



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KOOME, MURGOR & KANTAL, JJA]

CIVIL APPLICATION NO. 333 OF 2018 (UR 270/2018)

BETWEEN

AMINA HERSI MOGHE.....1ST APPLICANT

MUHAMOUD KADHAR HERSI.....2ND APPLICANT

MT. ELGON HARDWARE LIMITED3RD APPLICANT

AND

DIAMOND TRUST BANK (K) LIMITED.....1ST RESPONDENT

DALALI TRADERS AUCTIONEERS2ND RESPONDENT

CONSOLIDATED WITH

CIVIL APPLICATION NO. 334 OF 2018

BETWEEN

SAHRA HERSI ALI.....1ST APPLICANT

YURUB INVESTMENT LIMITED2ND APPLICANT

NEW NYANZA SUPERMARKETS LIMITED.....3RD APPLICANT

AND

DIAMOND TRUST BANK (K) LIMITED.....1ST RESPONDENT

DALALI TRADERS AUCTIONEERS2ND RESPONDENT

(Being an application for an injunction pending the hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Francis Tuiyott, J.) dated 15th August, 2018 in H.C.C.C. No. 176 of 2018)

RULING OF THE COURT

When this application and Civil Application No. NAI. 334 of 2018 came up for hearing on 31st January, 2019, at the request by respective counsel for the parties, we ordered that the two applications be consolidated and be heard together.

The applicants in this application are **Amina Hersi Mughe** as 1st applicant; **Mohamoud Kadhar Hersi** as 2nd applicant and **Mt. Elgon Hardware Limited** as 3rd applicant. The respondents are **Diamond Trust Bank Kenya Limited** and **Dalali Traders Auctioneers**. The parties in Civil Application No. 334 of 2018 are **Sahra Hersi Ali** as 1st applicant; **Yurub Investments Limited** as 2nd applicant and **New**

Nyanza Supermarkets Limited as 3rd applicant against the same respondents.

In this application the Motion is said to be brought under Article 159 of the Constitution of Kenya, 2010 and Rule 5(2) (b) of the Court of Appeal Rules and it is prayed in the main that the Court be pleased to issue orders restraining the respondents, their workers, agents, or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling or in any other way interfering with the properties known as **Bungoma Municipality/547 & 548; Bungoma /Township/2 and LR No. Bungoma Township/232** or any other property of the applicants pending the hearing of the application and the intended appeal.

In Civil Application No. 334 of 2018, we are asked in the main to issue orders restraining the respondents, their workers, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling or in any other way interfering with the properties known as **LR E. Bukusu/S. Kanduyi/3127 and LR No. 209/1063** or any other property of the applicants pending the hearing and determination of the application and the intended appeal.

In grounds in support of the applications it is stated amongst other things that the applicants filed Notices of Motion at the High Court of Kenya at Bungoma on **30th July, 2018** seeking orders to restrain the respondents from selling the said properties pending hearing of a suit filed at that court on **8th of May, 2018**; that after hearing the said application the High Court had issued a ruling on **15th August, 2018**; that the applicant being dissatisfied with the orders issued had filed a Notice of Appeal and had requested for proceedings to enable them appeal; that the advocates for the applicants had not been able to obtain proceedings and rulings because the same had not been typed or certified by the High Court; that on the foot of the ruling delivered on **15th August, 2018**, the respondents had issued Auctioneers'

Notices and advertised the applicants' properties for sale; that the Judge of the High Court had erred in finding that statutory notices under Section 90 of the Land Act had been served upon the applicants who are the chargors that the Judge had erred in failing to address the question of the validity of the exercise of a chargees' right of sale under the said Section 90 of the Land Act when forced sale valuation reports had neither been conducted nor its contents which were contested considered; that the Judge had failed to address his mind to the fact that the figures indicated on statutory notices under the said Section 90 of the Land Act and the figures in the auctioneers' notice differed and that the Judge in issuing the ruling had failed to address the fact that the amounts demanded by the chargees were manifestly inflated and that queries and protests raised by the chargors had not been addressed.

Those matters were deponed in an affidavit of **Muhamoud Kadhar Hersi** in support of the application at the High Court. In respect of application No. 334 of 2018 the same issues were raised in the grounds in support of the motion and in an affidavit in support by **Adam Ahmed Ali** who stated that he was the Director of the 3rd applicant New Nyanza Supermarkets Limited.

Lwanga Mwangi, a Legal Officer of the 1st respondent (Diamond Trust Bank K Limited) in a replying affidavit re-stated the facts that the application at the High Court had been dismissed; that the Judge at the High Court had on delivery of the ruling directed that reasons for the ruling would be provided to the parties at a later date; that the bank had been served with a Notice of Appeal; that he had not been served with a letter bespeaking proceedings; that the application did not meet the threshold meriting grant of the same; that the 1st respondent would be able to pay damages if any were awarded to the applicants. **Mr. Mwangi** also depones at paragraphs 16 to 19 of the replying affidavit:

“(1) THAT applicants are parties who are unable to meet their financial obligations as and when they become due under contract.

17. THAT further the bank being a tenant in LR No. 12596 /53 owned by the applicants, have been served with a notice to sell dated 6th November, 2018 issued by Kenya Commercial bank over one of the applicants' property to recover a sum of money previously advanced to the applicants. (Annexed hereto and marked “LM 3” is a copy of the abovementioned notice to sell).

18. THAT further, the applicants have filed application to frustrate the 1st respondent from enforcing the contact (sic) entered into between (sic) with the applicants.

19. THAT by their conducts, the applicants have demonstrated that they have little interest in prosecuting the matter before the honourable court. On the other hand, their actions reveal the intention of the applicants to waste the judicial time (sic) and prolong the matter in court”

Mr. Dancan Okatch, advocate, appeared for the applicants at the hearing of the motions while **Mr. Kisinga**, advocate, appeared for the respondents. In an address to us, Mr. Okatch submitted that properties were advertised for sale upon which the applicants applied for an injunction which was granted. It is not clear what became of the orders made in the first application (it is not in our record) but according to counsel, the applicants are appealing on a 2nd application because the effect of the ruling in the 2nd application was to render the 1st application moot and overtaken by events. Counsel submitted that there was no basis for the Judge to find that a Notice under Section 90 of The Land Act had been served and that without service of three months' notice the proposed auction by public means would be illegal; further that some notices had been served on different persons demanding different amounts of money based on the same loan sum. According to counsel, if the said public auction proceeded, it would infringe upon the 1st and 2nd applicants' rights; further that no notice had been sent or served on the 3rd applicant.

In opposing the applications it was **Mr. Kisinga's** submission that there was no arguable appeal. According to counsel the applicants had no *locus standi* to bring the applications as they were not parties at the High Court and that the applicants were seeking injunctive orders to bar sale of a property that does not belong to them. Counsel pointed out various errors which according to him created some confusion on who the parties were or who owned the various properties.

According to counsel, the intended appeals were deemed to have been withdrawn, as they were not filed within the timelines required by the rules of this Court.

In a brief reply **Mr. Okatch** submitted that it was wrong for the Judge to find that notices under Sections 90 and 96 of The Land Act had been served when there was no evidence to that effect.

For an applicant to succeed in an application for stay pending appeal two principles must be satisfied. The applicant must show that there is an arguable appeal and if he succeeds on that limb, he must also show that the appeal, if filed, or the intended appeal would be rendered nugatory if stay is not granted. These principles have been recognized in various pronouncement of this Court such as in the case of **Stanley Kangethe Kinyanjui versus Tonny Keter & 5 others** [2013] eKLR, where the principles were summarized as follows:-

- i. In dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court. See Ruben & 9 others V. Nderitu & Another [1989] KLR 459.**
- ii. The discretion of this Court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.**
- iii. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another V. Thornton & Turpin [1963] Ltd [1990] KLR 365.**
- iv. In considering whether an appeal will be rendered nugatory, the Court must bear in mind that each case depends on its own facts and peculiar circumstances. David Morton Silverstein V. Atsango Chesoni, Civil Application No. Nai 189 of 2001.**
- v. An applicant must satisfy the Court on both of the twin principles.**
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal raised. Damji Pragji Mandavia V. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.**
- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. Joseph Gitahi Gachau & Another V. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.**
- viii. In considering an application brought under Rule 5(2)(b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra).**
- ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd V. Norlake Investments Ltd [2002] 1EA 227 at Page 232.**
- x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.**
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases V. Kinyua, [1990] KLR 403.**

We have perused the ruling of the High Court delivered on **15th of August 2018**, where the learned Judge of the High Court in very few words summarizes that he had been addressed by the parties' advocates the day before (14th August, 2018) as to whether or not he should issue orders of injunction. He states that without going into detail, he had seen evidence that notices under Sections 90 and 96 of The Land Act had been served and acknowledged by the chargor. He further states that in respect of notices required under the Auctioneers' Act he had not seen any evidence by the respondent that the same had been served. The Judge says:

"A Chargor's Equity of Redemption is a cherished right and can only be taken away in the clearest of cases. A doubt has been created as to whether the Auctioneers' notification of sale was duly served. This is one of the issues raised in the plaint. I take a view that in the absence of an unequivocal Resolution of that issue, then the proposed sale should not proceed. However, as there is default in repayment of the Principal

Debt and Service of the other Notice required by The Land Act, the Bank cannot be held ransom indefinitely from exercising its Statutory Power of Sale because of the infraction of the Auctioneers' Rules. The Bank is at liberty to exercise its Statutory Power of Sale upon making a proper notice under the Auctioneer's Rules."

It is the applicant's case before us in the application for stay of execution pending appeal that the law as relates to how statutory power of sale is to be exercised has not been followed or has been breached.

There is no clear evidence on record that the required notices under The Land Act and the Auctioneers Act had been served as required by law. The applicants were always entitled to be served with proper notices as failure to do so would deny them the right to redeem the properties. Whether or not proper notices under the said laws had been served on the applicants to us creates a valid arguable point.

On the nugatory aspect which the applicants must also satisfy in an application like this one, we find that if the properties are sold without the law being followed, the properties would be beyond the reach of the applicants and that would render the intended appeal nugatory. Those being our findings, the applicants are entitled to orders of stay.

We allow the notices of motion by granting prayers (a) and (b) of the applications. The intended appeal or appeals be filed within 60 days of the date of this ruling, in default the orders of stay granted here will lapse without further orders.

Costs of the applications will abide the said appeal or appeals.

Dated and delivered at Nairobi this 21st day of June, 2019.

M. KOOME

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JUDGE OF APPEAL

A. K. MURGOR

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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.

DEPUTY REGISTRAR