioneers raided the property and attempted to evict him; that unknown to him the property had purportedly been sold in an auction on 31st May 2006 and fraudulently transferred to the 2nd respondent and; that the 1st respondent did not serve him with a statutory notice to signify his default in the repayment of the facility and its intention to sell the property in the event that he could not settle the debt.

But according to the 1st respondent, the applicant had admitted his indebtedness and requested for time to settle the loan, as a result of which the loan was rescheduled many times but he failed to honour his undertaking; that satisfied that there was no hope or intention to repay the

loan, the 1st respondent sent the statutory notice by registered post in 2005; that since the statutory notice was never returned and the debt remained unsettled, it proceeded to sell the suit property at an auction on 31st May, 2009 after the court dismissed the applicant's application to stop the sale.

The 2nd respondent maintained that he was a *bona fide* purchaser for value, having been declared the highest bidder at the auction; and that after he paid the full purchase price the suit property was transferred to him.

Aggrieved by the sale and transfer, the applicant moved the High Court seeking, *inter alia*: a declaration that the purported sale was fraudulent and unlawful; a permanent injunction to restrain the respondents, their agents, servants or employees from evicting or in any way interfering with his possession and occupation of the suit property or from selling, transferring, alienating or in any way disposing of the suit property and an order of rectification of the register by cancelling the registration of the 2nd respondent and restoring the applicant's name as the lawful proprietor of the suit property. In determining the dispute, the High Court (Majanja, J.) found that the applicant had failed to prove his case against the respondents and dismissed the claim.

Further aggrieved, the applicant has now taken out this application for orders that, pending the hearing and determination of the intended appeal: that there be an injunction restraining the respondents, whether by themselves or their servants or agents from evicting the applicant from the suit property or interfering with the applicant's occupation, possession and enjoyment of the suit property, or offering for sale, transferring or in any manner interfering with the suit property.

This motion was urged on the grounds that the applicant has an arguable appeal with good prospects of success as demonstrated in the draft memorandum of appeal annexed to the application, namely, that the learned Judge erred in holding: that the requisite statutory notice was served on the applicant without sufficient proof by the respondents; that the statutory notice was sent to the applicant by registered post when there was evidence that the letter was returned to the sender unclaimed; that since the Dispatch Book produced in court was stamped by the postal corporation, that alone was evidence of the statutory demand; that since the letter was addressed to the applicant, that that was sufficient service; and that the auction took place after the court dismissed the applicant's application to restrain the sale when there was no such order before him.

On the nugatory aspect of the intended appeal, it was the applicant's deposition that on 3rd January, 2020, a few days after the judgment, unknown persons visited the suit property demanding to view it as it was on sale; that these visits have since continued to occur sporadically and unannounced. The applicant is therefore apprehensive that the suit property may be sold and transferred to third parties, rendering the intended appeal nugatory, not to mention the high likelihood of the applicant being evicted from the suit property where she has lived with her family since 1998; and that should this happen she would be exposed to great hardship and irreparable damage.

Further, the applicant maintained that the respondents will not suffer any prejudice if the injunction sought is granted since the 1st respondent has a claim on loan arrears while the 2nd respondent has never taken possession of the suit property.

We are not able to trace on record any response by the 1st respondent. But the 2nd respondent, in opposing the motion filed a replying affidavit in which it has maintained that this application is frivolous and intended to further delay this matter as the applicant has for more than 14 years been enjoying possession of the suit property and collecting rent of up to Kshs. 150,000 per month; that the applicant knew all along that the loan was not being serviced, giving the 1st respondent the freedom to realize its security; that the applicant was properly served with the statutory notice, the basis upon which they engaged in negotiations; that when that failed the applicant proceeded to petition the High Court, which petition was dismissed by Nyamu, J. (as he then was); that it is the 2nd respondent's desire that this litigation comes to an end as both the original applicant and 2nd respondent are now deceased and; that there was no fraud in the auction as all the necessary steps were taken and a title was passed, hence the applicant has no arguable case.

The principles for considerations under **Rule 5(2)(b)** are now well settled. Firstly, the burden is on the applicant to satisfy us that she has an arguable appeal without showing that the appeal will necessarily succeed. The second burden is for the applicant to prove to us that unless an order of stay is granted, the intended appeal would be rendered nugatory. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others** ([2103]) eKLR.

On the aspect of arguability of the intended appeal, we have set out aspects in the draft memorandum of the appeal which demonstrate, in our estimation that the intended appeal is not frivolous.

On the nugatory aspect, the applicant has maintained that she has always been in occupation of the suit property with her family since 1998 and that if the orders sought are not granted, she would be greatly prejudiced as they are likely to be forcefully evicted from their land, before the intended appeal is determined. The 2nd respondent has on the other hand demonstrated that the applicant has been, for the past 14 years, collecting rent from the suit property amounting to Kshs. 150,000 per month and that she (the 2nd respondent) is the party prejudiced, being a *bona fide* purchaser for value at the auction and has been hindered from taking possession of the suit property.

Despite the applicant having an arguable appeal, it is our view that the intended appeal, if successful, will not be rendered nugatory as an award of damages would be an adequate remedy to compensate the applicant.

The applicant has failed to satisfy both limbs as required by **Rule 5(2)(b)** of this Court's Rules and on authority of **Republic vs. Kenya Anti-Corruption Commission & 2 others** ([2009]) KLR 31, in a long line of similar decisions.

The upshot is that this Court rejects the application. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR